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	1941 M Cr C 14		1940-2 M L J 502		192 I C 407		193 I C 832
	193 I C 551		192 I C 210		42 Cr L J 294	52	1940-2 M L J 707
21	1940-2 M L J 290	31	1940 M W N 1157	42	1940 M W N 35		52 M L W 638
	1940 M W N 917		1940-2 M L J 793		51 M L W 752		1940 M W N 1128
22	1940-2 M L J 590		52 M L W 745		1940-2 M L J 446		194 I C 36
	52 M L W 527		ILR 1941 M 300		193 I C 131	53	52 M L W 502
	1940 M W N 1011		195 I C 433	44	52 M L W 391		1940-2 M L J 594
	193 I C 147	36	1940-2 M L J 984		1940 M W N 935		1940 M W N 1056
23	52 M L W 364	FB	52 M L W 876		1940-2 M L J 451		ILR 1941 M 120
	1940 M W N 859		1941 M W N 14	45	1940-2 M L J 420		195 I C 261
	1940-2 M L J 747		1941 O W N 79		1940 M W N 861	55	1940-2 M L J 572
	192 I C 195		192 I C 607		52 M L W 851		52 M L W 487
24	1940 M W N 523		ILR 1941 M 212		193 I C 46		1940 M W N 1038
	1940-2 M L J 1		1941 A WR Rev 360	46	1940 M W N 806		193 I C 175
	1940 M Cr C 144	37	1940-2 M L J 340		1940-2 M L J 398	56	1940-2 M L J 293
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	195 I C 752
58	1940-2 M L J 517
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	52 M L W 500
	193 I C 171
	ILR 1941 M 128
59	1940 M W N 1042
	1940-2 M L J 651
	52 M L W 582
	196 I C 276
60	1940-2 M L J 837
	52 M L W 764
	1940 M W N 1217
61	1940-2 M L J 418
	1940 M W N 944
	1940 M Cr C 200
	52 M L W 492
	ILR 1940 M 869
	192 I C 289
	42 Cr L J 269
62	52 M L W 607
	1940-2 M L J 685
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63	1940-2 MLJ 1031
FB	52 M L W 947
	1940 M Cr C 279
	1940 M W N 1267
	1941 O W N 53
	192 I C 604
	1941 AWRSup 6
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64	1940 M W N 958
	52 M L W 530
	1940-2 M L J 694
	193 I C 827
65	1940 M W N 536
	1940 M Cr C 132
	52 M L W 66
	191 I C 88
	42 Cr L J 102
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	1940 M W N 1002
	52 M L W 546
67(1)	1940-2 M L J 654
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67(2)	52 M L W 935
FB	1941-1 M L J 77
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71(1)	52 M L W 870
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71(2)	52 M L W 847
	1940 M W N 873
	1940 M Cr C 207
	192 I C 256
	42 Cr L J 263
72	1940 M W N 976
	52 M L W 505
	1940-2 M L J 584
73(1)	1940-2 M L J 468
	52 M L W 430
	1940 M W N 948
73(2)	1940-2 M L J 709
	52 M L W 646
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74(1)	52 M L W 484
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75	1940 M W N 905
	52 M L W 377
76	1940-2 M L J 416
	52 M L W 385
	1940 M W N 936
77	52 M L W 354
	1940 M W N 889
	1940-2 M L J 402
79	1940-2 M L J 615
	1940 M W N 1016
81	1940 M W N 1232
FB	1940-2 M L J 990
	52 M L W 919
	192 I C 870
	ILR 1941 M 275
84	52 M L W 522
	1940-2 M L J 606
	1940 M W N 1039
87	1940-2 M L J 756
	52 M L W 673
	1940 M W N 1142
	192 I C 838
88	1940 M W N 761
	52 M L W 198
	1940 M Cr C 179
	192 I C 704
	42 Cr L J 316
91	1940-2 M L J 655
	52 M L W 610
	1940 M W N 1062
	ILR 1941 M 157
	195 I C 439
96	1940-2 M L J 494
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	52 M L W 508
	193 I C 823
97	1940-2 M L J 668
	52 M L W 629
	1940 M W N 1071
99(1)	52 M L W 479
	1940-2 M L J 555
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99(2)	52 M L W 620
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	1940-2 M L J 819
	1940 M Cr C 268
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100(1)	1940-2 M L J 379
	52 M L W 380
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100(2)	1940-2 M L J 466
	52 M L W 431
	1940 M W N 951
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101	1940 M W N 937
	52 M L W 495
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	42 Cr L J 808
103	52 M L W 598
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107	1940-2 M L J 648
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110	1940-2 M L J 326
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111	1940-2 M L J 587
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	195 I C 206
112	1940-2 M L J 498
	52 M L W 470
	1940 M W N 991
113	1940-2 M L J 513
	52 M L W 481
	1940 M W N 1010
	ILR 1941 M 53
	195 I C 697
114	52 M L W 809
	1940 M W N 1179
	1940-2 M L J 977
115	1940 M W N 1153
	1940-2 M L J 867
116	52 M L W 735
	1940 M W N 1155
	1940-2 M L J 825
118	1940-2 M L J 838
	52 M L W 772
	1940 M W N 1189
	ILR 1941 M 132
	195 I C 559
119	52 M L W 733
	1940-2 M L J 827
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120	1940-2 M L J 895
	52 M L W 853
	1940 M W N 1229
	1940 M Cr C 264
	ILR 1941 M 340
	195 I C 679
	42 Cr L J 770
123	1940 M W N 834
	1940-2 M L J 393
	52 M L W 458
125	1940 M W N 1151
	1940-2 M L J 844
	52 M L W 807
	192 I C 864
126	1940-2 M L J 881
	1940 M W N 1191
	52 M L W 844
127	52 M L W 436
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	1940-2 M L J 501
	193 I C 896
128	52 M L W 825
	1940-2 M L J 920
129	1940-2 M L J 520
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	1940 M W N 1083
147	1940-2 M L J 891
	52 M L W 822
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149	52 M L W 976
FB	1941-1 M L J 1
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152	1940-2 M L J 841
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154	52 M L W 724
	1940 M W N 1185
	1940 2 M L J 963
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	195 I C 507
158	1940-2 M L J 887
	52 M L W 819
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161	1941-1 M L J 45
FB	53 M L W 27
	1941 M W N 149
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	196 I C 204
176	1941 M W N 20
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179	52 M L W 440
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181	52 M L W 892
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	1940-2 M L J 1016
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	42 Cr L J 320
182	52 M L W 721
	1940 M W N 1143
	1940-2 M L J 791
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183	1940-2 M L J 979
	52 M L W 894
	1940 M W N 1251
	193 I C 460
	ILR 1941 M 398
185	1940-2 M L J 897
	52 M L W 889
	1940 M W N 1244
	193 I C 34
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186	1940-2 M L J 603
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	52 M L W 617
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188	1940-2 M L J 803
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193	1940-2 M L J 874
	52 M L W 830
	1940 M W N 1249
194	1940 M W N 1223
	52 M L W 881
	1941-1 M L J 186
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196	52 M L W 676
	1940-2 M L J 788
197	1940 M W N 895
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198	1940-2 M L J 753
	52 M L W 660
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201	1940-2 M L J 935
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	193 I C 406
202	52 M L W 678
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204	1940-2 M L J 872
	52 M L W 842
	1940 M W N 1218
	ILR 1941 M 336
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205	1940-2 M L J 943
	52 M L W 836
	1940 M W N 1257
207	52 M L W 719
	1940 M W N 1150
	1940-2 M L J 782
	ILR 1941 M 393
	195 I C 290
208	1941 M W N 66
	52 M L W 862
	1940-2 M L J 1038
	195 I C 212
217	1940 M W N 404
	51 M L W 666
225	52 M L W 924
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	42 Cr L J 315
226	52 M L W 484
	1940-2 M L J 547
	1940 M W N 1009
227	1940 M W N 878
	52 M L W 509
	1940-2 M L J 645
229	1941-1 M L J 99
SB	53 M L W 99
	1941 M W N 83
	1940 8 I T R 619
	194 I C 76
230	53 M L W 62
SB	1941 M W N 56
	1941-1 M L J 128
	1941 O W N 203
	1941 M Cr C 31
	1941 AWRSup 7
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	194 I C 587
	42 Cr L J 602
231	1940-2 M L J 927
	52 M L W 857
	1941 M W N 76
	ILR 1941 M 486
	196 I C 291
235	1941 M W N 131
FB	53 M L W 79
	1941-1 M L J 164
	ILR 1941 M 261
238	52 M L W 420
	1940 M W N 1045
	1940 M Cr C 247
	42 Cr L J 654
	195 I C 53
244	52 M L W 521
	1940 M W N 1043
	1940-2 M L J 711
245	52 M L W 279
	1940-2 M L J 376
	1940 M W N 899
246	1941-1 M L J 262
SB	1941 9 I T R 56
	53 M L W 714
	1941 M W N 286
	194 I C 637
249	1941-1 M L J 103
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	1941 M W N 81
	1940 8 I T R 628
	194 I C 443
250	52 M L W 633
	1940-2 M L J 748
	1940 M W N 1110
	1940 M Cr C 270
	192 I C 404
	42 Cr L J 296
251	1940 M W N 811
	1940 M Cr C 191
	42 Cr L J 668
	195 I C 64
255	1941-1 M L J 120
SB	1941-9 I T R 1
	53 M L W 210
	ILR 1941 M 220
	1941 M W N 317
	194 I C 118
256	1940-2 M L J 566
	52 M L W 488
	1940 M W N 1034
258	52 M L W 634
	1940-2 M L J 767
	1940 M W N 1235
	1940 M Cr C 245
	192 I C 299
	ILR 1941 M 172
	42 Cr L J 265
259	1940-2 M L J 1032
	52 M L W 910
	1941 M W N 46
	1941 M Cr C 19
	ILR 1941 M 406
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262	1940-2 M L J 860
	52 M L W 810
	1940 M W N 1225
266	1940 M W N 879
267	1940 M W N 767
	52 M L W 258
	1940 M Cr C 167
	193 I C 14
	42 Cr L J 396
270	1940-2 M L J 688
	52 M L W 625
	1940 M W N 1078
	ILR 1941 M 109
	195 I C 201
272	1940 M W N 1140
	1940-2 M L J 780
	52 M L W 753
274	1940-2 M L J 846
	52 M L W 768
	1940 M W N 1200
276	1940-2 M L J 503
	52 M L W 471
	1940 M W N 992
277	1940-2 M L J 1055
	52 M L W 955
	1941 M W N 176
	195 I C 165
280	1940-2 M L J 1018
	52 M L W 884
	1940 M W N 1236
	1940 M Cr C 259
	192 I C 525
	42 Cr L J 305
282	52 M L W 951
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285	52 M L W 604
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	194 I C 33
287	1940 M W N 1152
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288	1940-2 M L J 870
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289	52 M L W 731
	1940 M W N 1156
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	193 I C 547
290	1940 M W N 163
	1940 M Cr C 64
	193 I C 347
	42 Cr L J 407
296	1940 M W N 1163
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	42 Cr L J 402
297	1940 M W N 1167
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	194 I C 318
303	52 M L W 737
	1940-2 M L J 820
	1940 M W N 1177
305	1940-2 M L J 934
	52 M L W 835
	1941 M W N 34
306	52 M L W 898
	1940 M W N 1238
	1940 M Cr C 284
	193 I C 465
	42 Cr L J 424
309	53 M L W 145
FB	1941 M W N 127
	1941-1 M L J 242
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312	1941-1 M L J 935
	193 I C 696
313	1940-2 M L J 946
	52 M L W 903
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	195 I C 298
315	1940-2 M L J 877
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	ILR 1941 M 498
	195 I C 127
316	1940 M W N 764
	52 M L W 284
	1940 M Cr C 172
	ILR 1940 M 1028
	193 I C 814
	42 Cr L J 466
319	53 M L W 164
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	1941-1 M L J 257
	ILR 1941 M 347
	194 I C 328
320	52 M L W 893
	1940 M W N 1242
	1940 M Cr C 255
	192 I C 817
	42 Cr L J 330
321	1940-2 M L J 664
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	1940 M W N 1067
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323	1940 M W N 1270
	1940-2 M L J 1063
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	42 Cr L J 468
324	1940 M W N 1164
	52 M L W 790
	1940 M Cr C 288
	193 I C 342
	42 Cr L J 404
326	1940 M W N 963
	52 M L W 689
	1940 M Cr C 219
	194 I C 332
	42 Cr L J 558
339	1940 M W N 97
	1940 M Cr C 39
	193 I C 375
	42 Cr L J 414
345	1940 M W N 19
350	1940-2 M L J 923
	52 M L W 839
	1940 M W N 1253
352	1940 M W N 1268
	52 M L W 948
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	42 Cr L J 320
353	1940-2 M L J 937
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	1941 M W N 28
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354	1940-2 M L J 721
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356	52 M L W 963
	1941-1 M L J 39
	1941 M W N 54
358	52 M L W 949
	1941-1 M L J 34
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	1941 M Cr C 9
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	42 Cr L J 311
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359	1940 M W N 1272
	52 M L W 942
	1941 M Cr C 8
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	ILR 1941 M 503
	195 I C 76
	42 Cr L J 664
362	1940-2 M L J 940
	52 M L W 846
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363	1940-2 M L J 830
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	42 Cr L J 652
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364	1940-2 M L J 918
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	1941 M W N 30
365	1940-1 M L J 708
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	51 M L W 654
366	53 M L W 287
FB	1941-1 M L J 333
	1941 M W N 241
	ILR 1941 M 433
	195 I C 351
367	53 M L W 248
FB	1941 M W N 191
	1941-1 M L J 336
	194 I C 470
	ILR 1941 M 720
373	1941-1 M L J 6
	53 M L W 22
	1941 M W N 51
374	1941-1 M L J 43
	53 M L W 66
	1941 M W N 63
	1941 M Cr C 8
	194 I C 32
	42 Cr L J 518
375	53 M L W 15
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	1941 M W N 335
379	1941-1 M L J 161
	1941 M W N 87
	53 M L W 230
381	1941-1 M L J 476
SB	1940 8 I T R 297
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	53 M L W 530
	195 I C 839
382	1941-1 M L J 25
	53 M L W 67
	1941 M W N 39
	196 I C 251
383	53 M L W 59
	1941-1 M L J 153
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	ILR 1941 M 295
385	1941-1 M L J 108
	53 M L W 71
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387	1941-1 M L J 140
	53 M L W 89
	1941 M W N 182
389	1941-1 M L J 22
	53 M L W 64
	1941 M W N 87
391	1941-1 M L J 27
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392	1941-1 M L J 44
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	195 I C 555
	42 Cr L J 773

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393	1941-1 M L J 174
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394	1941 M W N 40
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	53 M L W 220
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397	53 M L W 103
	1941-1 M L J 256
	1941 M W N 328
398	1941-1 M L J 31
	1941 M W N 64
	53 M L W 201
399	1941-1 M L J 193
	53 M L W 167
	1941 M W N 299
401	53 M L W 153
	1941 M W N 185
	1941-1 M L J 225
402	1941-1 M L J 106
	53 M L W 57
	1941 M W N 89
403	1941-1 M L J 9
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	1941 M W N 326
405	1941-1 M L J 12
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	53 M L W 203
406	1941 M W N 44
	1941-1 M L J 116
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408	1941-1 M L J 113
	1941 M W N 80
	53 M L W 198
409	53 M L W 102
	1941-1 M L J 173
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410	1941-1 M L J 36
	1941 M W N 49
	53 M L W 191
411	1941 M W N 189
	53 M L W 265
	1941-1 M L J 314
412	1941 M W N 217
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	53 M L W 297
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413	53 M L W 108
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414	53 M L W 328
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	ILR 1941 M 747
416	1941 M W N 224
	1941-1 M L J 421
	53 M L W 394
	1941 M Cr C 101
	195 I C 228
	42 Cr L J 635
417	53 M L W 332
FB	1941 M W N 255
	1941-1 M L J 441
	ILR 1941 M 513
	195 I C 561
428	53 M L W 325
	1941 M W N 232
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	ILR 1941 M 587
429	1941-1 M L J 219
	53 M L W 154
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429 *con*	1941 M W N 369
	194 I C 98
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430	1941 M W N 208
	1941-1 M L J 349
	53 M L W 344
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432	53 M L W 104
	1941-1 M L J 177
	1941 M W N 186
433	53 M L W 227
	1941-1 M L J 296
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434	1941-1 M L J 499
	1941 M W N 315
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435	53 M L W 246
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	1941-1 M L J 319
436	1941 M W N 239
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437	53 M L W 206
	1941-1 M L J 305
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439	1941 M W N 253
	1941-1 M L J 411
	53 M L W 359
440	53 M L W 181
	1941-1 M L J 270
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445	1941-1 M L J 362
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446	53 M L W 233
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448	1941-1 M L J 466
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449	53 M L W 569
FB	1941 M W N 408
	1941-1 M L J 644
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475	1941-1 M L J 388
	53 M L W 348
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477	53 M L W 284
	1941-1 M L J 365
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479	53 M L W 240
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	1941-1 M L J 316
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	1941-1 M L J 800
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FB	1941 M W N 460
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486	1941-1 M L J 220
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487	53 M L W 105
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487 *con*	1941 M W N 271
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492	1941-1 M L J 776
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	1941-1 M L J 414
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	1941-1 M L J 302
497	1941-1 M L J 223
	53 M L W 162
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498	1941-1 M L J 322
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	ILR 1941 M 544
500	1941-1 M L J 156
	53 M L W 86
	1941 M W N 96
502	53 M L W 243
	1941-1 M L J 299
	1941 M W N 301
504	1941 M W N 225
	1941-1 M L J 419
	1941 M Cr C 78
	53 M L W 660
	195 I C 140
	42 Cr L J 683
505	53 M L W 193
	1941 M W N 165
	1941-1 M L J 234
506	1941-1 M L J 190
	53 M L W 195
	1941 M W N 294
507	53 M L W 75
	1941-1 M L J 123
	1941 M W N 296
	ILR 1941 M 567
510	53 M L W 170
	1941-1 M L J 250
	1941 M W N 281
	ILR 1941 M 559
513	1941-1 M L J 724
	1941 M W N 464
	53 M L W 693
	ILR 1941 M 989
524	53 M L W 258
	1941 M W N 198
	1941-1 M L J 354
528	53 M L W 155
	1941 M W N 171
	1941-1 M L J 267
530	54 M L W 7
FB	1941 MWN 644

AIR	Other Journals	
530 *con*	1941-2 M L J	47
FB	196 I C	353
	ILR 1941 M	850
533	1941 M Cr C	92
FB	1941 M W N	525
	1941-2 M L J	41
	196 I C	23
	ILR 1941 M	687
	42 Cr L J	793
	54 M L W	17
	1941-4 FLJHC	171
535	1941 M W N	690
SB	1941-2 M L J	148
	54 M L W	167
	196 I C	13
	1941-9 I T R	375
	ILR 1941 M	862
537	53 M L W	105
	1941-1 M L J	172
	1941 M W N	166
538	1941-1 M L J	200
	53 M L W	238
	1941 M W N	226
539	1941 M W N	655
FB	1941-2 M L J	79
	196 I C	406
	ILR 1941 M	785
546	1941 M W N	647
FB	196 I C	335
	ILR 1941 M	942
	1941-2 M L J	35
	54 M L W	12
549	53 M L W	300
	1941 M W N	239
	1941-1 M L J	484
550	1941-1 M L J	216
	53 M L W	144
	1941 M W N	267
551	1941 M W N	218
	53 M L W	396
	1941-1 M L J	475
	1941 M Cr C	97
	195 I C	183
	42 Cr L J	696
552	1941 M W N	211
	1941-1 M L J	510
	53 M L W	290
556	1941-1 M L J	218
	53 M L W	158
	1941 M W N	204
557	53 M L W	490
	1941-1 M L J	547
	1941 M W N	386
558	1941-1 M L J	573
	53 M L W	506
	1941 M W N	440
560	1941 M W N	220
	1941-1 M L J	364
	53 M L W	363
	1941 M Cr C	60
	195 I C	171
	42 Cr L J	707
561	1941 M W N	318
	1941-1 M L J	543
	53 M L W	457
563	53 M L W	454
	1941 M W N	313
	1941-1 M L J	519
	ILR 1941 M	924
564	1941 M W N	255
	1941-1 M L J	407
	53 M L W	356
565	53 M L W	321

AIR	Other Journals	
565 *con*	1941-1 M L J	369
	1941 M W N	275
	ILR 1941 M	538
567	1941-1 M L J	550
	53 M L W	509
	1941 M W N	436
569	1941 M W N	237
	53 M L W	352
	1941-1 M L J	492
571	53 M L W	190
	1941 M W N	204
	1941-1 M L J	295
572	53 M L W	303
	1941 M W N	248
	1941-1 M L J	384
574	1941 M W N	376
	1941-1 M L J	611
	53 M L W	677
	1941 M Cr C	115
	196 I C	128
	42 Cr L J	817
575	1941-1 M L J	405
	53 M L W	357
	1941 M W N	268
576	1941 M W N	220
	1941-1 M L J	363
	53 M L W	320
	1941 M Cr C	62
	196 I C	27
	42 Cr L J	800
577	1941-1 M L J	531
	53 M L W	479
	1941 M W N	366
579	1941 M W N	222
	53 M L W	358
	1941 M Cr C	188
	195 I C	233
	42 Cr L J	640
580	1941 M W N	246
	1941-1 M L J	423
	53 M L W	370
582	1941-1 M L J	503
	1941 M W N	308
	53 M L W	548
	ILR 1941 M	760
584	1941-1 M L J	561
	53 M L W	515
	1941 M W N	390
586	ILR 1941 M	930
	1941-1 M L J	577
	53 M L W	513
	1941 M W N	444
587	1941-1 M L J	502
	53 M L W	449
	1941 M W N	335
	1941 AWRSup	11
588	1941-1 M L J	537
	53 M L W	466
	1941 M W N	350
589	1941-1 M L J	540
	53 M L W	487
	1941 M W N	349
591	53 M L W	366
	1941 M W N	273
	1941-1 M L J	488
593	1941-1 M L J	586
	53 M L W	536
	1941 M W N	395
	ILR 1941 M	675
596	53 M L W	245
	1941 M W N	203
	1941-1 M L J	313
597	1941-1 M L J	464

AIR	Other Journals	
597 *con*	53 M L W	362
	1941 M W N	370
	1941 M Cr C	103
	42 Cr L J	702
	195 I C	189
598	1941 M W N	374
	53 M L W	556
	1941 M Cr C	185
	196 I C	28
	42 Cr L J	798
600	1941 M W N	344
	1941-1 M L J	523
	53 M L W	476
602	53 M L W	634
	1941-1 M L J	759
	1941 M W N	518
604	53 M L W	75
	1941 M W N	64
	1941 M Cr C	34
	194 I C	256
	42 Cr L J	551
605	1941 M W N	305
	53 M L W	452
	1941-1 M L J	508
606	1941-1 M L J	569
	53 M L W	498
	1941 M W N	577
607	53 M L W	492
	1941-1 M L J	554
	1941 M W N	404
609	1941-1 M L J	580
	53 M L W	501
	1941 M W N	383
611	53 M L W	497
	1941-1 M L J	609
	1941 M W N	570
612	53 M L W	483
	1941-1 M L J	557
	1941 M W N	529
614	1941 M W N	378
	1941-1 M L J	720
	1941 M Cr C	113
	196 I C	168
	42 Cr L J	832
615	53 M L W	640
	1941-1 M L J	779
	1941 M W N	477
616	1941-1 M L J	614
	53 M L W	545
	1941 M W N	438
	ILR 1941 M	703
617	1941 M W N	379
	1941-1 M L J	716
	1941 M Cr C	138
	195 I C	713
	42 Cr L J	795
618	1941-1 M L J	496
	1941 M W N	306
	53 M L W	449
620	53 M L W	494
	1941-1 M L J	565
	1941 M W N	388
621	1941-1 M L J	715
	53 M L W	615
	1941 M W N	449
	1941 M Cr C	137
	1941-4 FLJHC	97
	195 I C	115
	42 Cr L J	672
	ILR 1941 M	701
622	1941 M W N	363
	1941-1 M L J	818
625	1941 M W N	448

AIR	Other Journals	
625 *con*	1941-1 M L J	828
	1941 M Cr C	164
	195 I C	177
	42 Cr L J	688
626	1941 M W N	406
	1941-1 M L J	796
	53 M L W	740
628	1941-1 M L J	718
	53 M L W	642
	1941 M W N	501
629	53 M L W	306
	1941-1 M L J	378
	1941 M W N	278
632	1941 M W N	341
	53 M L W	680
	1941-2 M L J	110
635	53 M L W	644
	1941-1 M L J	793
	1941 M W N	499
636	53 M L W	533
	1941-1 M L J	620
	1941 M W N	402
638	1941-1 M L J	633
	I941 M W N	454
	53 M L W	672
639	1941-1 M L J	721
	53 M L W	637
	1941 M W N	564
	ILR 1941 M	935
641	53 M L W	616
	1941 M W N	545
	1941-2 M L J	189
	ILR 1941 M	897
650	1941-1 M L J	768
	53 M L W	656
	1941 M W N	502
652	53 M L W	719
	1941 M W N	624
	1941-2 M L J	109
653	1941-1 M L J	831
	1941 M W N	483
	196 I C	98
654	1941 M W N	358
	53 M L W	560
657	1941-1 M L J	624
	1941 M W N	443
	53 M L W	712
	196 I C	261
658	1941 M W N	371
	53 M L W	567
	1941 M Cr C	118
	194 I C	857
	42 Cr L J	631
660	1941-1 M L J	527
	53 M L W	463
	1941 M W N	346
	ILR 1941 M	753
662	1941-1 M L J	641
	1941 M W N	482
663	1941-1 M L J	773
	53 M L W	673
	1941 M W N	487
	196 I C	474
665	1941-1 M L J	635
	53 M L W	690
	1941 M W N	535
	196 I C	259
666	1941-1 M L J	754
	1941 M W N	532
	53 M L W	731
669	53 M L W	728
	1941-2 M L J	105
	1941 M W N	637

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671	53 M L W 726
	1941 2 M L J 66
	1941 M W N 633
	196 I C 94
672	53 M L W 685
	1941-1 M L J 782
	1941 M W N 488
	1941-9 I T R 284
673	54 M L W 90
SB	1941-2 M L J 152
	1941 M W N 880
	196 I C 635
	1941-9 I T R 502
	ILR 1941 M 868
674	1941 M W N 463
	1941 M Cr C 166
	196 I C 541
	42 Cr L J 896
675	1941 M W N 521
	54 M L W 69
	1941 M Cr C 228
	196 I C 342
	42 Cr L J 848
677	54 M L W 101
SB	1941-2 M L J 172
	1941 M W N 925
	1941 9 I T R 509
	197 I C 31
678	53 M L W 724
	1941 M W N 632
	197 I C 245
679	1941 M W N 447
	53 M L W 714
	1941 M Cr C 205
	196 I C 553
	43 Cr L J 58
680	1941-2 M L J 63
	54 M L W 95
	1941 M W N 663
	197 I C 419
681	1941 M W N 62
	1941 M Cr C 35
682	1941 M W N 537
	54 M L W 66
	1941 2 M L J 115
683	1941 M W N 373
	1941-1 M L J 610
	53 M L W 566
	1941 M Cr C 115
	196 I C 171
	42 Cr L J 827
684	1941-2 M L J 75
	1941 M W N 718
	54 M L W 724
	197 I C 402
685	1941 M W N 479
	1941 M Cr C 162
	196 I C 16
	42 Cr L J 838
686	1941-1 M L J 824
	1941 M W N 634
	54 M L W 140
687	1941 M W N 446
	53 M L W 711
	1941 M Cr C 163
	196 I C 543
	42 Cr L J 895
688	1941-2 M L J 68
	54 M L W 73
	1941 M W N 701
	ILR 1941 M 891
690	1941 M W N 513
	1941-2 M L J 99

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690 *con*	54 M L W 76
693	53 M L W 736
	1941 M W N 620
	1941-2 M L J 91
694	1941 M W N 479
	1941 M Cr C 201
	195 I C 432
	42 Cr L J 738
695	53 M L W 686
	1941-1 M L J 784
	1941 M W N 629
697	53 M L W 721
	1941-1 M L J 833
	1941 M W N 625
699	54 M L W 36
	1941-2 M L J 134
	1941 M W N 692
	ILR 1941 M 970
704	53 M L W 518
	1941-1 M L J 605
	1941 M W N 400
	ILR 1941 M 840
706	1941-1 M L J 638
	53 M L W 631
	1941 M W N 455
707	1941-1 M L J 815
	53 M L W 744
	1941 M W N 621
708	1941 M W N 480
	1941 M Cr C 188
	1941-2 M L J 253
	196 I C 227
	54 M L W 479
	42 Cr L J 824
709	1941-1 M L J 617
	53 M L W 543
	1941 M W N 569
	ILR 1941 M 716
	197 I C 224
	1941-9 I T R 275
710	1941-1 M L J 626
	1941 M W N 517
	54 M L W 65
	196 I C 389
711	1941-1 M L J 629
	53 M L W 611
	1941 M W N 579
	196 I C 521
713	1941 M W N 539
	ILR 1941 M 824
	54 M L W 758
	1941-2 M L J 834
718	1941 M W N 382
	1941-1 M L J 695
	1941 M Cr C 108
	53 M L W 718
	196 I C 437
	42 Cr L J 868
719	1941-1 M L J 765
	53 M L W 675
	1941 M W N 567
	ILR 1941 M 985
720	1941 M Cr C 44
	1941 M W N 505
	54 M L W 81
	197 I C 81
	43 Cr L J 3
724	53 M L W 552
	1941 M W N 392
	1941 1 M L J 697
727	1941 1 M L J 807
	1941 M W N 639
731	1941-1 M L J 837

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731 *con*	54 M L W 34
	1941 M W N 627
	197 I C 261
733	1941 M W N 450
736	54 M L W 103
	1941-2 M L J 155
	1941 M W N 952
737	54 M L W 124
	1941 2 M L J 248
	1941 M W N 749
	ILR 1941 M 963
739	1941-2 M L J 72
	54 M L W 176
	1941 M W N 862
741	1941 2 M L J 164
	54 M L W 118
	1941 M W N 746
742	1941 M W N 484
744	1941 M W N 703
	1941 M Cr C 278
745	1941 2 M L J 167
	54 M L W 144
	1941 M W N 949
746	1941 M W N 528
	1941 M Cr C 159
	54 M L W 62
	195 I C 231
	42 Cr L J 638
747	1941 2 M L J 123
	54 M L W 138
	1941 M W N 1015
	197 I C 425
748	1941 M W N 524
	1941 M Cr C 160
749	1941 M Cr C 167
	54 M L W 93
	1941 2 M L J 145
	1941 M W N 681
	196 I C 761
	43 Cr L J 78
	ILR 1942 M 73
750	1941-2 M L J 170
	54 M L W 143
	1941 M W N 903
	197 I C 299
751(1)	1941 M Cr C 213
	54 M L W 392
	1941 M W N 678
	198 I C 16
751(2)	1941 M W N 759
	1941 2 M L J 121
	54 M L W 98
	197 I C 302
752	1941 M W N 481
	1941 M Cr C 158
	195 I C 606
	42 Cr L J 780
753	1941 M W N 489
761	1941 M W N 667
	54 M L W 235
	1941 M Cr C 226
762(1)	1941-2 M L J 119
	54 M L W 100
	1941 M W N 854
762(2)	1941 M Cr C 136
	1941 M W N 668
	54 M L W 386
763	1941 M W N 679
	1941-2 M L J 207
	1941 M Cr C 218
	54 M L W 482
	197 I C 71
	43 Cr L J 106

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764	1941 M W N 523
	1941 M Cr C 304
765	54 M L W 136
	1941 M Cr C 175
	1941-2 M L J 209
	1941 M W N 766
	197 I C 54
	ILR 1942 M 77
	43 Cr L J 100
766	1941 M W N 684
	1941 M Cr C 216
	197 I C 16
	43 Cr L J 126
767(1)	1941 M W N 669
	54 M L W 236
	1941 M Cr C 217
767(2)	54 M L W 115
	1941-2 M L J 222
	1941 M W N 727
769	1941-2 M L J 571
	1941 M W N 919
772	1941 M W N 704
FB	54 M L W 186
	1941-2 M L J 311
	197 I C 199
786	1941-2 M L J 244
	1941 M W N 807
788	1941-2 M L J 270
794	54 M L W 213
	1941-2 M L J 386
	1941 M W N 976
	197 I C 441
795	1941 M W N 699
	1941-2 M L J 219
	54 M L W 714
	197 I C 238
796	1941 M W N 735
	54 M L W 259
	1941-2 M L J 810
799(1)	1941 M W N 671
	1941 M Cr C 224
799(2)	1941-2 M L J 307
	1941 M W N 800
	54 M L W 229
	197 I C 790
	ILR 1942 M 57
800(1)	1941 M W N 672
	1941-2 M L J 256
	1941 M Cr C 212
	54 M L W 391
800(2)	1941 M W N 739
	1941-2 M L J 646
	54 M L J 505
802	1941 M W N 670
	1941 M Cr C 215
803 (1)	1941 M W N 666
	1941 M Cr C 297
803 (2)	1941 M W N 767
	1941 M Cr C 302
804	1941 M W N 677
	54 M L W 391
	1941 M Cr C 211
805 (1)	1941 M W N 676
	1941 M Cr C 210
805 (2)	1941 M W N 751
	1941-2 M L J 293
	54 M L W 233
	197 I C 259
806	1941-2 M L J 94
	1941 M W N 972
	54 M L W 745
808	1941-2 M L J 156
	54 M L W 133

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808 *con*	1941 M W N 683
	1941 M Cr C 221
	196 I C 624
	ILR 1941 M 1019
	43 Cr L J 43
809	1941 M W N 665
	1941 M Cr C 225
810	54 M L W 178
	1941-2 M L J 295
	1941 M W N 961
811	1941-2 M L J 442
814	54 M L W 210
	1941 M W N 761
	1941-2 M L J 353
	1941 M Cr C 235
	196 I C 778
	43 Cr L J 81
815	54 M L W 241
	1941 M W N 981
	197 I C 448
816	1941 M W N 698
	1941 2 MLJ 456n
	197 I C 488
817	1941-2 M L J 125
	54 M L W 107
	1941 M W N 741
	1941-4 FLJHC280
	ILR 1942 M 60
822	1941-2 M L J 463
FB	54 M L W 357
	1941 M W N 831
	196 I C 721
	ILR 1942 M 13
825	1941-2 M L J 401
	54 M L W 307
	1941 M Cr C 285
	1941 M W N 1077
	197 I C 583
826	1941-2 M L J 351
	1941 M W N 799
	54 M L W 309
	197 I C 421
827	54 M L W 215
	1941-2 M L J 382
	1941 M W N 1016
828	1941-2 M L J 348
	1941 M W N 788
	1941 M Cr C 212
	196 I C 754
	43 Cr L J 80
	54 M L W 767
829	54 M L W 181
	1941-2 M L J 257
	1941 M W N 1041
831	1941-2 M L J 497
	54 M L W 283
832 (1)	1941 M Cr C 68
	1941 M W N 790
832 (2)	1941 M W N 673
	1941 M Cr C 223
833 (1)	1941-2 M L J 187
	54 M L W 171
	1941 M W N 794
833 (2)	1941 M W N 765
	1941 M Cr C 282
834 (1)	1941-2 M L J 347
	1941 M W N 792
	54 M L W 728
	197 I C 304
834 (2)	54 M L W 231
	1941-2 M L J 356
834(2) *con*	1941 M W N 785
	196 I C 765
	1941 M Cr C 298
	43 Cr L J 72
835	1941 M W N 671
	1941 M Cr C 220
836	54 M L W 349
FB	1941-2 M L J 500
	1941 M W N 835
	196 I C 894
	ILR 1941 M 954
838	1941 M W N 778
	54 M L W 302
	1941-2 M L J 951
841	1941-2 M L J 558
845	1941 M Cr C 156
	1941-2 M L J 349
	54 M L W 480
	196 I C 633
	43 Cr L J 49
846	1941 2 M L J 304
	54 M L W 223
	1941 M W N 776
	197 I C 324
847	54 M L W 286
	1941 M W N 965
	1941-2 M L J 866
851	54 M L W 267
	1941 M W N 795
	1941-2 M L J 378
853	1941 M Cr C 99
	1942 M W N 54
854	1941-2 M L J 261
	54 M L W 225
	1941 M W N 863
855	54 M L W 275
	1941-2 M L J 417
857	54 M L W 321
	1941-2 M L J 439
	1941 M W N 983
	197 I C 761
858	54 M L W 317
	1941-2 M L J 493
860	1941 M W N 786
	1941 M Cr C 238
	197 I C 784
	1941-2 M L J 674
861	1941 M W N 805
	1941-2 M L J 792
863	54 M L W 271
	1941-2 M L J 428
	1941 M W N 1020
	197 I C 432
865	1941-2 M L J 432
	1941 M W N 803
	54 M L W 602
866	1941-2 M L J 255
	1941 M W N 738
	54 M L W 502
867	54 M L W 324
	1941 M W N 829
	1941-2 M L J 537
868	1941-2 M L J 301
	1941 M W N 968
	54 M L W 768
870	1941 M Cr C 86
873	1941-2 M L J 366
877	1941-2 M L J 338
	1941 M W N 772
	54 M L W 392
878	1941-2 M L J 175
	54 M L W 147
878 *con*	1941 M W N 720
	ILR 1941 M 807
	1941-4 FLJHC321
884	1941 M W N 669
	1941 M Cr C 224
	197 I C 333
	43 Cr L J 156
885	54 M L W 320
	1941-2 M L J 447
	1941 M W N 1024
886	1941-2 M L J 360
	54 M L W 281
887	54 M L W 342
	1941-2 M L J 469
	1941 M W N 834
888	54 M L W 239
	1941 M W N 784
	1941-2 M L J 388
889(1)	1941 M W N 804
	54 M L W 240
889(2)	54 M L W 274
	1941-2 M L J 397
	196 I C 775
	1941 M W N 1078
	1941 M Cr C 317
	43 Cr L J 88
890	54 M L W 310
	1941 M W N 801
	1941-2 M L J 453
891(1)	1941-2 M L J 359
	54 M L W 306
891(2)	54 M L W 243
	1941 M W N 782
	1941-2 M L J 403
892	1941-2 M L J 460
	1941 M W N 827
	54 M L W 718
894	1941 M Cr C 73
	1941-2 M L J 399
	54 M L W 312
	1941 M W N 847
	196 I C 687
	43 Cr L J 56
895	54 M L W 278
	1941 M W N 797
	1941-2 M L J 362
897	54 M L W 377
	1941 M W N 867
	1941-2 M L J 541
	1941 M Cr C 908
898	1941-2 M L J 622
FB	54 M L W 448
	1941 M W N 906
	198 I C 158
903	54 M L W 495
FB	1941-2 M L J 684
	1941 M W N 942
	197 I C 599
	ILR 1942 M 1
905	1941-2 M L J 663
SB	54 M L W 481
	1941 M W N 936
	1941 M Cr C 281
	ILR 1941 M 940
	197 I C 658
906	54 M L W 420
	1941-2 M L J 591
	1941 M W N 899
908	1941 M W N 825
	1941-2 M L J 544
	54 M L W 720
910	54 M L W 387
	1941-2 M L J 534
	1941 M W N 869
	1941 M Cr C 319
	197 I C 588
912	1941-2 M L J 376
	54 M L W 301
	1941 M W N 802
913	1941-2 M L J 607
	54 M L W 452
	1941 M W N 887
	ILR 1941 M 874
	1941-4 FLJHC332
918	54 M L W 263
	1941-2 M L J 390
	1941 M W N 1047
921	1941 M W N 780
	1941-2 M L J 395
	54 M L W 604
922	1941-2 M L J 900
SB	54 M L W 734
	1941-9 I T R 656
924	1941-2 M L J 891
SB	54 M L W 732
	1941 M W N 1068
	1941-9 I T R 668
925	1941-2 M L J 883
FB	54 M L W 596
	1941 M W N 1013
	198 I C 177
928	1941-2 M L J 890
SB	54 M L W 707
	1941-9 I T R 663
	197 I C 707
	1942 M W N 107
929	1941-2 M L J 855
FB	54 M L W 627
	1941 M W N 1052
	198 I C 117
933	1941-2 M L J 904
FB	54 M L W 647
	1941 M W N 1050
	198 I C 230
935	1941-2 M L J 798
FB	54 M L W 583
	1941 M W N 1007
937	54 M L W 587
FB	1941-2 M L J 803
	1941 M W N 1009
	1942 O W N 84
	198 I C 236
939	1941 M W N 764
	1941 M Cr C 283
	197 I C 134
	43 Cr L J 136
940(1)	1941-2 M L J 452
	54 M L W 341
	1941 M W N 828
940(2)	1941 M W N 674
	1941-2 M L J 254
	54 M L W 387
	1941 M Cr C 283
941	54 M L W 291
	1941-2 M L J 475
	1941 M W N 841
	1941-9 I T R 604
	1941 M Cr C 313
	197 I C 717
944	54 M L W 395
	1941-2 M L J 548
	1941 M W N 1049

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ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
1	1940	PC	173	172	1941	M	258	340	1941	M	120	533	1941	M	565	785	1941	M	539
13	"	M	804	175	"	PC	1	345	"	"	392	544	"	"	498	807	"	"	878
27	"	"	828	191	"	M	67	347	"	"	319	551	"	"	430	824	"	"	713
36	"	"	811	203	"	"	28	354	"	"	230	559	"	"	510	840	"	"	704
43	"	"	890	212	"	"	36	356	"	"	149	567	"	"	507	846	"	"	434
49	1941	"	111	220	"	"	255	367	"	"	176	574	"	"	309	850	"	"	530
53	"	"	113	226	"	"	194	378	"	"	147	587	"	"	428	862	"	"	535
57	"	"	107	232	"	"	154	383	"	"	152	592	"	"	489	868	"	"	673
61	"	"	297	248	"	"	321	389	"	"	49	599	"	"	449	874	"	"	913
78	"	"	353	255	1940	"	879	393	"	"	207	675	"	"	593	891	"	"	688
81	"	"	101	258	1941	"	38	398	"	"	183	687	"	"	533	897	"	"	641
89	1940	PC	183	261	"	"	235	406	"	"	259	701	"	"	621	924	"	"	563
104	"	M	942	275	"	"	81	414	"	"	391	703	"	"	616	930	"	"	584
109	1941	"	270	286	"	"	63	419	"	"	394	708	"	"	493	935	"	"	639
120	"	"	53	288	"	"	385	428	"	"	358	716	"	"	709	940	"	"	905
125	"	"	48	295	"	"	383	433	"	"	366	720	"	"	367	942	"	"	546
128	"	"	58	300	"	"	31	438	"	"	161	739	"	"	475	954	"	"	836
132	"	"	118	313	"	"	282	481	"	"	412	747	"	"	414	963	"	"	737
136	1940	"	716	322	"	"	185	486	"	"	231	753	"	"	660	970	"	"	699
144	"	"	929	328	"	"	18	498	"	"	315	760	"	"	582	985	"	"	719
152	1941	"	186	332	"	"	26	503	"	"	359	767	"	"	484	989	"	"	513
157	"	"	91	336	"	"	204	513	"	"	417	775	"	"	481	1019	"	"	808
169	"	"	363																

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MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1941	M	149	177	1941	M	432	316	1941	M	479	492	1941	M	569	633	1941	M	638
6	"	"	373	178	"	"	394	319	"	"	435	496	"	"	618	635	"	"	665
9	"	"	403	185	"	"	413	322	"	"	498	499	"	"	434	638	"	"	706
12	"	"	405	186	"	"	194	328	"	"	446	502	"	"	587	641	"	"	662
20	"	"	225	190	"	"	506	333	"	"	366	503	"	"	582	644	"	"	449
22	"	"	389	193	"	"	399	336	"	"	367	508	"	"	605	695	"	"	718
25	"	"	382	197	"	"	487	349	"	"	430	510	"	"	552	697	"	"	724
27	"	"	391	200	"	"	538	354	"	"	524	519	"	"	563	703	"	"	297
31	"	"	398	204	1940	PC	160	362	"	"	445	523	"	"	600	715	"	"	621
34	"	"	358	216	1941	M	550	363	"	"	576	527	"	"	660	716	"	"	617
36	"	"	410	218	"	"	556	364	"	"	560	531	"	"	577	718	"	"	628
39	"	"	356	219	"	"	429	365	"	"	477	537	"	"	588	720	"	"	614
43	"	"	374	220	"	"	486	369	"	"	565	540	"	"	589	721	"	"	639
44	"	"	392	228	"	"	497	374	"	"	428	543	"	"	561	724	"	"	513
45	"	"	161	225	"	"	401	378	"	"	629	547	"	"	557	746	"	PC	16
77	"	"	67	227	"	"	359	384	"	"	572	550	"	"	567	754	"	M	666
88	"	PC	6	234	"	"	505	388	"	"	475	554	"	"	607	759	"	"	602
99	"	M	229	236	"	"	489	393	"	PC	1	557	"	"	612	765	"	"	719
103	"	"	249	242	"	"	309	405	"	M	575	561	"	"	584	768	"	"	650
106	"	"	402	250	"	"	510	407	"	"	564	565	"	"	620	773	"	"	663
108	"	"	385	256	"	"	397	411	"	"	439	569	"	"	606	776	"	"	492
113	"	"	408	257	"	"	319	414	"	"	493	573	"	"	558	779	"	"	615
116	"	"	406	262	"	"	246	419	"	"	504	577	"	"	586	782	"	"	672
120	"	"	255	267	"	"	528	421	"	"	416	580	"	"	609	784	"	"	695
123	"	"	507	270	"	"	440	423	"	"	580	586	"	"	593	788	"	"	484
128	"	"	230	281	"	"	282	427	1940	PC	192	594	1940	PC	215	793	"	"	635
130	1940	PC	230	286	"	"	375	441	1941	M	417	605	1941	M	704	796	"	"	626
140	1941	M	387	295	"	"	571	464	"	"	597	609	"	"	611	800	"	"	481
145	"	"	176	296	"	"	433	466	"	"	448	610	"	"	683	807	"	"	727
158	"	"	383	299	"	"	502	469	"	"	480	611	"	"	574	815	"	"	707
156	"	"	500	302	"	"	495	470	"	"	352	614	"	"	616	818	"	"	622
161	"	"	379	304	"	"	491	475	"	"	551	617	"	"	709	824	"	"	686
164	"	"	285	305	"	"	437	476	"	"	391	620	"	"	636	828	"	"	625
172	"	"	587	310	"	"	412	479	"	"	414	624	"	"	657	831	"	"	653
173	"	"	409	313	"	"	596	484	"	"	549	626	"	"	710	833	"	"	697
174	"	"	393	314	"	"	411	488	"	"	591	629	"	"	711	837	"	"	731

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MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1941	FC	47	45	1941	FC	1	49	1941	FC	5	65	1941	FC	16

MLJ		AIR		MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1941	PC	38	255	1941	M	866	450	1942	M	35	631	1942	M	21	848	1942	M	146
12	"	FC	72	256	"	"	800	452	1941	"	940	636	"	"	39	852	"	"	181
33	"	"	69	257	"	"	829	453	"	"	890	640	"	"	114	854	"	"	178
35	"	M	546	261	"	"	854	455	1942	"	242	644	"	"	23	855	1941	"	929
41	"	"	533	263	1942	"	1	456n	1941	"	816	646	1941	"	800	862	1942	"	212
47	"	"	530	270	1941	"	788	460	"	"	892	650	1942	"	101	866	1941	"	847
53	"	PC	36	281	1942	"	139	463	"	"	822	653	"	"	34	873	1942	"	170
58	"	"	48	287	"	"	36	469	"	"	887	655	"	"	78	877	"	"	198
63	"	M	680	291	"	"	29	472	1942	"	90	658	"	"	133	883	1941	"	925
66	"	"	671	293	1941	"	805	475	1941	"	941	661	"	"	100	890	"	"	928
68	"	"	688	295	"	"	810	481	1942	"	13	663	1941	"	905	891	"	"	924
72	"	"	739	298	1942	"	296	486	"	"	81	665	1942	"	116	894	"	PC	90
75	"	"	684	301	1941	"	868	487	"	"	75	671	"	"	4	900	"	M	922
79	"	"	539	304	"	"	846	490	"	"	104	674	1941	"	860	904	"	"	939
91	"	"	693	307	"	"	799	493	1941	"	858	677	1942	"	17	908	1942	"	337
94	"	"	806	309	1942	"	278	497	"	"	831	682	"	"	119	910	"	"	210
99	"	"	690	311	1941	"	772	500	"	"	836	684	1941	"	903	913	"	"	200
105	"	"	669	338	"	"	877	505	1942	"	16	690	1942	"	151	918	"	"	88
109	"	"	652	340	1942	"	134	507	"	"	76	693	"	"	251	923	"	"	232
110	"	"	632	347	1941	"	834	509	"	"	105	695	"	"	209	932	"	"	226
115	"	"	682	348	"	"	828	510	"	"	93	698	"	"	254	935	"	"	159
119	"	"	762	349	"	"	845	514	"	"	70	703	"	"	143	939	"	"	167
121	"	"	751	351	"	"	826	520	"	"	44	707	"	"	125	947	"	"	84
123	"	"	747	353	"	"	814	529	"	"	73	711	"	"	156	951	1941	"	838
125	"	"	817	356	"	"	834	534	1941	"	910	717	"	"	154	956	1942	"	41
134	"	"	699	359	"	"	891	537	"	"	867	722	"	"	67	962	"	"	247
145	"	"	749	360	"	"	886	541	"	"	897	726	1941	PC	95	968	"	"	252
148	"	"	535	362	"	"	895	544	"	"	908	733	"	"	85	972	1941	PC	120
152	"	"	673	366	"	"	873	548	"	"	944	740	1942	M	136	986	1942	M	205
155	"	"	736	375	1942	"	77	550	1942	"	97	746	"	"	92	993	"	"	244
156	"	"	808	376	1941	"	912	557	"	"	102	748	"	"	182	999	"	"	227
159	1942	"	56	378	"	"	851	558	1941	"	841	751	"	"	145	1002	"	"	230
164	1941	"	741	382	"	"	827	564	1942	"	121	754	"	"	5	1008	"	"	202
167	"	"	745	386	"	"	794	566	"	"	12	768	"	"	166	1010	"	"	149
170	"	"	750	388	"	"	888	567	"	"	103	770	"	"	219	1014	"	"	221
172	"	"	677	390	"	"	918	568	"	"	198	774	"	"	152	1018	"	"	216
175	"	"	878	395	"	"	921	571	1941	"	769	778	"	"	172	1024	"	"	260
187	"	"	833	397	"	"	889	577	1942	"	127	781	"	"	148	1034	"	"	279
189	"	"	641	399	"	"	894	580	"	"	204	784	"	"	128	1036	"	"	242
207	"	"	763	401	"	"	825	581	"	"	26	787	"	"	223	1038	"	"	241
209	"	"	765	403	"	"	891	584	"	"	120	792	1941	"	861	1040	"	"	196
212	1942	"	294	406	1942	"	106	587	"	"	92	795	1942	"	204	1042	"	"	269
216	"	"	111	417	1941	"	855	588	"	"	24	798	1941	"	935	1045	"	"	290
219	1941	"	795	420	1942	"	31	591	1941	"	906	803	"	"	937	1047	"	"	249
222	"	"	767	424	"	"	122	595	1942	"	95	808	1942	"	169	1049	"	"	240
227	"	PC	45	428	1941	"	863	598	"	"	86	810	1941	"	796	1050	"	"	62
233	"	"	51	432	"	"	865	601	"	"	28	816	1942	"	161	1060	"	"	271
242	1942	M	288	435	1942	"	179	604	"	"	79	827	"	"	173	1064	"	"	291
244	1941	"	786	439	1941	"	857	607	1941	"	913	834	1941	"	713	1070	"	"	49
248	"	"	737	442	"	"	811	618	1942	"	19	845	1942	"	27	1085	"	"	280
253	"	"	708	447	"	"	885	622	1941	"	898	847	"	"	103	1088	"	"	282
254	"	"	940													1093	"	"	256

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MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1940	PC	215	75b	1941	M	507	151	1941	M	486	201	1941	M	398	258	1941	M	524
8	1941	M	176	79	"	"	235	153	"	"	401	203	"	"	405	265	"	"	411
15	"	"	375	86	"	"	500	154	"	"	429	206	"	"	437	266	"	PC	75
22	"	"	378	89	"	"	387	155	"	"	528	210	"	"	255	283	"	M	480
24	"	"	403	93	"	"	406	158	"	"	556	212	"	PC	6	284	"	"	477
27	"	"	161	96	"	"	249	160	"	"	393	220	"	M	394	287	"	"	366
50	"	FC	1	99	"	"	229	162	"	"	497	225	"	"	495	290	"	"	552
54	"	M	391	102	"	"	409	164	"	"	319	227	"	"	433	297	"	"	412
57	"	"	402	103	"	"	397	167	"	"	399	229	"	"	491	300	"	"	549
59	"	"	383	104	"	"	432	170	"	"	510	230	"	"	379	303	"	"	572
62	"	"	230	105a	"	"	537	175	"	"	489	233	"	"	446	306	"	"	629
64	"	"	389	105b	"	"	487	181	"	"	440	238	"	"	538	311	"	"	493
66	"	"	374	108	"	"	413	190	"	"	571	240	"	"	479	315	"	"	498
67	"	"	382	109	"	FC	47	191	"	"	410	243	"	"	502	320	"	"	576
70	"	"	392	144	"	M	550	193	"	"	505	245	"	"	596	321	"	"	565
71	"	"	385	145	"	"	809	195	"	"	506	246	"	"	435	325	"	"	428
75a	"	"	604					198	"	"	408	248	"	"	367				

MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
328	1941	M	414	449a	1941	M	587	506	1941	M	558	611	1941	M	711	685	1941	M	672
332	"	"	417	449b	"	"	618	509	"	"	567	615	"	"	621	686	"	"	695
344	"	"	430	452	"	"	605	513	"	"	586	616	"	"	641	690	"	"	665
348	"	"	475	454	"	"	563	515	"	"	584	631	"	"	706	693	"	"	513
352	"	"	569	457	"	"	561	518	"	"	704	634	"	"	602	711	"	"	687
356	"	"	564	461	"	"	434	522	"	PC	1	637	"	"	639	712	"	"	657
357	"	"	575	463	"	"	660	530	"	M	381	640	"	"	615	714a	"	"	679
358	"	"	579	466	"	"	588	532	"	"	445	642	"	"	628	714b	"	"	246
359	"	"	439	469	"	PC	16	533	"	"	636	644	"	"	635	718	"	"	718
361	"	"	436	476	"	M	600	536	"	"	593	647	"	"	484	719	"	"	652
362	"	"	597	479	"	"	577	543	"	"	709	650	"	"	481	721	"	"	697
363	"	"	560	483	"	"	612	545	"	"	616	656	"	"	650	724	"	"	678
366	"	"	591	487	"	"	589	548	"	"	582	660	"	"	504	726	"	"	671
370	"	"	580	490	"	"	557	552	"	"	724	662	"	"	297	728	"	"	669
373	"	FC	5	492	"	"	607	556	"	"	598	672	"	"	638	731	"	"	666
391	"	M	448	494	"	"	620	560	"	"	654	673	"	"	663	736	"	"	693
394	"	"	416	497	"	"	611	566	"	"	683	675	"	"	719	738	"	"	492
396	"	"	551	498	"	"	606	567	"	"	658	677	"	"	574	740	"	"	626
397	"	FC	16	501	"	"	609	569	"	"	449	680b	"	"	632	744	"	"	707

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MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1941	PC	43	184	1942	M	296	321	1941	M	857	461	1942	M	133	596	1941	M	925
3	"	"	36	186	1941	"	772	324	"	"	867	464	"	"	78	602	"	"	865
7	"	M	530	207	1942	"	179	327	1942	"	49	466	"	"	120	604	"	"	921
12	"	"	546	210	1941	"	814	339	"	"	242	468	"	"	34	606	"	PC	93
17	"	"	533	213	"	"	794	341	1941	"	940	470	"	"	92	610	"	"	88
22	"	FC	72	215	"	"	827	342	"	"	887	471	"	"	12	613	"	"	90
34	"	M	731	217	1942	"	139	345	1942	"	13	472	"	"	198	624	1942	M	146
36	"	"	699	223	1941	"	846	349	1941	"	836	474	"	"	67	627	1941	"	929
45	1942	"	5	225	"	"	854	353	1942	"	105	478	"	"	298	632	1942	"	178
57	1941	PC	48	228	1942	"	278	355	"	"	104	479	1941	"	708	633	"	"	181
61	"	FC	69	229	1941	"	799	357	1941	"	822	480	"	"	845	635	1941	PC	120
62	"	M	746	231	"	"	834	362	1942	"	93	481	"	"	905	647	"	M	933
65	"	"	710	233	"	"	805	365	"	"	97	482	"	"	763	651	1942	"	212
66	"	"	682	234	1942	"	29	370	"	"	82	484	"	PC	45	654	"	"	226
69	"	"	675	235	1941	"	761	373	"	"	114	488	1942	M	111	656	"	"	232
73	"	"	688	236	"	"	767	377	1941	"	897	491	"	"	209	663	"	"	247
76	"	"	690	237	"	PC	47	379	1942	"	90	495	1941	"	903	668	"	"	159
81	"	"	720	239	"	M	888	382	"	"	73	499	1942	"	125	671	"	"	41
90	"	"	673	240	"	"	889	386	1941	"	762	502	1941	"	866	676	"	"	252
93	"	"	749	241	"	"	815	387a	"	"	940	503	1942	"	119	679	"	"	205
95	"	"	680	243	"	"	891	387b	"	"	910	505	1941	"	800	684	"	"	230
98	"	"	751	244	1942	"	122	391a	"	"	800	508	1942	"	156	688	"	"	260
100	"	"	762	250	"	"	106	391b	"	"	804	513	"	"	254	697	"	"	202
101	"	"	677	259	1941	"	796	392a	"	"	751	517	"	"	143	699	"	"	149
103	"	"	736	263	"	"	918	392b	"	"	877	521	"	"	182	702	"	"	244
105	1942	"	184	267	"	"	851	394	1942	"	76	523	"	"	151	707	1941	"	928
107	1941	"	817	271	"	"	863	395	1941	"	944	526	"	"	152	708	1942	"	216
115	"	"	767	274	"	"	889	397	"	PC	64	529	1941	PC	95	714	1941	"	795
118	"	"	741	275	"	"	855	404	1942	M	121	534	"	"	85	716	1942	"	80
120	1942	"	56	278	"	"	895	405	"	"	127	539	1942	M	154	718	1941	"	892
124	1941	"	737	281	"	"	886	408	"	"	89	544	"	"	186	720	"	"	908
128	1942	"	1	283	"	"	831	411	"	"	129	548	"	"	172	724	"	"	684
133	1941	"	808	286	"	"	847	416	"	"	84	551	"	"	204	726	1942	"	75
136	"	"	765	291	"	"	941	420	1941	"	906	553	"	"	145	728	1941	"	834
138	"	"	747	295	1942	"	70	422	1942	"	204	556	"	"	223	730	1942	"	196
140	"	"	686	301	1941	"	912	423	"	"	26	560	"	"	103	732	1941	"	924
143	"	"	750	302	"	"	888	426	"	"	28	561a	"	"	102	734	"	"	922
144	"	"	745	306	"	"	891	428	"	"	103	561b	"	"	275	737	1942	"	81
147	"	"	878	307	"	"	825	429	"	"	21	562	"	"	81	738	"	"	31
159	"	PC	38	309	"	"	826	433	"	"	79	563	"	"	193	741	"	"	278
167	"	M	535	310	"	"	890	435	"	"	24	570	"	"	27	745	1941	"	806
171	"	"	833	312	"	"	894	438	"	"	86	571	"	"	173	748	1942	"	277
172	1942	"	288	314	1942	"	77	440	"	"	95	577	"	"	169	751	"	"	258
173	"	"	294	315	"	"	85	444	"	"	28	579	"	"	200	754	"	"	256
176	1941	"	739	317	1941	"	858	445	"	"	19	583	1941	"	935	758	1941	"	713
178	"	"	810	320	"	"	885	448	1941	"	898	587	"	"	937	767	"	"	828
181	"	"	829					452	"	"	913	591	1942	"	167	768	"	"	868
												594	"	"	166				

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
1	1940	PC	204	220a	1941	M	576	386	1941	M	557	632	1941	M	678	789	1942	M	38
9	1941	M	67	220b	,,	,,	560	388	,,	,,	620	633	,,	,,	671	790	1941	,,	832
14	,,	,,	36	221a	,,	,,	445	390	,,	,,	584	634	,,	,,	686	792	,,	,,	834
17	,,	,,	282	221b	,,	,,	488	392	,,	,,	724	637	,,	,,	669	793	1942	,,	101
20	,,	,,	176	222	,,	,,	579	395	,,	,,	593	639	,,	,,	727	794	1941	,,	833
24	,,	,,	391	224	,,	,,	416	400	,,	,,	704	644	,,	,,	530	795	,,	,,	851
28	,,	,,	353	225	,,	,,	504	402	,,	,,	636	647	,,	,,	546	797	,,	,,	895
30	,,	,,	364	226	,,	,,	538	404	,,	,,	607	651	,,	PC	36	799	,,	,,	826
31	,,	,,	200	232	,,	,,	428	406	,,	,,	626	654	,,	,,	43	800	,,	,,	799
33	,,	,,	201	234	,,	,,	414	408	,,	,,	449	655	,,	M	539	801	,,	,,	890
34	,,	,,	305	237	,,	,,	569	436	,,	,,	567	663	,,	,,	680	802	,,	,,	912
35	,,	,,	149	239a	,,	,,	436	438	,,	,,	616	665	,,	,,	809	803	,,	,,	865
37	,,	,,	389	239b	,,	,,	549	440	,,	,,	558	666	,,	,,	803	804	,,	,,	889
39	,,	,,	382	241	,,	,,	366	443	,,	,,	657	667	,,	,,	761	805	,,	,,	861
40	,,	,,	394	243	,,	,,	493	444	,,	,,	586	668	,,	,,	762	807	,,	,,	786
44	,,	,,	406	246	,,	,,	580	446	,,	,,	687	669a	,,	,,	767	809	1942	,,	81
46	,,	,,	259	248	,,	,,	572	447	,,	,,	679	669b	,,	,,	884	811	,,	,,	31
49	,,	,,	410	250	,,	,,	498	448	,,	,,	625	670	,,	,,	802	813	,,	,,	113
51	,,	,,	373	253	,,	,,	439	449	,,	,,	621	671a	,,	,,	835	817	,,	,,	35
52	,,	,,	405	255a	,,	,,	564	450	,,	,,	733	671b	,,	,,	799	818	,,	,,	294
54	,,	,,	356	255b	,,	,,	417	454	,,	,,	638	672	,,	,,	800	819	,,	,,	62
56	,,	,,	230	267	,,	,,	550	455	,,	,,	706	673	,,	,,	832	825	1941	,,	908
57	,,	,,	392	268a	,,	,,	575	456	,,	,,	481	674	,,	,,	940	827	,,	,,	892
58	,,	,,	358	270	,,	,,	433	460	,,	,,	484	676	,,	,,	805	828	,,	,,	940
62	,,	,,	681	271	,,	,,	487	463b	,,	,,	674	677	,,	,,	804	829	,,	,,	867
63	,,	,,	374	273	,,	,,	591	464	,,	,,	513	678	,,	,,	751	831	,,	,,	822
64a	,,	,,	604	275	,,	,,	565	477	,,	,,	615	679b	,,	,,	763	834	,,	,,	887
64b	,,	,,	398	278	,,	,,	629	479a	,,	,,	685	681	,,	,,	749	835	,,	,,	836
66	,,	,,	208	281	,,	,,	510	479b	,,	,,	694	683	,,	,,	808	838	1942	,,	13
76	,,	,,	231	284	,,	,,	497	480	,,	,,	708	684	,,	,,	766	841	1941	,,	941
80	,,	,,	408	286	,,	,,	246	481	,,	,,	752	685	,,	PC	38	844a	1942	,,	48
81	,,	,,	249	289	,,	,,	475	482	,,	,,	662	690	,,	M	535	844b	,,	,,	69
83	,,	,,	229	291	,,	,,	448	483	,,	,,	653	692	,,	,,	699	845	,,	,,	25
85	,,	,,	383	292	,,	,,	477	484	,,	,,	742	698	,,	,,	81e	846	,,	,,	75
87	,,	,,	379	294	,,	,,	506	487	,,	,,	663	699	,,	,,	795	847	1941	,,	894
89	,,	,,	402	296	,,	,,	507	488	,,	,,	672	701	,,	,,	688	849	1942	,,	90
91	,,	,,	489	299	,,	,,	399	489	,,	,,	753	703	,,	,,	744	851	,,	,,	242
96	,,	,,	500	301	,,	,,	502	499	,,	,,	635	704	,,	,,	772	852	,,	,,	88
98	,,	,,	393	303	,,	,,	437	501	,,	,,	628	718	,,	,,	684	854	1941	,,	762
100	,,	FC	47	305	,,	,,	605	502	,,	,,	650	720	,,	,,	878	855	1942	,,	73
125	,,	M	319	306	,,	,,	618	505	,,	,,	720	727	,,	,,	767	857	,,	,,	82
127	,,	,,	309	308	,,	,,	582	513	,,	,,	690	729	1940	PC	215	860	,,	,,	84
131	,,	,,	235	313	,,	,,	563	517	,,	,,	710	734	1942	M	288	862	1941	,,	739
136	,,	FC	5	315	,,	,,	434	518	,,	,,	602	735	1941	,,	796	863	,,	,,	854
149	,,	M	161	317	,,	,,	255	521	,,	,,	675	738	,,	,,	866	865	1942	,,	93
165	,,	,,	505	318	,,	,,	561	523	,,	,,	764	739	,,	,,	800	867a	,,	,,	20
166	,,	,,	537	321	,,	PC	6	524	,,	,,	748	741	,,	,,	817	867b	1941	,,	897
167	,,	,,	385	326	,,	M	403	525	,,	,,	533	746	,,	,,	741	869	,,	,,	910
169	,,	,,	313	328	,,	,,	397	528	,,	,,	746	748	1942	,,	29	871	1942	,,	124
171	,,	,,	528	329	,,	,,	440	529	,,	,,	612	749	1941	,,	737	874	,,	,,	275
173	,,	,,	413	335a	,,	,,	587	532	,,	,,	666	751	,,	,,	805	875	,,	,,	81
174	,,	,,	486	335b	,,	,,	375	535	,,	,,	665	752	1942	,,	5	876a	,,	,,	33
175	,,	,,	409	341	,,	,,	632	537	,,	,,	682	759	1941	,,	751	876b	,,	,,	92
176	,,	,,	277	344	,,	,,	600	539	,,	,,	713	761	,,	,,	814	877	,,	,,	198
180	,,	,,	435	346	,,	,,	660	545	,,	,,	641	763	1942	,,	289	879a	,,	,,	204
182	,,	,,	387	349	,,	,,	589	556	,,	FC	72	764	1941	,,	939	879b	,,	,,	102
185	,,	,,	401	350	,,	,,	588	564	,,	M	639	765b	,,	,,	833	880	1941	,,	673
186a	,,	,,	432	352	,,	,,	381	566	,,	FC	69	766	,,	,,	765	881	1942	,,	39
186b	,,	,,	495	354	,,	PC	16	567	,,	M	719	767	,,	,,	803	883	,,	,,	127
188	,,	,,	479	358	,,	M	654	569	,,	,,	709	769	1942	,,	139	885	,,	,,	111
189	,,	,,	411	363	,,	,,	622	570	,,	,,	611	772	1941	,,	877	887a	,,	,,	105
191a	,,	,,	491	366	,,	,,	577	571	,,	PC	1	773	1942	,,	17	887b	1941	,,	913
191b	,,	,,	367	369	,,	,,	429	577	,,	M	606	775	,,	,,	30	893	1942	,,	26
198	,,	,,	524	370	,,	,,	597	579	,,	,,	711	776	1941	,,	846	895	,,	,,	24
203	,,	,,	596	371	,,	,,	658	581	,,	FC	16	778	,,	,,	838	896	,,	,,	67
204a	,,	,,	556	373	,,	,,	683	618	,,	,,	70	780	,,	,,	921	898	,,	,,	23
204b	,,	,,	571	374	,,	,,	598	620	,,	M	693	782	,,	,,	891	899	1941	,,	906
205	,,	,,	446	376	,,	,,	574	621	,,	,,	707	783	1942	,,	4	903	,,	,,	750
208	,,	,,	430	378	,,	,,	614	623	,,	,,	492	784	1941	,,	888	904	1942	,,	56
211	,,	,,	552	379	,,	,,	617	624	,,	,,	652	785	,,	,,	834	906	1941	,,	898
216	,,	,,	480	382	,,	,,	718	625	,,	,,	697	786	,,	,,	860	910	1942	,,	116
217	,,	,,	412	383	,,	,,	609	627	,,	,,	731	788	,,	,,	828	913	,,	,,	79
218	,,	,,	551					629	,,	,,	695								

MWN		AIR		MWN		AIR		MWN		AIR		MWN		AIR		MWN		AIR	
914	1942	M	120	944	1942	M	125	982	1942	M	128	1020	1941	M	863	1049	1941	M	944
916	"	"	86	946	"	"	12	983	1941	"	857	1022	1942	"	95	1050	"	"	933
917	"	"	28	947	"	"	254	985	1942	"	97	1024	1941	"	885	1052	"	"	929
919	1941	"	769	949	1941	"	745	989	"	"	170	1025	1942	"	227	1055	1942	"	205
921	1942	"	16	951	1942	"	76	991	"	"	34	1027	"	"	221	1058	"	"	247
922	"	"	133	952	1941	"	736	992	"	"	145	1028	"	"	213	1061	"	"	280
924	"	"	27	956	1942	"	237	994	"	"	172	1030	"	"	275	1064	"	"	41
925	1941	"	677	961	1941	"	810	995	"	"	204	1032	"	"	223	1067	"	"	210
926	1942	"	103	962	1942	"	154	997	"	"	78	1035	"	"	199	1068	1941	"	924
927	"	"	134	965	1941	"	847	998	"	"	219	1036	"	"	92	1070	1942	"	143
928	"	"	103	968	"	"	868	1000	"	"	200	1037	"	"	251	1072	"	"	166
929	"	"	49	970	1942	"	152	1003	"	"	193	1038	"	"	100	1073a	"	"	181
936	1941	"	905	971	"	"	278	1007	1941	"	935	1039	"	"	319	1073b	"	"	279
937	1942	"	151	972	1941	"	806	1009	"	"	937	1041	1941	"	829	1074	"	"	281
938	"	"	156	975	1942	"	296	1012	"	"	925	1042	1942	"	202	1075	"	"	276
941	"	"	119	976	1941	"	794	1015	"	"	747	1045	"	"	104	1076	"	"	19
942	1941	"	903	978	1942	"	1	1016	"	"	827	1047	1941	"	918	1077	1941	"	825
				981	1941	"	815	1018	1942	"	179					1078	"	"	889

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MCrC		AIR		MCrC		AIR		MCrC		AIR		MCrC		AIR		MCrC		AIR	
1	1941	M	225	101	1941	M	416	201b	1942	M	285	238	1941	M	860	291	1942	M	196
3	"	"	359	103	"	"	597	205	1941	"	679	241b	1942	"	289	292	"	"	181
8	"	"	374	108	"	"	718	210	"	"	805	244	"	"	31	294	"	"	287
9	"	"	358	113	"	"	614	211	"	"	804	246	"	"	49	295	"	"	178
11	"	"	352	115a	"	"	683	212a	"	"	800	257	"	"	100	297	1941	"	803
12	"	"	323	115b	"	"	574	212b	"	"	828	260	"	"	279	298a	1942	"	124
13	"	"	392	118	"	"	658	213	"	"	751	261	"	"	293	298b	1941	"	834
14	"	"	19	136b	"	"	762	215	"	"	802	263	"	"	92	300	1942	"	182
19	"	"	259	137	"	"	621	216b	"	"	766	266	"	"	81	302	1941	"	803
31	"	"	230	138	"	"	617	217	"	"	767	267	"	"	288	303	1942	"	69
33	"	"	429	146	"	"	58	218	"	"	763	270	"	"	25	304a	"	"	275
34	"	"	604	156	1941	"	845	220	"	"	835	271	"	"	283	304b	1941	"	764
35	"	"	681	158	"	"	752	221	"	"	808	273	"	"	290	305	1942	"	20
36	"	"	489	159	"	"	746	223	"	"	832	277a	"	"	48	306	"	"	75
44	"	"	720	160	"	"	748	224a	"	"	799	277b	"	"	113	308	1941	"	897
60	"	"	560	162	"	"	685	224b	"	"	884	278	1941	"	744	310	1942	"	223
61	"	"	445	163	"	"	687	225	"	"	809	279	1942	"	38	313	1941	"	941
62	"	"	576	164	"	"	625	226	"	"	761	281a	1941	"	905	317	"	"	889
68	"	"	832	166	"	"	674	227	1942	"	281	282	"	"	833	319a	1942	"	81
73	"	"	894	167	"	"	749	228	1941	"	675	283a	"	"	939	319b	1941	"	910
78	"	"	504	175	"	"	765	235	"	"	814	283b	"	"	940	322	1942	"	33
79	"	"	488	185	"	"	598					284	1942	"	77	323	"	"	93
86b	"	"	870	188a	"	"	708					285	1941	"	825	326	"	"	213
92	"	"	533	188b	"	"	579					287b	1942	"	295				
97	"	"	551	201a	"	"	694												
99	"	"	853																

CASES OVERRULED & REVERSED

IN

(28) A. I. R. 1941 MADRAS

Abdul Kuthus v. Inayathulla, (1937) 1937 M W N 279=(24) A I R 1937 Mad 727 =170 I C 851	Reversed in (28) A I R 1941 Mad 620.
Alagappa Chettiar v. Somasundara Chettiar, (1937) 1937 M W N 465	Overruled in (28) AIR 1941 Mad 319 (FB).
Brahmayya v. Ratayya, (1925) 20 M L W 503 = 1924 M W N 844 = (12) A I R 1925 Mad 67=83 I C 59	Overruled in (28) AIR 1941 Mad 935 (FB).
Chinnammal Achi v. Saminatha Malavarayan, (1907) 30 Mad 367 = 2 M L T 328	Overruled in (28) AIR 1941 Mad 933 (FB).
Hussain Batcha Sahib v. Secy. of State (1939) 1939 - 1 M L J 476=49 M L W 595=1939 M W N 298 = (26) A I R 1939 Mad 570=186 I C 343	Reversed in (28) A I R 1941 Mad 428.
Kandasami Goundar v. Chinnammal, (1933) 1933 M W N 335 = 37 M L W 729= (20) AIR 1933 Mad 540=146 I C 346	Overruled in (28) AIR 1941 Mad 937 (FB).
Kelu Kurup v. Paru Amma, (1940) 1940 M W N 55=(1940) 1 M L J 693=51 M L W 617=(27) AIR 1940 Mad 686	Reversed in (28) A I R 1941 Mad 549.
Kesavan Chettiar v. Ramaswami Chettiar, (1941) 1941 M W N 44 = (1941) 1 M L J 116=53 M L W 98=(28) A I R 1941 Mad 406	Reversed in (28) A I R 1941 Mad 737.
Krishnaswami Aiyangar v. Gouri Amma, (1936) 1936 M W N 367=(23) A I R 1936 Mad 256=163 I C 195	Reversed in (28) A I R 1941 P C 90.
Kunhi Kannan v. Vazhayil Devaki, (1939) 1939 M W N 984=50 M L W 562 = (1939) 2 M L J 619=(26) A I R 1939 907=189 I C 167	Reversed in (28) A I R 1941 Mad 678.
Kuriyali v. Mayan, (1884) 7 Mad 255 = 8 Ind Jur 138	Overruled in (28) AIR 1941 Mad 898 (FB).
Lakshmi Narasimha Rao v. Seetharamaswami, (1917) 3 M L W 405=19 M L T 336=(4) AIR 1917 Mad 314=34 IC 2	Overruled in (28) AIR 1941 Mad 36 (FB).
Mahomed Yusuf v. Narayana Pillai, (1937) 45 M L W 684 = (1937) 2 M L J 170 =1937 M W N 916=(24) A I R 1937 Mad 642=172 I C 576	Overruled in (28) A I R 1941 Mad 475.
Midnapore Zamindari Co., Ltd. v. Muthappudayan, (1921) 44 Mad 534 = 40 M L J 213=13 M L W 387=(8) AIR 1921 Mad 195=62 I C 337	Overruled in (28) AIR 1941 Mad 149 (FB).
Municipal Council Srirangam v. The Srirangam Devasthanam, (1936) 1936 M W N 1088	Overruled in (28) A I R 1941 Mad 185.
Murahari Brahma Sastri v. Sumitramma, (1934) 57 Mad 411=1934 M W N 127 = 39 M L W 133 = 66 M L J 577 = (21) AIR 1934 Mad 191=151 I C 200	Overruled in (28) AIR 1941 Mad 937 (FB).
Muthupalaniappa Chettiar v. Raman Chettiar, (1940) 1940 M W N 905 = 52 M L W 377=(28) A I R 1941 Mad 75	Reversed in (28) A I R 1941 Mad 580.

Narasimha Ayyar v. Venkatachalapathi Ayyar, (1934) 57 Mad 457=67 M L J 207=1934 M W N 634 = 39 M L W 188=(21) A I R 1934 Mad 181 (1) = 148 I C 55	Overruled in (28) AIR 1941 Mad 161 (FB).
Patteri Pakker v. Kunhi Tharuvayi, C. R. P. No. 767 of 1939	Overruled in (28) AIR 1941 Mad 366 (FB).
Periakaruppan Chettiar v. Doraiswamy Naicken, (1940) 51 M L W 191=1940 M W N 602 = (1940) 1 M L J 134= (27) A I R 1940 Mad 461	Reversed in (28) A I R 1941 Mad 475.
Pierce Leslie & Co. Ltd., Cochin v. Perumal, (1918) 40 Mad 1069=33 M L J 130= 22 M L T 139=6 M L W 203=1917 M W N 712=(5) A I R 1918 Mad 580 =42 I C 294 (F B)	Overruled in (28) AIR 1941 Mad 309 (FB).
Rahima Bi v. Abdul Vakil Sahib, A. S. No. 526 of 1931	Overruled in (28) AIR 1941 Mad 481 (FB).
Ratansi D. Morarji v. Administrator General of Madras, (1928) 1928 M W N 848=28 M L W 674=52 Mad 160= 55 M L J 478 = (15) A I R 1928 Mad 1279=111 I C 364	Overruled in (28) A I R 1941 Mad 513.
Satyanarayana v. Mallayya (1935) 58 Mad 735=68 M L J 540=41 M L W 514 =1935 M W N 349=(22) A I R 1935 Mad 447=155 I C 581 (F.B.)	Overruled in (28) AIR 1941 Mad 417 (FB).
Somasundara Edangapurandar v. Narasimhachariar, (1939) ILR (1939) Mad 140=(1939) 1 M L J 68=1938 M W N 981=48 M L W 452=(26) A I R 1939 Mad 69=180 I C 49	Overruled in (28) AIR 1941 Mad 925 (FB).
Somasundaram Chettiar v. Peria Karuppan Chettiar, (1940) 1940 M W N 412=51 M L W 606=(27) AIR 1940 Mad 478	Overruled in (28) AIR 1941 Mad 929 (FB).
Sorimuthu Pillai v. Muthukrishna Pillai, (1933) 56 Mad 808 = 1933 M W N 1081=65 MLJ 253=38 MLW 138 = (20) AIR 1933 Mad 598=143 IC 854	Overruled in (28) AIR 1941 Mad 161 (FB).
Suryanarayana v. Venkataramana, (1903) 26 Mad 681=13 M L J 318	Overruled in (28) AIR 1941 Mad 935 (FB).
Swaminatha Iyer v. A. Ramier, (1925) 47 M L J 671 = 20 M L W 893 = 1925 M W N 52=(12) A I R 1925 Mad 421 =80 I C 1053	Overruled in (28) A I R 1941 Mad 822 (F B).
Vasudeva Kamath v. Lakshminarayana Rao, (1919) 42 Mad 684=36 M L J 453 = 9 M L W 475=26 M L T 90=(1919) M W N 612=(6) A I R 1919 Mad 167 =52 I C 442	Overruled in (28) AIR 1941 Mad 903 (FB).
Veera Basavaraju v. Balasurya Prasada Rao, (1914) 1914 M W N 502 = (2) A I R 1915 Mad 316=25 I C 3	Overruled in (28) AIR 1941 Mad 935 (FB).
Visvanathan Chettiar v. Ramanathan Chettiar, (1937) 46 MLW 275=1937 MWN 913=(1937) 2 M L J 559 = (24) AIR 1937 Mad 816=176 I C 1003	Reversed in (28) A I R 1941 P C 43.

THE
ALL INDIA REPORTER
1941
Madras High Court

**** A. I. R. 1941 Madras 1**

KRISHNASWAMI AYYANGAR J.

Emperor

v.

Kuppammal — Accused.

Case No. 7 of Fourth Criminal Sessions of 1940, Decided on 21st August 1940.

(a) Penal Code (1898), S. 300—Accused charged with intentionally causing death of her new born infant by drowning — Essentials to be proved by prosecution, stated.

Where the charge against the accused is that she intentionally caused the death of her new born infant by drowning it in a Corporation syphon, the prosecution must not only prove that she was recently delivered of a child but also that the body of the child found in the cess-pool was the body of her child. The accused cannot be convicted merely on the evidence that she was seen in an advanced state of pregnancy and that her appearance and the state of the room that she occupied on the date of the alleged offence indicated that she had been delivered of a child and that the dead body of a newly born infant was discovered in the syphon: (1867) 11 Cox C C 684, *Rel. on.* [P 3 C 1, 2]

(b) Criminal Trial—Suspicion cannot be made ground of finding.

In the trial of an accused for a crime, or for that matter even in the trial of a civil cause, suspicion cannot be made the ground of a finding by the Court or jury as the case may be. [P 3 C 1]

*** (c) Criminal P. C. (1898), Ss. 287, 209 and 342—Object of S. 209—Applicability of S. 342—Ss. 209 and 342 enable Magistrate to examine accused only in case of circumstances appearing against accused in prosecution evidence — No prima facie case against accused made out — Magistrate examining accused and recording answers — Answers cannot be said to have been duly recorded within meaning of S. 287 and cannot be used to fill up gaps in prosecution evidence — Presumption under S. 80, Evidence Act, cannot apply to such record of answers.*

Section 209 makes it clear that the Magistrate is to examine the accused not for the purpose of filling gaps in the prosecution but for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. S. 342 is applicable not only to the trial before the Court of Session but is applicable also to the enquiry before the committing Magistrate. Both Ss. 209 and 342, caste upon the Magistrate the duty to interrogate the accused if the facts and circumstances proved are of such a nature that they tend, if unexplained, to implicate the accused. The interrogation is to be made in order to afford him an opportunity for offering an explanation. Ss. 209 and 342 enable the Magistrate to examine the accused only if there are circumstances appearing against the accused in the evidence given by the prosecution and answers given by the accused in the absence of such evidence to questions put by the Magistrate cannot be used for filling up gaps in the proof adduced by the prosecution. [P 4 C 2]

Where in a case in which the evidence against the accused falls far short of making out a prima facie case against the accused and the Magistrate proceeds to examine the accused and record his answers, the examination of the accused cannot be said to have been duly recorded within the meaning of S. 287 and consequently the presumption under S. 80, Evidence Act, cannot apply to it: AIR 1916 Mad 407; 27 Mad 238 and (1852) 6 Cox C C 388, *Rel. on.* [P 5 C 1]

(d) Criminal Trial — Fundamental principle of administration of criminal justice — Accused person must be presumed to be innocent until contrary is proved.

The fundamental principle upon which the administration of criminal justice is founded in India is that an accused person must be presumed to be innocent until the contrary is proved by credible testimony adduced by the Crown, a duty cast upon the prosecution and on the prosecution alone, though certain limited exceptions under specified safeguards are provided in the Criminal Procedure Code and the Evidence Act: 26 Cal 49 and 27 Mad 238, *Ref.* [P 6 C 1]

Crown Prosecutor — for the Crown.

N. Rangachari — for Accused.

Charge to the jury

The accused in this case has been charged with having committed the offence of murder by intentionally causing the death of her new born infant by drowning it in a Corporation syphon (cess-pool) on or about 9th April 1940 at Madras. The facts deposed

to by the witnesses called for the prosecution may be briefly summarised as follows:

The accused is a widow with six children living at No. 16, Bhashyakaralu Naidu Street, George Town, Madras. She was keeping a betel-nut shop in No. 51, Krishnappa Naicken Agraharam, George Town. On the morning of 10th April last at about 10 A. M. Madurai Naicker, P. W. 1, living in No. 30, Bhashyakaralu Naidu Street, found that the drain in his court-yard was obstructed. He went out to the street and examined the syphon in front of his house to find out what the cause of obstruction was. He removed the cement lid and then removed the iron bucket in the syphon; and when he looked in, he found first, five fingers of the palm of the left hand of a dead child and then he noticed also the head. He went to the police station at the Seven Wells almost immediately and reported to the head constable present at the police station what he found in the syphon. The Sub-Inspector in charge of that station (Mr. Ramanujam) examined as P. W. 12, followed by a constable and a head constable came to the front of Madurai Naicker's house and found in the syphon the hand and head of a dead child as reported by Madurai Naicker. The body was taken out at the instance of the police by Jogi Veeraraghavan and it was found to be the dead body of a recently born male child. The Sub-Inspector, P. W. 12, had the body removed to the police station and from there it was sent under police custody to the general hospital for post-mortem examination. Dr. Srinivasalu Naidu, P. W. 3, Professor of Medical Jurisprudence attached to the Medical College, Madras, held the post-mortem examination and found the condition of the corpse in the state described by him in his certificate. It is unnecessary to go into details for the present purpose; but Dr. Srinivasalu Naidu expressed the opinion in his certificate that the infant over whose body he held the post-mortem examination should have been alive when born and drowned in the cess-pool—an opinion which he repeated in his evidence before the Court here. The accused was arrested at about 11-30 on 10th April 1940 by P. W. 12 and three sarees were seized from her. That night she was sent by Mr. Ramaseshan, Sub-Inspector, Crimes Branch (P. W. 14) to the Gosha Hospital, Triplicane, for medical examination. Miss Oommen, the Resident Medical Officer of the Hospital, examined the person of the accused at 8 A. M. on the morning of 11th April 1940 and from the appearances found she came to the conclusion that she must have been recently delivered of a child and that opinion was repeated by her before this Court during the course of the evidence that she gave here. The three articles of clothing seized from the accused by P. W. 12 along with another saree and a jacket recovered from her at the Gosha Hospital were sent to the Government Chemical Examiner, and on examination he detected blood on one of the articles, namely M. O. 1, a torn, dirty, grey, cotton cloth with red and white cross stripes and red, green and white borders, on which were brownish stains. This was one of the three articles seized by Sub-Inspector Ramanujam from the accused when he arrested her on 10th April 1940. A specimen of the stains found on it was sent to the Imperial Serologist for the purpose of ascertaining whether the stains were stains of human blood and his report (EX. G-1) which has been exhibited on the side of the prosecution is that the cloth (M. O. 1) was stained with human blood. Mr. Ramaseshan who was examined as P. W. 14, Sub-Inspector of the Crime Branch, was in charge of the investigation. It was he who took charge of the articles of clothing seized by P. W. 12 and also of those recovered from the accused at the Gosha Hospital.

Evidence has been called by the prosecution of three witnesses, namely P. Ws. 6, 7 and 8, two of whom, P. Ws. 6 and 8 were tenants living in No. 51, Krishnappa Naicken Agraharam, the place where the accused was keeping the betel-nut shop, and the third P. W. 7, was the owner of the house. Briefly their evidence is that they had seen her about 6th or 7th April and found her abdomen prominent, in other words, found signs of advanced pregnancy on her. On the night of the 10th when the accused was arrested, P. W. 7 the owner of the house was there and noticed that the size of the accused's abdomen had diminished or, as he put it, it was not so big as it was before. That statement is corroborated by the evidence of P. W. 8, a goldsmith, who was a tenant in the same house as the one in which the accused was having her shop. The prosecution also called the Kanakupillai in charge of the burial ground at Washermanpet to which place the bodies of persons who died in Bhashyakaralu Naidu Street are ordinarily taken. He deposed that no dead body of any child was brought to the burial ground between 8th and 11th April last.

This is the substance of the evidence adduced by the prosecution. It seems to me

that here is a quantity of evidence tending to show, if believed, that the accused was seen in an advanced state of pregnancy about 6th or 7th April last and was delivered of a child on or about 9th April. The evidence, if believed, would seem to establish that on the morning of the 10th there was found in the syphon in front of Madurai Naicker's house the dead body of a recently born male child; but there is no evidence that that child was the child born to the accused, nor any direct evidence tending to show that it was the accused that deposited the child in the syphon. The charge against the accused, it may be remembered, is that she intentionally caused the death of her new born infant by drowning it in the Corporation syphon. That being the charge against her the prosecution must not only prove that she was recently delivered of a child but also that the body of the child found in the cess-pool was the body of her child. The facts deposed to by the prosecution witnesses no doubt amount to circumstances causing a suspicion against the accused; but in the trial of an accused for a crime, or for that matter even in the trial of a civil cause, suspicion cannot be made the ground of a finding by the Court or jury as the case may be.

Learned counsel for the accused placed before me for my consideration the decision in (1867) 11 COX C C 684,[1] of Montague Smith J. That was a case in which the learned Judge held that there was no sufficient evidence to go to the jury on the offence charged and accordingly directed them to return a verdict of not guilty. The offence charged was that the accused had concealed the dead body of her newly born infant. The facts proved in that case by the prosecution are clearly stated in the headnote. A woman apparently pregnant, while staying at an inn at Stafford, received by post, on 28th August 1870, a Rugby newspaper, with the Rugby post mark on it. On the same day her appearance and the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsburry next morning, carrying a parcel. That afternoon a parcel was found in a waiting room at Stafford station. It was the dead body of a newly born child, wrapped in a Rugby Gazette of 27th August 1870, bearing the Rugby post mark. There is a railway from Stafford to Shrewsbury, but no proof was given of the woman having been at the Stafford station. The judgment which was very short was as follows:

> It is impossible to proceed with this case. The gist of the offence charged in the indictment is the concealment, by the prisoner, of the dead body of *her* child (the italics are mine). The evidence as to the identification of the body does not seem to me sufficient. A man cannot be convicted of murder unless the corpse of the murdered person is found, otherwise the prisoner charged might be executed, and the individual supposed to have been killed by him proved to be in fact living. So in the present case, the child of which the prisoner is said to have been delivered may, at this moment, be somewhere alive. I must direct you to return a verdict of not guilty.

The facts of this case come very close to the facts of the case now before me. There was in that case, as in this, evidence sufficient to go to the jury that the accused was seen in an advanced state of pregnancy on 28th August 1870. There was evidence in that case, as in this, that her appearance and the state of the room that she occupied in the inn on the date of the alleged offence indicated that she had been delivered of a child. There was however in that case, one circumstance for which there is no counterpart here, viz., that she left for Shrewsbury next morning carrying a parcel. A parcel was found at the Stafford station containing the dead body of a newly born child and there was a railway from Stafford to Shrewsbury. This circumstance has its counterpart in the present case in the fact that there was in the syphon in front of Madhurai Naicker's house the dead body of a newly born infant. What was not proved in that case, was that the woman was seen at the Stafford station. What is not proved in this case is that the woman was seen near or about the syphon in which the body of the child was discovered. It will therefore be quite apparent that, if there was no evidence to go to the jury in the case cited, it cannot be held that there is evidence in the case before me either sufficient in quantity or character to put it before the jury.

It is, however, necessary to refer to one other matter in this connexion. Practically the same evidence as the evidence adduced in this Court seems to have been put before the Magistrate who has committed the case to the Sessions. I have seen the record of the depositions of the prosecution witnesses before the committing Magistrate and I am satisfied that there was no evidence before the committing Magistrate to indicate that the body found in the syphon was the body of the child born to the accused. In other words, the link, that is wanting before me

1. (1867) 11 Cox C C 684, Reg v. Williams.

was wanting also in the committing Magistrate's Court. That is to say, the evidence such as it was recorded by the committing Magistrate was not sufficient to implicate the accused. At the end of the evidence adduced by the prosecution before him the committing Magistrate put the following questions and recorded the following answers:

Q. Have you any witnesses to be examined on your behalf here?

A. No.

Q. You have heard the evidence of the prosecution witnesses. What have you to say?

A. What I did is a wrong act. The police have taken charge of the bangle, which I was wearing. I have six children. I was carrying and I gave birth to a child. I went to the latrine and there I gave birth to a still born child. I kept the child for about ten minutes and as there was no life I took it and threw it in the cess-pool opposite.

If this answer was an answer which could be said to have been duly recorded within the meaning of S.287, Criminal P. C., it would undoubtedly take the case of the prosecution much farther in that it provided material upon which the missing link could be found. Section 287, Criminal P. C., says this:

The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

As I indicated, if the examination of the accused which resulted in the answers which I read just now can be said to have been duly recorded by the committing Magistrate, the answers should be tendered by the prosecution and it is open to the Court to read those answers as evidence in the case. I may at once say that the prosecution did tender the record of the examination of the accused by the committing Magistrate and the only question for consideration is whether it could be read as evidence in this case. The condition for its being read as evidence is that it should have been duly recorded as I have said. For the purpose of finding out whether the answers can be said to have been duly recorded, reference must be made to Ss.209 and 342, Criminal P. C. Section 209 says:

1. When the evidence referred to in S.208, sub-ss. (1) and (3) (that is, the evidence of the complainant and the evidence of the witnesses called and the documents produced by the prosecution) has been taken, and he has if necessary examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

2. Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

The section makes it clear that the Magistrate is to examine the accused not for the purpose of filling gaps in the prosecution but for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. It may be that it is not obligatory on the Magistrate to examine the accused unless he decides to commit the accused, in which case he is bound to examine the accused and that only for the purpose mentioned. Section 342 lays down the rule of procedure on this point in almost the same terms. Section 342(1) says:

For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

Clause (3) says:

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

Section 342, as I understand it, is applicable not only to the trial before the Court of Session but is applicable also to the enquiry before the committing Magistrate. Both these Ss.209 and 342 cast upon the Magistrate the duty to interrogate the accused if the facts and circumstances proved are of such a nature that they tend, if unexplained, to implicate the accused. The interrogation is to be made in order to afford him an opportunity for offering an explanation. S.80, Evidence Act, relating to the presumption regarding documents produced as a record of evidence says:

Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

The section merely purports to lay down the presumption to be drawn in the absence of positive evidence, *viz.*, that a statement or confession given by an accused person or

prisoner and signed by the Judge or Magistrate was taken in accordance with the law and that such statement or confession was duly taken. That presumption cannot be drawn in the present case in view of the nature and character of the evidence before the committing Magistrate which, even if taken at its face value, falls far short of making out a prima facie case against the accused. If, therefore, in a case in which the evidence so falls short, the Magistrate proceeds to examine the accused as he did in the present case, and record his answers, could it be said that the examination of the accused was duly recorded by him within the meaning of that expression in S.287? On this point I have the advantage of the guidance afforded by the decision of a Bench of this Court in 39 MAD 770.[2] That was a case where there were seven accused who had been charged with having forged a promissory note. The preliminary enquiry into the offence was held by the committing Magistrate who committed the accused to take their trial in the Sessions Court. There was no evidence adduced by the prosecution before the committing Magistrate to show that accused 2 forged the promissory note or that accused 6 and 7 attested the forged promissory note.

At the end of the prosecution evidence before the committing Magistrate, accused 2, 6 and 7 were asked the following question: "You heard what the prosecution witnesses stated. What do you say?", and they gave answers indicating that accused 2 had the promissory note in question prepared by his younger brother and he got the signatures of the witnesses appended to it. Accused 6 admitted that in response to a request from accused 2 he took the promissory note from the complainant and attested the document. Accused 7 also made a similar statement admitting his attestation of the promissory note charged as a forged document in the case. As against these accused, beyond the admissions contained in the answers given by them to the committing Magistrate, the admissibility of which was in question, there was no evidence whatever. These accused were convicted and in the appeal preferred by them the point was taken that as there was no evidence given by the prosecution to connect them with the forged document, before the committing Magistrate, the Magistrate was not entitled to put any questions to them or to take any statements from them. It was said that S.342—the same may be said of S.209 as well—enabled the Magistrate to examine the accused only if there were circumstances appearing against the accused in the evidence given by the prosecution and that answers given by the accused in the absence of such evidence to questions put by the Magistrate, could not be used for filling up gaps in the proof adduced by the prosecution. The appeal was heard by a very strong Bench of this Court consisting of Sir John Wallis C. J. and Coutts-Trotter J., as he then was, the judgment of the Court being delivered by the latter. The Court observed :

> The admissions in the Court below were made in answer to an invitation from the committing Magistrate to say what they had to say. At the time when these statements were made in the Court of the committing Magistrate the prosecution had given no evidence at all involving any one of these accused, as appears from an examination of the record of the evidence given in that Court. S.342, Criminal P. C., only gives the Magistrate the right to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him. We think that where no evidence has been given implicating the accused, the Magistrate has no right under the statute to put questions to the accused or invite him to make a statement. We further think that if a statement is made by the accused in such circumstances it is not admissible evidence against the accused on his subsequent trial.

The learned Judges in support of their opinion relied upon an earlier decision of this Court in 27 MAD 238[3] and the decision in the English case in (1852) 6 COX C C 388.[4] This decision in 39 MAD 770[2] contains a clear pronouncement that answers recorded by the Magistrate from the accused in the absence of evidence adduced by the prosecution implicating the accused are not admissible in the trial of the accused later in the Court of Session. Though S.287 is not in terms referred to, it appears to my mind that when the learned Judges were considering the question of the admissibility of the answers in evidence they must have done so only with reference to S.287. That principle that gaps in the case of the prosecution cannot be filled in by answers elicited from the accused during his examination by the Court is too well-settled to need a citation of authority. That principle is clearly stated in 26 CAL 49[5] and repeated in

2. ('16) 3 A I R 1916 Mad 407 : 30 I C 447 : 39 Mad 770 : 16 Cr L J 623, In re Abdulla Ravuthan.

3. ('04) 27 Mad 238 : 2 Weir 408, Mohideen Abdul Kader v. Emperor.

4. (1852) 6 Cox C C 388, Reg. v. Berriman.

5. ('99) 26 Cal 49, Basanta Kumar v. Queen-Empress.

27 MAD 238.[3] These decisions are in my view entirely consistent with the fundamental principle upon which the administration of criminal justice is founded in this country, and that is, that an accused person must be presumed to be innocent until the contrary is proved by credible testimony adduced by the Crown, a duty cast upon the prosecution and on the prosecution alone. Certain limited exceptions under specified safeguards are no doubt to be found in the Criminal Procedure Code and the Evidence Act. Statements in the nature of a confession made by an accused, provided they are free and voluntary, in other words, not induced by a promise of advantage and not procured by threats, are declared admissible by law. Apart from confessions, it appears to me that there is no warrant for supplementing the evidence for the prosecution by statements obtained from the accused as the result of judicial interrogation. The purpose of interrogation by Court or by the committing Magistrate is merely to obtain an explanation from the accused in respect of circumstances appearing against him. That this is the only legitimate purpose of the interrogation is not to be forgotten and it is not to be extended to cases where the prosecution evidence does not go far enough and tend to involve the accused in guilt.

I must therefore hold that in this case no proof has been adduced by the prosecution to show that the body of the child found in cess-pool was the body of the child of which the accused was delivered. Nor is there any proof that it was the accused that deposited the body in the cess-pool in front of Madurai Naicker's house. The link, the most important link, in the chain of evidence by which the offence can be brought home to the accused is wanting. I must withhold the case from the jury. (At this stage the jury are called in and addressed by his Lordship as follows:)

"Gentlemen,

A question of very great importance has arisen for my consideration and I have come to the conclusion that there is no sufficient evidence to go to the jury. I therefore direct you to return a verdict of 'not guilty'."

(The jury accordingly returned a unanimous verdict of "not guilty.")

Order. — The jury at my direction having returned a unanimous verdict of "not guilty" the accused is acquitted and she will be set at liberty immediately.

C.R.K./G.N. *Accused acquitted.*

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* A. I. R. 1941 Madras 6

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

T. S. P. L. S. Thinnappa Chettiar by agent A. S. Arunachalam Chettiar — Appellant

v.

Putti Krishna Rao and others — Respondents.

Appeal No. 148 of 1937 and Civil Misc. Petns. Nos. 4852 and 4853 of 1939, Decided on 2nd November 1939, against decree of Court of Sub-Judge, Trichinopoly, D/- 11th January 1937.

* *(a) Limitation Act (1908), S. 20 — Direction by mortgagor to his vendee to discharge debt due by mortgagor — Part payment made by vendee is not payment by agent duly authorized within meaning of S. 20.*

Under S. 20 the agent whose payment would keep alive the debt must be one who was duly authorized to make the part payment of interest or principal. A power to extinguish the debt would not carry with it a power to keep alive the debt. Hence, a direction or power by mortgagor to his purchaser to discharge a debt does not make the donee of the power an agent authorized to make a part payment so as to keep alive the debt. The part payment made by the purchaser would not be payment by an agent duly authorized within the meaning of S. 20. [P 8 C 1, 2]

(b) Limitation Act (1908), S. 20 — S. 20 does not make distinction between simple contract debt and debt charged on land.

Section 20 makes no difference between a simple contract debt and a specialty debt or a debt charged on land like the English statutes. [P 14 C 2]

(c) Limitation Act (1908), S. 20 — 'Debtor' — Meaning explained.

The word 'debtor' was intended to connote not only the person who contracted the debt but his legal representative and in the case of a debt charged on land the person who derived title from him; in short the person who can be rendered liable for the debt by the creditor, that is the person against whom the debt can be enforced. That is, the liability need not be personal in the sense of being liable to be arrested; it may be proprietory; that is liability arising from the possession of property. [P 15 C 1]

(d) Contract Act (1872), S. 200 — S. 200 does not affect principle that general rule as to ratification would not apply when it affects rights of other parties.

The provisions of the Contract Act relating to agency are not meant to be exhaustive. S. 200 or other provisions relating to ratification do not affect the general principle of law of agency that the general rule as to ratification would not apply when it would affect the rights of other parties. [P 16 C 1]

(e) Limitation Act (1908), S. 19—Acknowledgment—Father cannot acknowledge barred debt so as to keep it alive against son.

A father has no right to acknowledge a barred debt so as to keep it alive against his son. He has no right to validate an acknowledgment unautho-

rizedly made by an agent by ratifying it and keep the debt alive. [P 16 C 2]

(f) Limitation Act (1908), S.20 — No difference between payment of interest or of principal.

The Legislature did not intend to draw a distinction between the payment of interest and the payment of principal in saving limitation. [P 15 C 1]

B. Sitarama Rao, T. K. Sundararaman and C. S. Rama Rao Saheb — for Appellant.

T. V. Muthukrishna Ayyar, K. Aravamudha Ayyangar, V. C. Viraraghavan and P. J. Kuppanna Rao — for Respondents.

Venkataramana Rao J.—The question for decision in this appeal is whether the plaintiff's suit is barred by limitation. The relevant facts are few and not in dispute. One Jaya Rao since deceased executed a deed of mortgage to one Sundaram Aiyer on 18th June 1919. In execution of a decree against the said Sundaram Aiyer the plaintiff on 10th April 1935 purchased the rights under the said mortgage deed. After giving credit to certain payments received towards interest and principal, the plaintiff sues for recovery of the balance due thereunder. The amount due on the date of the plaint was Rs. 9432. The plaintiff waived Rs. 432 and claimed only Rs. 9000. Defendants 1 to 3 are the sons of the mortgagor Jaya Rao; defendant 4 is a divided brother of Jaya Rao and defendants 5 to 8 are alienees from Jaya Rao of some of the properties claiming under alienations subsequent to the date of the mortgage. The main defence was one of limitation. To save limitation the plaintiff relied on the five following payments endorsed on the deed of mortgage: Rs. 400 on 15th July 1922 (Ex. A-2); Rs. 700 on 20th May 1923 (Ex. A-3); Rs. 150 on 4th June 1923 (Ex. A-4); Rs. 125 on 20th April 1924 (Ex. A-5) and Rs. 5 on 16th December 1935 (Ex. A-6). The first four payments were made and signed by defendant 4 and the last payment was by Jaya Rao and signed by him.

The case for the plaintiff is that three years after the date of the said mortgage Jaya Rao sold certain property belonging to him but not comprised in the deed of mortgage to defendant 4 and another by a sale deed dated 23rd June 1922 (Ex. C) and directed them to pay and discharge the said mortgage, that the payments were made and signed by defendant 4 in pursuance of Ex. C, that the last payment made by Jaya Rao was within twelve years of the last payment made by defendant 4 and therefore the suit is within time. The case for the defendants is that the payments and at any rate the payment of Rs. 150 on 4th June 1933 (Ex. A-4) was not a payment of interest as such, that none of the payments was by a person liable to pay the interest or by the debtor or his agent and therefore would not save limitation. The learned Subordinate Judge took the view that the payments were towards interest as such but the defendant 4 was not the duly authorized agent of Jaya Rao or a person liable to pay the debt within the meaning of S. 20, Limitation Act, and that none of the payments made by him could save limitation and the endorsement of payment by Jaya Rao was made long after the claim under the mortgage was barred. There was another contention raised on behalf of the plaintiff that even assuming that the defendant 4 had no authority to make the payment, Jaya Rao must be deemed to have ratified it by his endorsement in Ex. A-6. The Subordinate Judge negatived this contention also holding that the defendant 4 did not purport to act on behalf of Jaya Rao in making the payment, that the alleged ratification was after Jaya Rao sold and mortgaged the properties to defendants 5 to 8 and so far as they are concerned, the alleged ratification could not be valid. On these facts the learned Subordinate Judge dismissed the suit. The plaintiff has preferred this appeal.

Mr. Sitarama Rao on his behalf raises the following contentions: (1) By virtue of Ex. C, defendant 4 became liable to pay Jaya Rao the debt and therefore defendant 4 was a person liable to pay the debt within the meaning of S. 20, Limitation Act. (2) Defendant 4 was an agent to make the part payments within the meaning of the Section. (3). There was a valid ratification by Jaya Rao of the payments made by defendant 4. Mr. Muthukrishna Ayyar on behalf of the alienee-defendants in answer contended thus: Defendant 4 was a stranger to the mortgage contract and further he was not interested in the mortgaged property; the person liable to pay the debt within the meaning of S. 20, Limitation Act, must be one who was either a party to the contract or his legal representatives or a person deriving title from him and who could have been sued by the mortgagee ; defendant 4 would not come under any of these categories ; he was at best an agent empowered to discharge the debt and not to keep it alive by a part payment; the alleged ratification is not valid as it would operate to the prejudice of his clients. Before dealing with these contentions, it is necessary to find the relationship of the vendees

under Ex. C and therefore of defendant 4 to Jaya Rao, the mortgagor. Ex. C so far as is material for the purpose of the present discussion runs thus :

Deed of absolute sale executed on 9th Ani of Thunthubi, corresponding to the 23rd June 1922, to you, namely (1) Putti K. Sethu Rao and (2) Putti Dasu Rao . . . by Putti Jaya Rao . . . the undermentioned property has, this day, been sold to you and the amount received is Rs. 4000. Particulars of receipt of this sum of Rs. 4000. As I have directed you to pay and discharge the amount of principal and interest due under the mortgage deed for Rs. 3000 executed by me in favour of Sundaram Aiyer, residing at Karur, amount paid to me is Rs. 3400. As I have directed you to pay and discharge the amount due by me to the Co-operative Credit Bank at Andankoil, amount paid to me is Rs. 600. As in all Rs. 4000 was paid to me as aforesaid, you shall yourselves hold and enjoy the undermentioned nanja lands from this date hereditarily from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale.

The substance of the transaction as disclosed by the language of the document is that from and out of the consideration money of Rs. 4000 the vendees were directed to discharge two debts, namely, a sum of Rs. 3400 in discharge of the suit mortgage which was then the amount due and payable thereunder and Rs. 600 in discharge of a debt due to the Co-operative Credit Bank at Andankoil. Prima facie, it is a mandate by the vendor to the vendees to put an end to the said debts. The relationship is therefore one of agency. The question is, does it confer a power to keep alive the debt? Under S. 20, Limitation Act, the agent whose payment would keep alive the debt must be one who was duly authorized to make the part payment of interest on principal. Ex. C confers only a power to discharge and extinguish the debt. A power to extinguish the debt would not, in our opinion, carry with it a power to keep alive the debt. Our High Court has consistently taken the view that a direction or power to discharge a debt does not make the donee of the power an agent authorized to make a part payment so as to keep alive the debt: *vide* 43 I C 865[1] at p. 868. In 26 M L J 509[2] the facts were as follows : defendants 1 and 2 in that case executed a deed of mortgage in favour of defendant 3 therein for Rs. 26,000. It was alleged in the deed of mortgage that from and out of Rs. 26,000 which formed the consideration of the mortgage a sum of Rs. 10,920 was stated to have been received as follows:

Defendants 1 and 2 have executed two registered bonds on 14th December 1896 and 17th March 1897 for Rs. 2000 and Rs. 4000 respectively in favour of the plaintiff's assignees. The sum received by us in the matter of our having given you permission to pay off and obtain return of the same is Rs. 10,920.

In pursuance of this deed, the mortgagee paid a sum of Rs. 4170 towards interest on the bond dated 17th March 1897. The question was whether this payment of interest by the said defendant 3 would keep alive the debt due under the said bond. Wallis and Sadasiva Iyer JJ. held that it would not, observing that though the mortgagee had authority to pay off the debt in full he had no authority to make a part payment of interest as such so as to bring the case within S. 20, Limitation Act. The principle of this case was applied consistently in subsequent decisions : 48 M L J 506[3] (Devadoss and Wallace JJ.), A I R 1928 MAD 226[4] (Kumaraswami Sastri and Curgenven JJ.) and 1932 M W N 1193[5] (Ramesam J.). If the principle of these decisions is to be followed, there can be no question that the part payment made by defendant 4 would not be payment by an agent duly authorized within the meaning of S. 20, Limitation Act.

But Mr. Sitarama Rao contends that apart from any doctrine of agency defendant 4 having under Ex. C become liable to pay the mortgage debt is a person liable to pay the debt within the meaning of S. 20, Limitation Act. He very strongly relied on (1902) 2 CH 430,[6] in support of his contention and particularly the observations of Buckley J. in that case with which we shall presently deal. He also relied on certain passages from English text-writers who referred to (1902) 2 CH 430[6] as establishing the proposition he is contending for : *vide* Banning on Limitation, p. 168; Halsbury's Laws of England, Vol. 19, pp. 94 and 95. We may point out at once that the case in (1902) 2 CH 430[6] was noticed by their Lordships of the Judicial Committee in *National Bank of Upper India, Ltd.* v. *Bansidhar*,[7] where their Lordships had to deal with a question of part payment on facts almost similar to the said case. They did not apply the principle

1. ('19) 6 A I R 1919 Mad 998 : 43 I C 865, Chidambaram Pillai v. Veerappa Chettiar.
2. ('14) 1 AIR 1914 Mad 881 : 23 I C 810 : 26 M L J 509, Alagappa Chettiar v. Subramania Pandia.
3. ('25) 12 AIR 1925 Mad 703 : 87 I C 989 : 48 M L J 506, Balaguruswami Naicker v. Gurusawmi Naicker.
4. ('28) 15 AIR 1928 Mad 226 : 108 I C 529, Ramasami v. Kasinatha.
5. ('32) 1932 M W N 1193, Subbakka v. Venkata Sastri.
6. (1902) 2 Ch 430 : 71 L J Ch 627 : 86 L T 726 : 50 W R 561, Bradshaw v. Widdington.
7. *Reported in* ('29) 16 A I R 1929 P C 297 : 121 I C 193 : 57 I A 1 (PC).

enunciated by Buckley J., because they considered it unnecessary in the view they took of the facts, namely, the person who made the payments was the duly authorized agent of the debtor to make the payment. They however remarked thus at p. 9 with reference to the English case in (1902) 2 CH 430[6] and other decisions relied upon :

> Their Lordships do not think it necessary to discuss the applicability of these cases to the construction of the Indian Act . . . . . whether the English cases to which reference has been made above would engraft a larger principle upon the section may possibly have to be considered on some future occasion. Their Lordships note that Farwell L. J. in (1907) 1 CH 330,[8] appeared to regard (1902) 2 CH 430[6] as one only of implied agency.

Their Lordships thus left the question open. Before considering the applicability in (1902) 2 CH 430[6] to the construction of S. 20, Limitation Act, we think it necessary to examine whether there was any warrant even in English law in support of the said principle. A reference to the history of the English legislation relating to part payments may not be out of place in this connexion because until 1902 as noticed by Buckley J. himself no case has gone the length of enunciating the principle in the way he has done. Under early English law the only statute of limitation was that relating to simple contract debts, 21 Jac. I. C. 16. Under that statute the remedy to recover a debt became barred after six years. There was no provision relating to acknowledgment or part payment of a debt. The decisions evolved a rule that if there was acknowledgment of a debt which amounted to a fresh promise to pay the debt, a cause of action could be laid thereon, i. e., not on the original debt but on the new promise to pay. It was generally assumed that the acknowledgment of a debt implied a promise to pay and from the part payment of interest, an acknowledgment was implied thus implying a fresh promise to pay. Lord Tenterdon's Act 9, Geo. IV, C. 14, modified the effect of the decisions relating to acknowledgments by providing that acknowledgments of a debt must be in writing signed by the party charged but left the question of part payments untouched. As the measure of the creditor's right is thus based on the new promise, it evidently followed that the acknowledgment or part payment must be by a person liable under the contract to pay the debt or his real or personal representative apart from the doctrine of agency: *vide* Lightwood on Time Limit, p. 341. There was no special statute of limitation relating to specialty debts or debts charged upon land though Courts of law and equity established twenty years as the period after which they would presume payment. It was only in 1833, two statutes were passed, namely, 3 and 4 William IV, C. 27, which by Ss. 40 and 42 provided for the recovery of sums of money charged upon land and arrears of interest in respect thereof and 3 and 4 William IV, Ch. 42 which provided for the recovery of specialty debts. The relevant provisions of these statutes in so far as they have got a bearing on the question in issue run thus: 3 and 4 William IV, C. 27 :

> 40. After the said 31st day of December 1833, no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land; but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent . . . . .
>
> 42. After the said 31st day of December 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land, shall be recovered by any distress, action or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent . . . . . .

3 and 4 William IV, Chap. 42:

> 3. All actions of covenant or debt upon any bond or other specialty . . . . shall be commenced and sued within the time and limitation hereinafter expressed and not after . . . .
>
> 5. Provided always, that if any acknowledgment shall have been made, either by writing, signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment, or part satisfaction on account of any principal or interest being then due thereon . . . . within 20 years after such acknowledgment by writing or part payment or part satisfaction as aforesaid.

It will be seen that the acknowledgments and part payments are put on the same footing and no difference is made between the part payment of principal or interest in regard to its legal effect. The relevant expressions whose interpretation may have a bearing on the construction of the Indian enactment are 'the person by whom the same shall be payable or his agent' which are contained in Ss. 40 and 42 of 3 and 4 Will. IV, Ch. 27, and the words 'by the party liable' contained in S.5 of 3 and 4 Will.IV,Ch.42.

8. (1907) 1 Ch 330 : 76 L J Ch 316 : 96 L T 306 : 51 S J 67, In re Lacey; Howard v. Lightfoot.

This was the prevailing law until 1874 and S. 40 of 3 and 4 Will. IV, Ch. 27 was replaced by S. 8, Real Property Limitation Act, 1874 which substituted 12 years for 20 years. In (1857) 44 E R 622,[9] S. 5 of 3 and 4 Will. IV, Ch. 42, that is, the statute relating to specialty debt became the subject of judicial interpretation. The question in that case was whether a payment by a tenant for life of certain land under a will would save limitation in respect of a debt due under a bond by an ancestor by which he and his heirs were bound as against the remainder-men. It was held by Lord Cranworth overruling Sir Page Wood that the devisee would be a person liable to pay the debt within the meaning of S. 5 of the Act. Before giving his decision Lord Cranworth referred the matter to the opinion of two Common Law Judges, Williams and Crowder JJ., who gave their opinion that the devisee would properly be said to be liable by virtue of the indenture as either the real or personal representative within the meaning of the Act.

Lord Chancellor accepting that opinion remarked that the person who would save limitation must be a person who was interested in making the payment; and the question was whether a devisee for life was a party so interested. He pointed out that though under the terms of the bond the heirs of the ancestor were bound inasmuch as the property in the hands of the devisee was liable to be proceeded against, he would be a person liable to be sued and therefore a person liable to pay the debt. Under the law then prevailing both the heirs and the devisee were liable to be sued and they were both interested in resisting the demand of the creditor. He therefore deduced the principle that where there are several persons liable in respect of a debt payment by any one of them would be enough to save limitation because the statutory power did not require that the payment must be by the persons liable. The principle of this case was later applied in English Courts in the case of simple contract debts in (1888) 37 CH D 651,[10] where Chitty J. in the course of the judgment observed at page 659 as follows:

> The right principle to adopt is, that so far as the real estate is concerned, there is no one else but the tenant for life to pay the interest; that in making such payment he represents the whole estate; that the payment is an admission of the liability to the debt affecting the real estate of which he is in possession.

Subsequent to this decision, (1857) 44 E R 622,[9] Lord Westbury in (1863) 46 E R 47[11] at p. 51 had to construe the words "the person by whom the same was payable." In S. 42, 3 and 4 Will. IV, Ch. 27, he observed:

> These words do not denote merely the persons liable to pay the debt but all the persons against whom the payment of such arrears may be enforced by any action or suit and by whom therefore as they have a right to pay such interest, interest may be properly said to be payable .....

These words appear to have been selected as a description capable of including not only every person liable to be sued at law but every person who having interest in the land sought to be charged may be properly sued as a defendant in a suit in equity brought to enforce a payment of the principal and interest out of such land. He re-affirmed this interpretation in (1864) 11 E R 1274,[12] where referring to (1863) 46 E R 47,[11] remarked thus at p. 1283:

> What was decided in (1863) 46 E R 47[11] was this that the words 'the person by whom the same is payable, or his agent,' were words of such large import and meaning that they would not only comprehend the mortgagor and his personal representatives, upon whom the contract would be personally binding, but would also include the second or the third mortgagee, by whom the principal and interest due to the first mortgagee might with propriety be said to be payable.

Therefore apart from the question of agency the person liable to pay the debt must be the person by whom the debt was payable within the meaning of English statute above referred to, that is (1) the debtor or the party to the contract, (2) his real and personal representatives after his death, that is, heirs and devisees (whether devisees of mortgaged estate or free estate or devisees of different estates or of a single estate to a tenant for life and remainder-men), (3) in the case of a debt charged on land, person deriving title from the debtor, that is the assignees of equity of redemption either mortgagees or purchasers. The legal basis on which all the above persons were held to be persons by whom money was payable is that they are all persons against whom an action at law or suit in equity could be maintained by the creditor for the recovery of the debt. It was on this basis Lord Westbury rested his judgment both in (1863) 46 E R 47[11] and (1864) 11 E R 1274.[12]

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9. (1857) 1 De G & J 1 : 26 L J Ch 438 : 3 Jur (NS) 449 : 5 W R 510 : 118 R R 1 : 44 E R 622, Roddam v. Morely.
10. (1888) 37 Ch D 651 : 57 L J Ch 400 : 58 L T 758 : 36 W R 660, Hollinghead v. Webster.
11. (1863) 1 De G J & S 122 : 32 L J Ch 219 : 9 Jur (NS) 506 : 7 L T (NS) 812 : 11 W R 386 : 46 E R 47, Bolding v. Lane.
12. (1864) 11 H L C 115 : 10 Jur (NS) 855 : 11 L T (NS) 68 : 13 W R 20 : 4 N R 520 : 145 R R 79 : 11 E R 1274, Chinnery v. Evans.

That was also the basis of the decision in (1857) 44 E R 622,[9] the principle of which is thus put by Farwell L. J.:

(1857) 44 E R 622[9] appears to me to rest upon the joint liability of a number of persons standing in equal peril of suit and who all benefit by the discharge of all or any part of such liability : (1907) 1 CH 330,[8] at p. 346.

Payment made by the agent of the above persons will be equally operative. It is useful in this connexion to refer to the case in (1864) 11 E R 1274[12] which clearly illustrates the doctrine of agency for the purpose of the said statutes. In that case lands in Cork, Kerry and Limerick were mortgaged by the owner. Subsequent to the mortgage the owner sold the Kerry estate to one *M*. Some time later he demised the lands in Cork to Chinnery who subsequently obtained by sale the estate of Kerry. At the instance of the mortgagee a receiver was appointed and he was only able to obtain possession of the Limerick estate. From the rents and profits collected out of the said lands, he made payments of interest towards the mortgage. The question was whether such payments would save limitation even as against Chinnery in whom the lands in Cork and Kerry were vested. It was held that the payments saved limitation on the ground that they must be deemed to have been made by the receiver as the agent of the mortgagor. Lord Westbury in the course of the judgment made the following observations at page 1282 :

I think no reasonable doubt can be entertained that under the statute the receiver in the receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order, is payment in law by the legal agent of the person liable to pay.

This case is therefore a clear authority for the position that payment made by a person who represents the mortgagor will be sufficient to save limitation, that the agency need not arise out of a contract and the agency may arise by operation of law. The scope of this decision was explained by Jessel M. R., in (1881) 18 CH D 449[13] at p. 457 where the learned Judge referring to (1864) 11 E R 1274[12] remarked as follows :

The case there arose under the statute of limitations, 3 and 4 Will. IV, C. 27 and the first question to be decided was whether a payment in order to take a case out of statute must be made by the party chargeable or his agent and it was held that it must. Then arose the question whether the payments in that case were so made. The payments were made by a receiver, who no doubt, had been appointed at the instance of the mortgagee, and the question was whether such payments were made by or on behalf of the mortgagor . . . . The payments therefore were payments made by an agent of the mortgagor. The decision is that payments, in order to take a case out of the statute, must be so made.

It is therefore clear that Jessel M. R., understands the case in (1864) 11 E R 1274[12] as a case of agency. One thing that is clear from the decisions is that payments in order to operate as an exception to the statute must not be made by a stranger, that is, the person making the payment must be either a party to the transaction by which the debt was created or interested in the property which would be liable for the payment of the said debt and by the possession of which the person interested becomes liable to pay the debt. In dealing with the question whether a payment of interest by a stranger would keep alive the mortgage, Lord Westbury remarked thus :

It is hardly necessary to deal with such an improbable case as that ; but the answer to it I think, would be this : that money paid, that is money handed over, by a stranger to the contract under which it was paid, to the individual entitled to receive it would not have the characteristics and the legal quality of payment. It would be a voluntary render, a gift or donation being made by a party not in any respect subject to liability to the individual who would not be entitled to receive from the person so rendering it any part of the money which it is supposed would be so paid : (1864) E R 1274[12] at page 1282.

This is also made very clear by the decision of the Privy Council in (1886) 11 A C 639.[14] In that case one Howie and White gave a joint and several bond to one *C* to secure the payment of a sum of £. 1000 advanced by *C*. As between Howie and White, White was a surety but they were both principal debtors to the obligee. On the same day both Howie and White mortgaged some property to the obligee to secure the said debt. White's mortgage contained a condition that if he and Howie or either of them, their or either of their heirs, executors or administrators shall pay to *C* the sum borrowed, the mortgage deed is to be void, otherwise to remain in full force. A question arose whether payments made by Howie would prevent time from running in favour of White in respect of the said mortgage. It was contended that Howie was a stranger to White's mortgage and therefore any payment made by him could not save limitation. Their Lordships negatived this contention and held that that view was quite inconsistent with the terms of the contract

13. (1881) 18 Ch D 449 : 51 L J Ch 46 : 45 L T 500, Cockburn v. Edwards.

14. (1886) 11 A C 639 : 55 L J P C 75 : 55 L T 410, Lewin v. Wilson.

by which Howie was bound to pay the debt and was expressly named as a person entitled to come in and work a defeasance of White's conveyance.

The observations of their Lordships are very significant and instructive on the construction of the Statutes 3 and 4 Will IV, C. 27, Ss. 40 and 42. After referring to the case in (1864) 11 E R 1274,[12] Lord Hobhouse remarked as follows at page 646:

They consider that money brought in by a stranger to the mortgage contract would not have the characteristics or legal quality of payment; it would be a gift from a person not entitled to tender it to a person not entitled to demand it .... In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender of money for the defeasance or redemption of the mortgage, are payments which by S. 30 give a new starting point for the lapse of time. And Howie was clearly such a person.

In another portion of the judgment, he observed as follows:

Their Lordships have not been referred to any case where it has been decided that payments made by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his agent.

It is clear in what sense their Lordships used the words 'person concerned to answer the debt'. Howie was the principal debtor as between himself and White and was concerned to answer the debt. It seems to follow from this decision that if a stranger to the contract were to make the payment it can only be supported on the ground of agency; otherwise the payments made by him could not save limitation. As their Lordships clearly say, the payment made by such a stranger would not have the characteristics or legal quality of payment. This was the state of the English law till (1902) 2 CH 430.[6] As that case formed the subject of considerable discussion at the Bar, we shall state what the facts of that case are and what the scope of that decision is. On 1st August 1879, J. E. Bradshaw executed a mortgage of Fair Oaks estate in favour of one Moss to secure £5171-14-6 with interest thereon at 4 per cent. per annum. The money was borrowed to oblige the son William Bradshaw who on the same day executed in favour of his father a bond for £. 10,000 which was conditioned to become void upon payment by William Bradshaw to his father the said sum of £. 5171-14-6 with interest. On 16th September 1887, J. E. Bradshaw died appointing his son William Bradshaw and one Harrison as his executors.

Harrison was the solicitor who acted for all parties in the said transaction and subsequently acted for the executors of J. E. Bradshaw and also for William Bradshaw. Interest on the mortgage debt was paid by Harrison down to the date of his death in 1889 and it was found that it was paid on behalf of William Bradshaw because it was found in the accounts maintained by the solicitor that the payment of interest was charged to the estate of William Bradshaw. The father during his lifetime in 1884 conveyed this estate free from encumbrances to his son, J. C. Bradshaw. As the mortgage in favour of Moss remained undischarged, notice was given to J. C. Bradshaw to pay the mortgage debt and thereupon J. C. Bradshaw commenced a suit for a declaration that the mortgage must be deemed to have not subsisted on the ground that it was long ago barred as any payment towards interest by or on behalf of William Bradshaw could not save limitation. It was held that the mortgage was subsisting by reason of the payments made by or on behalf of William Bradshaw. Buckley J. stated the principle which according to him should be applied thus:

Now looking upon it upon principle, in the first instance, apart from authority, it seems to me that all principle and common sense lead to the conclusion that it is sufficient that the payment be made by a person, who as between himself and the mortgagor is bound to pay. You have to see whether the mortgagor has made an admission. That is the basis of it all: (1902) 2 Ch 430[6] at pp. 436 and 437.

After remarking that he was not able to put his hand upon a case in which that exact point has arisen, the learned Judge proceeded to justify his conclusion from three decisions, namely (1864) 11 E R 1274,[12] (1882) 19 CH D 539[15] and (1886) 11 A C 639.[14] He said that the statute would be justified if the payment was made by the person entitled to pay; not a person bound as between himself and the mortgagee but a person as between himself and mortgagor. He concluded the judgment thus:

For the present purpose I am assuming that William Bradshaw was not his agent. Assuming that he was not his agent, still it was made by William who was, I think, as between himself and his father, the person who was bound to pay. In as much as that was so, William's payment, made in pursuance of his contractual obligations towards his father, was, it appears to me, his father's admission of liability.

It will be seen from a perusal of the judgment of Buckley J. that he rests his decision both on the ground that the son is an agent of the father and also apart from the question of agency. The decision on the

15. (1882) 19 Ch D 539: 51 L J Ch 894: 46 L T 356: 30 W R 827, Harlock v. Ashberry.

basis of agency is intelligible enough by reason of the contract between the father and the son; the father put forward the son to act for him in the matter of payment of the debt. But apart from the question of agency, it is difficult to understand how the payment made by William Bradshaw could be a legal payment to use the language of the Judicial Committee in (1886) 11 A C 639.[14] When Buckley J. says that William Bradshaw's payment made in pursuance of the contract was his father's admission of liability, it is tantamount to saying that William Bradshaw made an admission on behalf of his father which brings in the question of agency. Therefore it is difficult to divest the notion of agency from the observations of Buckley J. himself. At p. 437, Buckley J. remarks thus:

> If the mortgagor has himself paid, or whether he has called upon somebody else and bound somebody else towards him to pay and that person has paid, equally, as it appears to me, the mortgagor has made an admission. That is how I regard it upon principle.

If *A* calls on *B* to pay for him, *A* authorizes *B* to make the payment for him. *B* therefore acts as *A's* agent in making the payment. On the general principles of law, a person can be bound by his own admissions or admissions made on his behalf by someone who is authorized to make it whether expressly or impliedly. If, by reason of contractual relationship, another man is put forward to do an act for him, it would be a question of implied agency. The authorization may also result by operation of law as in the case of a receiver. Apart from agency, it is impossible to bind one man by the admissions of another. I think Farwell J. puts the correct legal position, if I may say so with respect, when he remarked as follows on the scope of the decision in (1902) 2 CH 430[6]:

> I read it as a decision on the words 'or agent' and as shewing that a man can be an 'agent' within the meaning of the Act, not only when he acts for a principal properly so called but also when he makes the payment on behalf of the debtor, because he has bound himself by deed for value so to do. I think that the case proceeds on the same reasoning as Lord Wensleydale's judgment in (1853) 8 Ex 716[16] as explained by Chitty J. in (1893) 2 Ch 429.[17]

In (1853) 8 EX 716[16] the question was whether a payment by an assignee of equity of redemption would save the operation of the statute. After holding that it would, Parke B., held that the assignee in that case could be deemed to be an agent of the mortgagor because he covenanted to pay the debt. He therefore inferred an agency by reason of the said covenant. Again, the three decisions referred to by Buckley J. when examined do not support the broad proposition laid down by him that apart from the question of agency a person who became liable to the mortgagor (debtor) to pay the debt will be a person liable to pay the debt within the meaning of the statute. (1864) 11 E R 1274,[12] as already explained, was a pure case of agency. But what Buckley J. relies on in support of the proposition which he was enunciating was a passage from Lord Cranworth's judgment which runs thus:

> The payments in this case were not payments by a stranger; for though a receiver appointed under the Irish statute is an officer of the Court, yet he is certainly no stranger to the mortgagor; but a person paying for him and on his account what he is bound to pay.

On this Buckley J. makes the following comment:

> The context in which that language occurs is this: if a mere stranger to the whole transaction, to both mortgagor and mortgagee comes and pays, that is not an admission at all; if a mere outsider, a stranger to both comes and pays, that is no admission; but if a person who is not a stranger to the mortgagor (that is what Lord Cranworth says) comes and pays, that will do for the purposes of the statute.

It is not possible to understand how the statement of Lord Cranworth supports Buckley J. When Lord Cranworth says that the receiver is not a stranger to the mortgagor, what the learned Lord means is he was the agent of the mortgagor. That is plain from the language 'a person paying for him and on his account'; that is, acting as an agent. The learned Lord does not say that any person who is a stranger to the mortgage contract or to the mortgage transaction apart from any question of agency can make a payment which would be a legal payment for the purpose of the statute. Then Buckley J. relies upon the observations of Jessel, Master of Rolls in (1882) 19 CH D 539.[15] The observation relied on is this:

> On principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money and this is not such a payment.

There Jessel M. R. was dealing with the case of a tenant paying rent to the mortgagee. It was held that the payment by the tenant cannot be said to be payment by a person liable to pay because as observed by Jessel M. R. it was not a payment on behalf of a mortgagor but simply a payment which a tenant as tenant is bound to make. The

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16. (1853) 8 Ex 716 : 22 L J Ex 255: 17 Jur 675 : 1 W R 356, Forsyth v. Bristowe.

17. (1893) 2 Ch 429 : 62 L J Ch 536: 3 R 474 : 68 L T 610 : 41 W R 427, Dibb v. Walker.

learned Judge in the passage relied on was referring to the case of a receiver in (1864) 11 E R 1274[12] as a person who under the law was bound to make the payment as the agent of the mortgagor and on his behalf. In view of the pronouncement of Jessel M. R. himself in (1881) 18 CH D 449[13] at p. 456 as to the scope in (1864) 11 E R 1274[12] it cannot be said that Jessel M. R. was understanding the said case differently in (1882) 19 CH D 539.[15] Again Buckley J. relies on the following observations of Brett L. J. in (1882) 19 CH D 539[15]:

> On the ordinary rules of construction, and on the authority of (1864) 11 E R 1274,[12] I feel bound to say that a payment, to come within 1 Vict. C. 28 must be a payment by a person liable as mortgagor or some person on his behalf or such a person as was the receiver, a person entitled to pay on his behalf.

Buckley J. deduces from this a principle that the person entitled to pay on his behalf must be a person entitled by reason of the relations between himself and the mortgagor to pay money on his behalf. If that were so, it does not support the proposition of Buckley J. namely, that the person bound to pay is not a person as between himself and the mortgagee but a person bound as between himself and the mortgagor. What Brett L. J. said was that a person to make the payment must be such a person as the receiver who as described by Lord Westbury was a legal agent. The class of persons mentioned by Brett L. J. would be persons like the guardian of an infant, *vide* 26 BOM 221,[18] the Court of Wards making payment on behalf of the ward, 17 ALL 198,[19] and the committee of a lunatic on behalf of a lunatic. All these persons would be legal agents entitled to act as agents for the mortgagor as the receiver in (1864) 11 E R 1274.[12] The other case relied on by Buckly J. is (1886) 11 A C 639[14] where Lord Hobhouse referred to the case of a person concerned to answer the debt. In that case Howie was the principal debtor under the original contract by which the debt was borrowed. Further in one sense he can be termed as agent for White because he was designated in the mortgage contract itself as the person from whom the mortgagee could receive a tender and Howie could therefore act for White. Therefore there was no warrant in any of the cases relied on by Buckley J., for the proposition which he laid down. When the matter went up to the Court of appeal, Collins M. R. practically rested his decision on the question of agency. This is clear from the following passage in his judgment:

> The payment must be one which will operate as an acknowledgment by the mortgagor of the subsistence of the security ..... That acknowledgment results as much when there is an arrangement between the mortgagor and a third person, either by a contract or by a mere mandate, that that person shall make the payment for him. Whether the person who makes the payment does so under an obligation imposed upon him by law as a legal agent without his assent, or whether he is appointed under some arrangement with the mortgagor, so long as he pays with the assent, expressed or implied, of the mortgagor, the payment as it seems to me, will keep alive the liability of the mortgagor, being in point of law an admission by him of the subsistence of the security.

The only question therefore is that if the payment by defendant 4 could be justified it could only be on the ground that by virtue of the contract contained in EX. C, he must be deemed to be an agent for Jaya Rao and if he is deemed to be an agent, the part payment must be within the scope of his agency. As already indicated by me he was only an agent to extinguish the debt and not to keep alive the debt. Whatever may be the justification for the interpretation placed by Buckley J. on the words 'person liable to pay' in the English statute, the question is, does the Limitation Act warrant that interpretation. The relevant section of the Indian Act is S. 20, Limitation Act, which runs thus:

> Where interest on a debt or legacy is before the expiration of the prescribed period paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

It will be seen that this section makes no difference between a simple contract debt and a specialty debt or a debt charged on land like the English statutes. In regard to the payment of interest, it is stated that the person by whom the payment should be made is the person liable to pay the debt; in the case of part-payment of a principal the person by whom the payment should be made is the debtor or his agent. The question is what is the interpretation to be placed upon the words "person liable to pay." So far as the part payment of principal is concerned, the section specifically says, "the debtor." Literally construed, it would mean the person who contracted the debt. We do not think that the Legislature intended by the use of the word "debtor" to have that restricted interpretation. It

18. ('02) 26 Bom 221 : 3 Bom L R 817, Annappa Gauda v. Sangadiappa.
19. ('95) 17 All 198 : 22 I A 31 : 6 Sar 551 (PC), Beti Maharani v. Collector of Etavah.

would seem to us that the word "debtor" was intended to connote not only the person who contracted the debt but his legal representative and in the case of a debt charged on land the person who derived title from him; in short the person who can be rendered liable for the debt by the creditor, that is, the person against whom the debt can be enforced. That is, the liability need not be personal in the sense of being liable to be arrested; it may be proprietary; that is, liability arising from the possession of property; (*Cf.* 44 MAD 544,[20] (1938) 1 M L J 624[21]). We do not think that the Legislature intended to draw a distinction between the payment of interest and the payment of principal in saving limitation. If the history of this section is taken into consideration it would seem to be clear beyond doubt that it was hardly in the contemplation of the Legislature to draw any such distinction or to warrant the interpretation placed on the English statute of Buckley J. The first Limitation Act introduced by Legislature was Act 14 of 1859. The only provision relating to acknowledgment was S. 4 of the Act which ran thus:

> If in respect of any legacy or debt, the person, who, but for the law of limitation, would be liable, to pay the same, shall have admitted that such debt or legacy or any part thereof is due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission.

Under that section it will be seen that the operation of the statute of limitation is suspended only in cases where there has been an acknowledgment in writing signed by the person liable to pay. It would be seen that neither an acknowledgment by an agent would save limitation nor a part payment of principal or interest would keep alive the debt. It was a deliberate departure from English law. This Act was replaced by Act 9 of 1871 and S. 4 of Act 14 of 1859 has been replaced by Ss. 20 and 21; S. 20 related to acknowledgment and the change that was effected was that acknowledgment should be by the party to be charged therewith or by his agent. So far as part payments are concerned they were provided by S.21, which runs thus:

> When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent generally or specially authorized in this behalf, or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent generally or specially authorized in this behalf.

This section has in substance been retained in all the subsequent Limitation Acts. These sections were modelled on English law then prevailing at the time and as declared by (1857) 44 E R 622,[9] (1863) 46 E R 47[11] and (1864) 11 E R 1274[12]: see the introduction to the Limitation Act of 1877 by Whitely Stokes at page 945 in Volume 2 of his Anglo Indian Codes. Under the English Statutes 3 and 4 Will. IV, C. 27 and 42 no difference was made between payment of interest and part payment of principal in regard to their legal effect on the suspension of the operation of the statute. We have already shown what interpretation was placed upon the words 'person liable to pay' in the English statutes. We do not think any different interpretation was intended to be placed by the Indian Legislature in enacting either S. 20 or S. 21 and this derives considerable support from the deliberate use of the word 'debtor' as the person by whom part payment of principal should be made. The expression 'person liable to pay' is used in cl. 1 of the section with reference to payment of interest apparently as suggested by Mitra in his valuable commentary of the Limitation Act for the purpose of having a common expression for both debts and legacies because it would be incongruous to use the expression 'debtor' with reference to a person liable to pay a legacy: *vide* 1909 Vol. 2 p. 819. Therefore the expression 'person liable to pay the debt' must also connote the debtor or person liable to be charged with the debt. That both the person liable to pay the debt and the debtor must mean the same thing seems to be suggested by the judgment of Jenkins C. J. in 26 BOM 221[18] where the learned Judge had to consider the position of a guardian in regard to acknowledgment made by him on behalf of his ward. The learned Judge considered him to be a legal agent just like an agent in (1864) 11 E R 1274[12] and held that the payment made by a guardian would save limitation and he would be the ward's agent duly authorized within the meaning of S. 20. In the course of the judgment he considered whether the guardian would be personally liable to pay the debt and he held that he would not, observing thus:

> The guardian is not a person liable to pay the debt within the meaning of the section, and this, I think, is made clear by the use of the word 'debtor' in the latter part of the section.

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20. ('21) 8 AIR 1921 Mad 102 : 62 I C 393 : 44 Mad 544 : 40 M L J 218, Askaram Sowcar v. Venkataswami Naidu.
21. ('38) 25 A I R 1938 Mad 579 : 182 I C 468 : (1938) 1 M L J 624, Parthasarathy Iyengar v. Ekambara Mudaliar.

This observation seems to suggest that in view of the learned Judge the word 'debtor' and the expression 'the person liable to pay the debt' were intended to convey the same meaning. Whether this view is correct or not, we are clearly of the opinion that the expression 'the person liable to pay the debt' in S. 21, Limitation Act of 1871 and S. 20, Limitation Act of 1908 cannot bear the interpretation put on the corresponding expression in the English statute by Buckley J. Therefore, apart from any question of agency, defendant 4 would not be a person liable to pay the debt within the meaning of S. 20, Limitation Act. The remaining question is whether there has been a valid ratification by Jaya Rao of the payments made by defendant 4. When the payment was made by Jaya Rao he had already alienated the property in favour of defendants 5 to 8 and whatever may be the effect of such a ratification on Jaya Rao or his sons defendants 1 to 3, the ratification could not be held to operate to the prejudice of the alienees, defendants 5 to 8. Mr. Sitarama Rao has relied on S. 200, Contract Act, and contended that under that section the ratification could only be deemed invalid if it had the effect of subjecting a third person to damages or of terminating any right or interest of a third person and the ratification by Jaya Rao did not have that effect so far as defendants 5 to 8 are concerned. We are not inclined to agree with this contention of Mr. Sitarama Rao. The provisions of the Contract Act relating to agency are not meant to be exhaustive. We do not think that S. 200, Contract Act, or the other provisions relating to ratification affect the general principle of law of agency that the general rule as to ratification would not apply when it would affect the rights of other parties : *vide* the observations of Channel J. in (1901) 1 K B 683[22] at p. 693. In Halsbury's Laws of England vol. 1 p. 181, the rule is thus stated :

> A ratification . . . . does not relate back when persons other than the co-contracting party have acquired interests prior to ratification.

It cannot be denied that so far as the alienee defendants are concerned, Jaya Rao has parted with his interest long before the date of the ratification. Therefore the ratification made by Jaya Rao would certainly affect their rights and put the property in their hands to peril. But it seems to us that it is open to the defendants to contend that the ratification would terminate their right or interest within the meaning of S. 200, Contract Act. On the date of the ratification the right to enforce the mortgage was barred by limitation. The defendants have therefore acquired a valuable right to plead the statute. The effect of the ratification would be to terminate that right. Again, the ratification would have the effect of terminating the interest of the alienee defendants in the property alienated to them because it would be liable to be sold by reason of the mortgage debt being kept alive. We are therefore prepared to hold that the alleged ratification is not binding on defendants 5 to 8.

Even as against defendants 1 to 3 the ratification would be of no avail. It is settled law that a father has no right to acknowledge a barred debt so as to keep it alive against his son. He has no right to validate an acknowledgment unauthorisedly made by an agent by ratifying it and keep the debt alive. So far as Jaya Rao is concerned, the ratification must be deemed to be valid. As we have already stated, defendant 4 was acting as the agent of Jaya Rao in making the payments and thus admitting the debt though in excess of the authority conferred upon him. It is open to Jaya Rao to ratify the unauthorized acts of an agent. Therefore the decree of the learned Judge must be modified by giving a mortgage decree in favour of the plaintiff for the amount claimed against the interest of the mortgagor in the mortgaged properties leaving the extent of his interest open other than those alienated to defendants 5 to 8 to the extent of the interest of the alienees therein. Time for redemption three months. Subject to this modification the appeal fails and is dismissed with costs of respondents 5, 7, 9 to 11, one set.

Civil Miscellaneous Petitions Nos. 4852 and 4853 of 1939.

Two applications are filed, one by Mr. Veeraraghavan on behalf of defendant 4 and another by Mr. Aravamudha Ayyangar on behalf of defendants 2 and 3 under the Madras Agriculturists Relief Act. These petitions will be sent down to the lower Court for inquiry and the decree we have passed herein will be subject to any relief that the lower Court may order on those applications. The plaintiff-respondent will be entitled to file his counter-affidavit stating his objections to the petitions filed.

C.R.K./D.S. *Order accordingly.*

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22. (1901) 1 KB 683 : 70 L J K B 459 : 84 L T 354 : 17 T L R 325 : 49 W R 345 : 65 J P 391, Ford v. Newth.

A. I. R. 1941 Madras 17

HORWILL J.

M. Venkatachariar — Petitioner

v.

Moulvi Mahammad Faizuddeen Sahib Bahadur by agent Moulvi Manjoor Ahamed Sahib Kuddoossi —

Respondent.

Civil Revn. Petn. No. 291 of 1937, Decided on 17th October 1939, to revise decree of Dist. Court, Chittoor, D/- 5th August 1936.

(a) Civil P. C. (1908), O. 9, Rr. 13 and 9 — Application under O. 9, R. 13—Conditional order setting aside ex parte decree if applicant paid certain sum within prescribed time — Condition not fulfilled and application rejected — Application under O. 9, R. 9 to re-open aforesaid application rejected — No appeal lies from order rejecting second application — Nor is any application for re-opening earlier application rejected under O. 9, R. 13 for non-fulfilment of condition competent.

On an application under O. 9, R. 13, to set aside an ex parte decree a conditional order was passed setting aside the ex parte decree if the applicant deposited a certain sum of money within a prescribed time. The condition was not fulfilled and the petition was dismissed. No appeal was preferred against that order. A second petition purporting to be under O. 9, R. 9 and S. 151, to restore the earlier petition which had been dismissed for non-fulfilment of the condition was also dismissed on merits :

Held **that no petition would lie to re-open the previous order rejecting the application under O. 9, R. 13. If a petition lay at all, it would be a review petition and the Court would in that case have to confine itself to the situation as it was at the time it considered the first application: A I R 1926 Mad 654 and A I R 1926 Mad 325,** *Disting.* **[P 17 C 2]**

Held further **that an appeal to set aside the order dismissing the second petition was not competent as O. 43, R. 1, Civil P. C., made no provision for an appeal under those circumstances. [P 17 C 2]**

(b) Appeal—Jurisdiction — Failure to object to maintainability of appeal does not make appellate order valid — But it can be taken into consideration by High Court whether it should interfere in revision from appellate decision.

The mere fact that no objection to the maintainability of the appeal was taken does not make the order in the appeal valid, but the party's failure to raise the objection below is a circumstance that can be taken into account by the High Court in considering whether it should interfere in revision filed by the aforesaid party against the appellate order. [P 17 C 2; P 18 C 1]

D. Krishnaswami Iyer — for Petitioner.

T. Kumaraswamiah — for Respondent.

Order.—The petitioner's suit was decreed ex parte and the respondent put in an application under O. 9, R. 13, Civil P. C., to set aside the ex parte decree. A conditional order was passed setting aside the ex parte decree if the respondent deposited a certain sum of money within a prescribed time. The condition was not fulfilled and so the petition was dismissed. No appeal was preferred against that order ; but a petition was filed purporting to be under O. 9, R. 9 and S. 151, Civil P. C., to restore the earlier petition which had been dismissed for non-fulfilment of the condition. The District Munsif considered the application on its merits and came to the conclusion that the respondent did not show sufficient cause for re-opening the earlier application. He accordingly dismissed it. An appeal against this later order was preferred to the District Court, Chittoor. No question as to the maintainability of the appeal seems to have been raised and the learned District Judge came to the conclusion that the respondent had substantially complied with the condition and that the petition should have been granted.

It has been held in AIR 1926 MAD 654[1] and 50 M L J 75,[2] that when an application under O. 9, R. 9 is dismissed for default, another application to set aside that order would also be an application under O. 9, R. 9 and would therefore lie. In the present case however the petition under O. 9, R. 9 was not dismissed for default and I cannot see how any petition would lie to re-open the previous order. If a petition lies at all, it would presumably be a review petition and the Court would in that case have to confine itself to the situation as it was at the time it considered the first application. The appeal to set aside the order of the District Munsif dismissing the second petition was not competent as O. 43, R. 1 makes no provision for an appeal under such circumstances. It is next argued that the petitioner must be deemed to have waived the above objection by not raising it in the lower Court. The respondent filed a revision petition against the order of the District Munsif and that petition was withdrawn and dismissed when the District Judge allowed the appeal and restored the suit to file. The petitioner was not however responsible for the withdrawal of that petition and there can be no waiver with regard to jurisdiction. The mere fact that the petitioner did not object to the maintainability of the appeal does not make the order in the appeal valid, but the petitioner's failure to raise the objection below is a circumstance that can be taken into account in considering whether

1. ('26) 13 AIR 1926 Mad 654 : 94 I C 151, Salar Beg v. Kottayya.
2. ('26) 13 AIR 1926 Mad 325: 92 I C 802: 50 MLJ 75, Venkatanarasimha Rao v. Suryanarayana.

this Court should interfere in revision. Any inconvenience caused by the default of a party during the hearing of a suit is generally a matter for which the other side can be compensated by the awarding of costs ; and as in the present case no substantial injustice was done to the petitioner, I do not feel called upon to interfere with the order restoring the suit. In the result, the civil revision petition is dismissed; but there will be no order as to costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 18

LEACH C. J. AND HORWILL J.

R. C. Bhide — Appellant

v.

Travancore National and Quilon Bank Ltd. (in Liquidation)—Respondents.

Appeal No. 46 of 1939, Decided on 22nd August 1940, from judgment and order of Venkataramana Rao, J., D/- 1st September 1939.

Companies Act (1913), Ss. 230A and 229 — General law of insolvency applies to winding up of insolvent company — Order for compulsory winding up of bank passed — Application under S. 230A by customer for rescinding contract between him and bank and for damages—Applicant is entitled to be heard and can be relegated to ordinary procedure of filing suit only if Court finds that contract had already been rescinded.

The general law of insolvency applies to the winding up of an insolvent company. A creditor in insolvency cannot in ordinary circumstances bring a suit against the official assignee. If he claims to be a creditor he must file a proof of his debt with the official assignee. If his claim is rejected, then he has the right of asking the Judge sitting in insolvency to reverse the official assignee's decision. Consequently a customer of a bank putting in an application under S. 230A, after an order for the compulsory winding up of the bank is passed, for rescinding a contract between him and the bank and praying for damages is entitled to have his application heard. If the Court then comes to the conclusion that the contract had already been rescinded it would have no power to pass an order on the application and the applicant would have to be relegated to the ordinary procedure provided by the Act for proving any debt in the winding up. The applicant cannot be relegated to the procedure of filing a suit unless he is heard. [P 19 C 2]

C. V. Nilakantan — for Appellant.

King and Partridge — for Respondents.

Leach C. J. — The appellant claims to be a creditor of the Travancore National and Quilon Bank Ltd., which is now in liquidation under an order passed by this Court for its compulsory winding up. In February 1938 the appellant entered into an agreement with the Bank under which the Bank was to allow him on certain conditions to overdraw his account upto the sum of Rs. 75,000 for the purpose of financing a contract which he had entered into with the Travancore Government. The Bank suspended payment on 20th June 1938. The petition for winding up was filed on 21st June 1938 and the order for compulsory winding up was passed on 4th September 1938. On the date of suspension of payment by the Bank the appellant had overdrawn his account to the extent of Rs. 56,000. After suspension of payment he was, of course, not allowed to draw further on his account and he says that in consequence the Bank has committed a breach of contract. He also alleges that the contract is a continuing one. On this basis he filed an application under S. 230A, Companies Act, for an order rescinding the contract and awarding him damages. Other reliefs were also asked for, but the learned Judge refused to consider the application and directed the appellant to file a regular suit. The appellant contends that the learned Judge erred in so doing. In the first place he says that the learned Judge had no power to relegate him to a regular suit and in the second place that he should have heard the application and passed such order thereon as the circumstances demanded. If the appellant was not entitled to an order under S. 230A, he would be entitled to prove in the ordinary way for any loss suffered by him. Section 230A (5) says :

> The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

The discretion here given to the Court is a discretion to make an order rescinding the contract. Of course if a contract has already been rescinded an application under this section will not lie, and it is the case of the liquidators that this contract has been terminated by a notice calling in the amount due on the overdraft. It is said that the liquidators had a right to do this because the contract between the appellant and the Bank provided that the amount was to be repayable on demand. Section 229, Companies Act, states that in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable as are in force under the law of insolvency and that

all persons who in such a case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they are entitled to by virtue of the section. Therefore the general law of insolvency applies to the winding up of an insolvent company. A creditor in insolvency cannot in ordinary circumstances bring a suit against the official assignee. If he claims to be a creditor he must file a proof of his debt with the official assignee. If his claim is rejected, then he has the right of asking the Judge sitting in insolvency to reverse the official assignee's decision. The Presidency Towns Insolvency Act contains a section similar to S. 230A, Companies Act, namely S. 65. When it is not a question of rescinding a contract and assessing damages under S. 65 a person who has contracted with an insolvent may file a proof of the damages suffered by him by virtue of the provisions of S. 46, Presidency Towns Insolvency Act. The position then is this. The appellant was entitled to have his application heard. If the Court then came to the conclusion that the contract had already been rescinded it would have no power to pass an order on the application and the appellant would have to be relegated to the ordinary procedure provided by the Act for proving any debt in the winding up. The learned counsel for the liquidators has been unable to point to any authority, either in England or in India, which lends support for the course taken by the learned Judge in this case.

The appeal must be allowed and the case will be remanded to the learned Judge to hear and decide according to law. The appellant is entitled to his costs. The liquidators will be entitled to their costs out of the estate. The court-fee paid on the memorandum of appeal will be refunded to the appellant. It follows from this order that application No. 1863 of 1939 which the appellant has filed asking that leave be granted to the liquidators to compromise the appellant's claim will also be remanded to the learned Judge for disposal. His order under appeal apparently applied to this application as well.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1941 Madras 19

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Khan Bahadur Abdul Kareem Sahib — Applicant

v.

The Commissioner, Corporation of Madras — Respondent.

Appln. No. 1900 of 1939, Decided on 8th December 1939.

Madras City Municipal Act (4 of 1919 as amended by Act 10 of 1936), S. 287 — Commissioner has, in proper case, power to refuse renewal of licence provided refusal is not arbitrary or prompted by ulterior motive.

Section 287 must be construed according to the words used therein. There is nothing in S. 287 which indicates an intention on the part of the Legislature to withhold from the Commissioner the power of refusing to renew a license when the circumstances demand it. The Commissioner has in a proper case the power to refuse a renewal, provided the refusal is not arbitrary or prompted by some ulterior motive: 28 Bom 253, *Rel. on.* [P 21 C 1, 2]

T. R. Venkatarama Sastriar and K. S. Rajagopal Iyengar — for Applicant.

The Advocate-General and A. Suryanarayanayya — for Respondent.

Leach C. J. — The petitioner is a manufacturer of beedis and has been carrying on business in Madras for 25 years. As the result of his industry he has succeeded in building up a very substantial concern. The business is carried on in five buildings in Sembudoss Street, George Town, Madras. In No. 41, Sembudoss Street, he stores the tobacco required for the making of his beedis. He stores beedi leaves in No. 59 and uses Nos. 48, 57 and 58 for the handling and storage of the finished products. Sembudoss Street is in a residential part of Madras. It is a very narrow street and it is said that the growth of petitioner's business has resulted in a grave nuisance and a menace to health. On 19th August 1938, thirteen people living in the neighbourhood presented a petition to the Commissioner of Police, complaining of the nuisance and asking that action be taken. The Commissioner of Police had no jurisdiction to interfere, and the petition was forwarded to the Commissioner of the Corporation of Madras. The Commissioner inquired into the complaint and considered it to be well founded. As the result the corporation refused the petitioner a license to carry on his business in the premises in Sembudoss Street from 1st April 1939. Section 287, Madras City Municipal Act, as amended by Act 10 of 1936, requires a person to take out a license before he uses premises for the storage, packing, pressing, cleansing,

preparing or manufacturing by any process whatever, tobacco, which the Act states shall include cigars, cigarettes and beedis. The petitioner asks this Court to direct, either by certiorari or mandamus, the corporation to issue a license permitting him to carry on his business in these premises as heretofore. He alleges that the corporation in refusing to grant him a license has acted arbitrarily and he says that inasmuch as a license was granted to him in respect of the previous year, the corporation is not entitled in law to refuse to renew it. For the corporation, it is said that the refusal to grant the petitioner a license is fully justified by the facts and that it cannot be compelled to renew the license.

On the evidence before the Court it must be held that the carrying on of the petitioner's business in Sembudoss Street does constitute a nuisance and a danger to health. The process of broiling to which the tobacco leaves are subjected creates an offensive smell, and the storage of large quantities of tobacco results in tobacco dust being carried by the wind to adjoining houses and causes the inhabitants to cough and sneeze. The business involves the attendance at the premises of large numbers of coollies and other people for whom there is no proper accommodation or sanitary arrangements. The noise also adds to the discomfort of the residents. The Commissioner of the corporation in an affidavit states that he has been advised by the Health Officer of the corporation that the continuance of the business in this locality will positively endanger the health of the residents. The Health Officer of the corporation has sworn an affidavit in which he confirms the advice given to the Commissioner. In addition, Mr. B. W. Batchelor, a director of Messrs. Binny & Company and a member of the Standing Committee of the corporation, took part in the inspection and has endorsed the opinion of the Commissioner in a separate affidavit. The petitioner denies that there is any nuisance, but his denial is only supported by his own affidavits, and they cannot be accepted in view of what the Commissioner, the Health Officer and Mr. Batchelor have said. It has not been suggested that these gentlemen are not speaking the truth. There is a suggestion that they have perhaps exaggerated the situation, but I am not prepared to accept it. In any event, there is ample evidence on the record to show that the corporation in refusing to renew the petitioner's license has not acted arbitrarily, but in the interest of the health of the residents of the locality. The question then resolves itself into this. Has the corporation the power under the Act to refuse the license? Before the Act was amended in 1936, no license was required; but by reason of the amendment of S. 287 and Sch. 6, a license is now requisite. Sub-section (1) of S. 287 says:

No place within the limits of the City shall be used for any of the purposes mentioned in Sch. 6 without a license obtained from the Commissioner and except in accordance with the conditions specified therein.

Sub-section (3) says:

The owner or occupier of every place for the use of which for any purpose a license is required shall apply to the Commissioner not less than thirty days before the place is used for such purposes.

Sub-section (5) says:

The Commissioner may grant a license subject to such restrictions and regulations as may be specified by him therein or he may refuse to grant the license.

Sub-section (6) states that every license shall expire at the end of the year for which it is granted, or at such earlier date as the Commissioner may, for special reasons, specify in the license. By reason of sub-s. (7), an application for renewal of a license must be made not less than thirty days before the commencement of the year for which renewal is sought. Mr. Venkatarama Sastriar on behalf of the petitioner has conceded, as he must, that when S. 287 was amended by Act 10 of 1936 the Commissioner had the power to refuse to issue a license, notwithstanding that the business had been carried on in the same premises for a quarter of a century. But he says that inasmuch as sub-s. (7) does not state that the Commissioner may, if he so chooses, refuse a license, it cannot be withdrawn once it has been issued, and must be renewed, although on renewal conditions may be imposed. Where there is a power to grant a license, there is power to refuse, and where an act requires a person to apply for the renewal of a license at the expiry of the period for which it is granted, it must, in my opinion, necessarily imply a right to refuse to renew, unless there is indication to the contrary in the statute.

In 28 BOM 253,[1] the Bombay High Court held that the power of the Municipal Commissioner of Bombay to grant a license under S. 394, City of Bombay Municipal Act, (3 of 1888) included the power to refuse it. It was also held that unless it was clear that the Commissioner had used his authority with some indirect motive and for a collateral

1. ('04) 28 Bom 253: 5 Bom L R 1001, Haji Ismail v. Municipal Commissioner of Bombay.

purpose not for the purpose for which the legislature had armed him with the power, the Court could not interfere with his discretion. There is nothing in S. 287, Madras Act, which indicates an intention on the part of the legislature to withhold from the Commissioner the power of refusing to renew a license when the circumstances demand it. Mr. Venkatarama Sastriar has laid great stress on the provisions of S. 282 of the Act which requires the owner or occupier of a stable, veterinary infirmary, stand, shed, yard or other place in which quadrupeds are kept or taken in for purposes of profit, shall take out a license in the first month of every year. Sub-section (2) of that section says that the Commissioner may, by an order and under such restrictions and regulations as he thinks fit, grant or refuse to grant the license. Mr. Venkatarama Sastriar argues that because there is no special power given under S. 287 to refuse renewal, it must in view of the terms of S. 282 be taken that the legislature intended a license for the carrying on of a business to be on a different basis. In this connexion he has also drawn attention to the provision of S. 284 which states that if any stable, cattle shed or cow-house is not constructed or maintained in the manner required by or under the Act, the Commissioner may by notice direct that it shall no longer be used as a stable, cattle shed, or cow-house.

The argument here is really met by the provisions of S. 304. That section says that no person shall, without or otherwise than in conformity with an annual license granted by the Commissioner continue to keep open a private market. Application for the renewal of the license shall be made not less than thirty days before the commencement of the year for which the license is sought. The Commissioner may by an order grant or refuse to grant or renew the license or withhold the license until the owner or occupier executes such works as may be specified in the order. Then follows the important proviso that the Commissioner shall not refuse or withhold the license for any cause other than the failure of the owner or occupier to comply with some provision of the Act or some regulation made under S. 308 or some by-law made under S. 349, or without the approval of the Standing Committee. The proviso indicates that where the legislature intended that there should be no power to refuse to renew, or intended to limit the exercise of such power, it has used appropriate language. The argument which S. 304 provides for the respondent corporation is certainly as strong, if not a stronger one, than the argument which can be based for the petitioner on Ss. 282 and 284. In my judgment S. 287 must be construed according to the words used therein and when it is so construed, I consider that there is no room for reasonable doubt that the Commissioner has in a proper case the power to refuse a renewal. I say in a proper case, because if the refusal were arbitrary or prompted by some ulterior motive, the position would be different. That cannot be said to be the case here. There is no ground for suggesting that the Commissioner has acted in any way contrary to his duty. For the reasons indicated the petition will be dismissed with costs, and we fix the advocate's fee at Rs. 250.

Krishnaswami Ayyangar J. — I am of the same opinion. I agree that a consideration of the language of not only S. 304 but also of S. 285C, cl. (3) gives a clear indication that where the statute intends that the Commissioner is not to have the power of refusing a renewal, it has said so. The effect of the refusal is not to prohibit the petitioner from carrying on his business altogether but only to prohibit it in the premises in which it is now being carried on. There is nothing inherently wrong in the legislature placing a restriction upon the right of an individual in the interests of the residents in general of the locality.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 21

PATANJALI SASTRI J.

Thota Varahalayya

v.

Mattapalli Raju.

Civil Revn. Petn. No. 1581 of 1938, Decided on 29th March 1940, to revise order of Sub-Judge, Coconada, D/- 30th August 1938.

Madras Agriculturists' Relief Act (4 of 1938)— Usufructuary mortgage — Subsequent lease by mortgagor — Lessee is entitled to raise plea that debt due to mortgagee is liable to be scaled down.

A lessee is entitled to redeem the usufructuary mortgage by virtue of the lease alleged to have been obtained from the mortgagor subsequently to the mortgage and is thus interested in raising the question as to the true amount payable to the mortgagee. He is therefore entitled to raise the plea that the debt due to the mortgagee is liable to be scaled down under the provisions of Act 4 of 1938.

[P 22 C 1]

P. Somasundaram — for Petitioners.

V. Viyanna — for Respondents.

Order. — The petitioner claims to be a lessee under the mortgagor defendant 3 in

the suit and seeks to file an additional written statement raising the plea that the debt due to the plaintiff is liable to be scaled down under the provisions of Act 4 of 1938. The Court below has refused to grant leave to file the additional written statement on the ground that the suit by the plaintiff as usufructuary mortgagee to recover possession was not one to enforce the debt and so no question of scaling it down could arise. Mr. Somasundaram for the petitioner however points out that he is entitled to redeem the plaintiff's usufructuary mortgage by virtue of the lease alleged to have been obtained from the mortgagor subsequently to the plaintiff's mortgage and is thus interested in raising the question as to the true amount payable to the plaintiff. This contention is correct and must be upheld. It follows that the petitioner's additional written statement must be admitted and the questions arising thereon must be determined. This civil revision petition is therefore allowed with costs here and below.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1941 Madras 22

PATANJALI SASTRI J.

Chinniya Pillai

v.

Subbaratnam Pillai.

Civil Revn. Petn. No. 581 of 1940, Decided on 31st July 1940, to revise order of Dist. Court, Trichinopoly, D/- 11th November 1939.

Madras Local Boards Act (14 of 1920), S. 55 (2) (b)—Person whose adjudication is annulled under S. 43, Provincial Insolvency Act, is not insolvent in eye of law—He is not disqualified for election as member of Local Board as "undischarged insolvent"—S. 55, Madras Local Boards Act, is not controlled by S. 73, Provincial Insolvency Act.

An annulment of adjudication under Ss. 35, 39 or 43, Provincial Insolvency Act, on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which adjudication under the Act confers upon a debtor and he can no longer be regarded in the eye of law as an insolvent. Consequently, a person whose adjudication is annulled under S. 43, Provincial Insolvency Act, is not disqualified for election as a member of a local board as an "undischarged insolvent" under S. 55 (2) (b), Madras Local Boards Act, inasmuch as S. 55, Madras Local Boards Act, is not controlled by S. 73, Provincial Insolvency Act. [P 23 C 1, 2]

T. A. Ramaswami Reddi — for Petitioners.

A. V. Narayanaswami Aiyar — for Respondent.

Order. — The question that falls to be decided in this revision petition is whether a person whose adjudication is annulled under S. 43, Provincial Insolvency Act, is disqualified for election as a member of a Local Board as an "undischarged insolvent" under S. 55 (2) (b), Madras Local Boards Act. The respondent was adjudicated insolvent in 1928 and the adjudication was annulled in 1932 as he did not apply for discharge within the time prescribed. He was elected as a member of the Samayapuram-Kannanore Panchayat Board in June 1938. Apparently no objection was raised on the ground of disqualification when he offered himself for election nor was any proceeding instituted to set aside his election after he was elected but the petitioner who was also a member of the Board applied under S. 57 on 21st November 1938, to the District Judge, Trichinopoly, in which the area of the Local Board is situated, to determine whether or not the respondent was disqualified under S. 55 of the Act. The learned District Judge held that the adjudication of the respondent having been annulled, he could not be said to be an "undischarged insolvent" and accordingly rejected the application. This civil revision petition is directed against that order.

The petitioner's learned counsel contends that the expression 'undischarged insolvent' should be understood in a literal sense and that once a person was adjudicated insolvent he remained an 'undischarged insolvent' unless he obtained an order of discharge, though the adjudication itself was subsequently annulled. I have no hesitation in rejecting this contention, as its acceptance would lead to the obvious anomaly that a debtor who has obtained his discharge on a partial pay of his debts would be qualified for election to Local Boards, whereas a person whose adjudication has been annulled under S. 35, Provincial Insolvency Act, either on the ground that he ought not to have been adjudged insolvent or that his debts have been paid in full, would continue to be disqualified for such election as he would be an 'undischarged insolvent' in the sense contended for by the petitioners' counsel.

This certainly could not have been the intention of the Legislature in enacting S. 55 (2) (b). The petitioner's learned counsel recognising this *reductio ad absurdum* endeavoured to draw a distinction between an annulment of adjudication under S. 35 and an annulment under S. 43, Provincial Insolvency Act, on the ground that annulment under the latter provision does not remove the taint of insolvency but only emphasises the debtors insolvent state, and he placed reliance on S. 73 of that Act as recognizing the distinction. Apart from this

section the bearing of which on the question in dispute I will presently consider, the Act makes no distinction between annulments of adjudication based on one ground or another so far as their legal effect is concerned. There are three sections in the Act which provide for annulment of adjudication, namely, Ss. 35, 39 and 43 and S. 37 which indicates what consequences are to follow on such annulment is made applicable in each case. It seems to me therefore that annulment of adjudication, on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which adjudication under the Act confers upon a debtor. The extinction of such character due to annulment may operate to the advantage or to the prejudice of the person concerned according to the circumstances in which his adjudication is annulled, but it is clear that he can no longer be regarded in the eye of the law as an insolvent. It follows therefore that the respondent in this case cannot be held to be an 'undischarged insolvent.' It remains to consider whether this conclusion is affected by anything contained in S. 73, Provincial Insolvency Act. That section relates to disqualification of insolvent debtors and so far as it is material here, runs thus :

73 (1). Where a debtor is adjudged or readjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from (c) being elected or sitting or voting as member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed, and shall cease if (a) the order of adjudication is annulled under S. 35, or (b) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part.

It is clear that under this provision, a person adjudged an insolvent continues to be disqualified for election as member of any local authority notwithstanding the annulment of his adjudication under S. 43 of the Act and in this respect the provision goes beyond S. 55 (2) (b), Local Boards Act. Petitioner's learned counsel did not argue before me that S. 73 enacted by the Central Legislature ought to prevail against S. 55, Local Boards Act, passed by the Provincial Legislature. Such a contention will obviously be of no assistance to the petitioner as the application in this case was made to the lower Court under the special procedure provided by S. 57, Local Boards Act, whereby jurisdiction is conferred upon the District Judge to decide questions of disqualification under certain specific provisions only, namely, Ss. 54, 55, 56 and 59 of that Act. All that was argued was that the expression 'undischarged insolvent' used in S. 55 (2) (b) must be understood in the light of the provisions of S. 73, Provincial Insolvency Act, so as to avoid a discrepancy between the two provisions. I am unable to see how this can be done consistently with established principles governing construction of statutes. The two provisions, though relating to disqualification for election to local board, so far as it arises out of insolvency, are worded altogether differently and the expression 'undischarged insolvent' does not occur in S. 73. Petitioner's counsel pointed out that the expression 'uncertificated bankrupt' in S. 55 (2) (b), Local Boards Act, must refer to the certificate which is provided for in S. 73 (3) of the other Act and argued that the two sections must be read together. I fail to see how the meaning of the expression 'undischarged insolvent' in the former section can be controlled by anything contained in S. 73. It may be that the respondent is disqualified for membership of the panchayat board in question by virtue of the provisions of S. 73 and that, in an appropriate proceeding, he may be declared to be so disqualified. But that, in my opinion, cannot affect the question whether the respondent is disqualified under S. 55 (2) (b), Madras Local Boards Act. The Court below was concerned only with this question in the proceeding out of which this civil revision petition arises and agreeing with its conclusion I dismiss this petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 23

PATANJALI SASTRI J.

In re K. M. Narayanan Nambudripad — Insolvent.

Petn. No. 424 of 1927 and Application No. 168 of 1940, Decided on 3rd July 1940.

Madras Nambudri Act (21 of 1933), Ss. 5 and 23—Share of insolvent member in properties of illom can be sold in insolvency for discharge of his debts.

There is nothing in Ss. 5 and 23 restricting the right of the official assignee to bring the interest of an insolvent member of an illom to sale on behalf of his creditors. [P 24 C 1]

P. G. Krishna Iyer—for Insolvent.

Official Assignee in person.

Order. — Learned counsel for the insolvent's illom has argued that the share of the insolvent in the properties belonging to the illom is not liable to be sold in insolvency for the discharge of his debts. S. 3,

Madras Nambudri Act 21 of 1933, says that every member of an illom shall have an equal proprietary interest in its properties. Prima facie therefore the insolvent has an interest in the illom properties to which he is entitled in his own right and this should in the absence of any provision in the Act to the contrary be available for the discharge of the debts due from him to his creditors. Mr. Krishna Iyer relies upon Ss.5 and 23 of the Act as indicating that the interest of the insolvent in the illom properties is not liable to be proceeded against by his creditors. But I see nothing in those provisions having the effect contended for by the learned counsel. Section 5 deals with the karnavan's power of alienation of illom properties so as to bind the other members of the illom and does not relate to the power of a member of the illom to alienate his own interest. Nor does S. 23 have any bearing on the point under consideration, as it provides for partition of such properties subject to certain conditions. I am unable to spell out of these provisions any restriction on the right of the official assignee to bring the interest of an insolvent member of an illom to sale on behalf of his creditors. The application is dismissed.

C.R.K./D.S. *Application dismissed.*

A. I. R. 1941 Madras 24

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

B. N. Chowdappa Chetti — Petitioner

v.

President, Panchayat Board, Karimangalam — Respondent.

Civil Misc. Petition No. 5569 of 1939, Decided on 2nd April 1940, to issue a writ of certiorari to the President, Panchayat Board, Karimangalam.

Madras Local Boards Act (14 of 1920), S. 193 (3) — President has, in proper case, power to refuse to renew license.

Section 193 (3) empowers the president of the Board to grant or refuse a license; and the president has in a proper case the power to refuse to renew a license. His order refusing to renew license can only be set aside if he has exercised that power in an arbitrary or illegal manner. [P 25 C 2]

K. Bhashyam Ayyangar and T. M. Venugopal Mudaliar — for Petitioner.

K. Rajah Ayyar — for Respondent.

Leach C. J. — Since the year 1930 the petitioner has been carrying on a rice milling business at Karimangalam in premises which had been used for the same purpose from 1920 to 1930 by his brother. By virtue of the provisions of S. 193, Madras Local Boards Act, 1930, the Panchayat Board of Karimangalam was empowered to require the petitioner to take out a license in respect of the premises. Licenses were issued to the petitioner from year to year but in 1939 the Board refused a further renewal. The petitioner says that in doing so the Board has acted in excess of its powers and asks that its order be quashed. Sub-s. (1) of S. 193 states that the Panchayat Board may notify that no place within the limits of the village shall be used for any one or more of the purposes specified in Sch. 7 without a license issued by the President of the Board and except in accordance with the conditions specified in the license, provided that no notification shall take effect until sixty days from the date of publication. The purposes for which premises may not be used without a license include the "using for any industrial purpose any fuel or machinery." Sub-s. (2) says that the owner or occupier shall within thirty days of the publication of the notification under sub-s. (1) apply to the president of the Board for a license for the use of the premises for the purpose intended. Sub-s. (3) says that the president may, by an order and under such restrictions and regulations as he thinks fit, grant a license or refuse to grant it.

On 20th September 1932 the Panchayat Board caused a notification to be issued under S. 193 (1) to the effect that no place within the limits of its jurisdiction should be used for specified purposes without a license from the president. The notification applied expressly to rice mills and the license fee was fixed at Rs. 5. In pursuance of this notification the petitioner applied for and was granted a license by the Board and he renewed his application every year. On 21st January 1938 a fresh notification was published by the Board. It differed from the earlier notification only in that it increased the license fee from Rs. 5 to 10. On 18th February 1938 the Board issued a notification under S. 215-A of the Act. This section says :

Whenever a Local Board sets apart any place for any purpose or prohibits the doing of anything in any place, the president shall forthwith cause to be put up a notice in the chief vernacular language of the locality specifying the purpose for which such place has been set apart or the act prohibited in such place.

The notification purported to create an industrial area within the jurisdiction of the Board. On 19th February 1938 the Board issued to the persons having mills in Karimangalam a notice in these terms :

As the sites noted in the margin have been declared as the industrial area of this Board with the approval of the District Health Officer and Direc -

tor of Town Planning and as the District Health Officer insists upon removing all the mills to the industrial area in the interest of the public health, I hereby give you three months notice to shift your mills to the industrial areas approved by this Board, failing which action will be taken to remove the mills.

On this date there were six persons carrying on milling businesses in Karimangalam, of which the petitioner was one. The record discloses that the health officer considered that from the standpoint of health it was undesirable to have mills in the residential part of Karimangalam. In his opinion the petitioner's mill was particularly objectionable. On 6th April 1938 the special officer who had been appointed by the Government to fulfil the duties of the Panchayat Board for the time being, wrote to the mill owners informing them that they would be granted temporary licenses upto 18th May 1938, the intention being that after that date no licenses would be issued to them unless they removed their mills to the industrial area. On receipt of this letter the mill owners moved the Government to cancel the notification of 19th February 1938. Pending inquiry into the matter the Government suspended the operation of the notification and allowed the mill owners to run their mills in the premises they then occupied. On 16th January 1939 the Government passed an order which in effect rejected the application of the mill owners. The order was in these terms :

The President, Panchayat Board, Karimangalam, (Salem District) is informed that the rice mill owners who have not yet moved to the industrial area should be directed to do so at an early date. They may be given time for the purpose, as may be fixed by the Panchayat Board. The time limit should not however exceed one year. Meanwhile the prosecutions pending against them may be withdrawn.

On 12th February 1939 the Board gave the mill owners six months time from 1st February 1939 to remove their mills to the industrial area. With the exception of the petitioner all the mill owners have complied with this direction. On 15th February 1939 the petitioner applied for a license in respect of his mill in the residential area for the year commencing 1st April 1938 and the license was issued to him. On 23rd February 1939 he applied for a license for the year commencing 1st April 1939. This was refused, but he was informed that he could apply for a temporary license until 31 July 1939, subject to the condition that he should then remove his mill to the industrial area. This permission was in accordance with the notice issued to the mill owners on 12th February 1939. Inspite of this decision the petitioner wrote to the president of the Board on 30th March 1939 requesting that license be issued to him "according to mamool", which means according to the usual practice. This letter resulted in an order granting a temporary license from 1st April 1939 to 31st July 1939 subject to the condition that he should then remove his mill to the industrial area. The Board refused to alter this decision and consequently refused to issue a license to the petitioner after 1st August 1939. The petitioner has now moved this Court to quash the orders of 24th February and of 30th March 1939.

The petitioner says that the Board had no power to notify an industrial area and, as it has not got this power, it is not entitled to refuse him a license in respect of the premises in which he has carried on a milling business for so many years. For the purposes of the present application the Court may assume that the Board had no power to notify an industrial area. It is not necessary for the Court to examine S.215-A and the relevant sections which precede it, because it is clear that the petition must be dismissed on another ground. Section 193 (3) empowers the president of the Board to grant or refuse a license ; and as pointed out by this Bench in Appln. No. 1900 of1939[1] on the file of the High Court, Madras when considering the corresponding section in the City Municipal Act 1919, the section must be construed according to the words used therein and when it is so construed there is no room for reasonable doubt that the president has in a proper case the power to refuse to renew a license. Of course, if the refusal were arbitrary or prompted by some ulterior motive the position would be different. In this case it cannot be said that the Board has acted arbitrarily or in any way improperly. There was material before the Board on which it could come to the conclusion that it was in the interest of the residents of Karimangalam that the mills in the residential quarters should be removed to another area. The Board gave ample opportunity to the mill owners to remove their mills from the residential area and when refusing licenses for their old premises the Board made it quite clear that licenses would be issued in respect of premises within the industrial area. It is not disputed that the Board acted entirely bona fide. Its action is

1. *Reported in* ('41) 28 A I R 1941 Mad 19, Abdul Kareem Sahib v. Commissioner, Corporation of Madras.

only challenged on the ground that it had no power to notify an industrial area. That is not sufficient to entitle the petitioner to succeed, even assuming that his contention in this respect is correct. The president had power to refuse to renew and his order can only be set aside if he has exercised that power in an arbitrary or illegal manner, which is not the case. The petition will be dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1941 Madras 26

KING J.

Messrs. Bapalal & Co. — Appellants

v.

A. R. Krishnaswami Iyer—Respondent.

City Civil Court Appeal No. 52 of 1939, Decided on 2nd August 1940, against decree of City Civil Court, Madras, in O. S. No. 787 of 1937.

Defamation — Complaint to police officer is absolutely privileged.

A complaint to a police officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath is absolutely privileged: *Case law referred.* [P 27 C 1]

V. C. Gopalaratnam — for Appellants.

N. Panchapagesa Aiyar — for Respondent.

Judgment. — This appeal arises out of a suit filed by respondent against the appellants for damages for defamation. The facts may be stated very briefly. Respondent, a medical practitioner in Madras, took some diamonds from the appellants, a firm of jewellers, on approval in April 1936. On 25th May appellants presented him with an invoice for their cost. By 27th September the diamonds had not been paid for. On that day the appellants sent a letter to the Inspector of Police, Flower Bazaar Police Station, which is claimed by respondent to be defamatory, as being equivalent to a charge against him of criminal breach of trust. In their written statement appellants contended that this communication was privileged, having been sent bona fide with the sole purpose of protecting their own interests. The learned City Civil Judge held that the occasion was privileged and if the letter were in fact bona fide the suit must be dismissed, but he held further that the letter did not state the true facts; that there was an outright sale on 25th May; and that the appellants were maliciously referring to the police for investigation what they knew could be only the subject-matter of a civil claim. He accordingly decreed the suit. In appeal an entirely new point has been taken with reference to the law of privilege. It is now contended that the letter in question was privileged absolutely, that is to say, that a civil Court is precluded from adjudicating upon the question whether it was sent maliciously or not. On a careful consideration of the authorities I think this contention must prevail. The principal authorities to which I have been referred to in the course of the arguments are 49 MAD 315,[1] 38 CAL 880,[2] ILR (1939) 1 CAL 574[3] and 46 ALL 671.[4] All these authorities are unanimous in holding that the Common Law of England which grants an absolute privilege to all statements made in the witness-box should be applied in India. That privilege extends in England to the preliminary examination of witnesses, e. g., by a solicitor to find out what they can prove: *see* (1905) A C 480.[5] The question then is how far this principle derived from (1905) A C 480[5] should be extended. 49 MAD 315[1] dealt with a complaint to a Magistrate requesting him to take action under S. 107, Criminal P. C., and to statements made by the complainant to a police officer investigating that complaint. Both were held to be absolutely privileged. No actual evidence was given in this case, as the Magistrate eventually refused to take any action under S. 107. In 38 CAL 880[2] a complaint laid before a Magistrate for criminal breach of trust which led to no trial but was dismissed under S. 203, Civil P. C., was held to be absolutely privileged. In I L R (1939) 1 CAL 574[3] it was held that both a report to the police alleging the commission of a cirme and evidence given in Court in support of the accusation were absolutely privileged. In 46 ALL 671[4] a distinction was drawn between a complaint to the police which in fact led to judicial proceedings, and one which did not. A complaint in the latter case was held not to be privileged.

Now there is nothing in the three other decisions referred to above to suggest that this particular ground of distinction would find favour with the Madras or Calcutta

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1. ('26) 13 A I R 1926 Mad 521 : 93 I C 8 : 49 Mad 315 : 50 M L J 460, Sanjivi Reddi v. Koneri Reddi.
2. ('11) 38 Cal 880 : 11 I C 311 : 15 C W N 917, Golap Jan v. Bholanath.
3. ('39) 26 A I R 1939 Cal 477 : 184 I C 637 : I L R (1939) 1 Cal 574 : 43 C W N 775, Madhab Chandra v. Nirode Chandra.
4. ('24) 11 A I R 1924 All 585 : 84 I C 702 : 46 All 671 : 22 A L J 597 (F B), Majju v. Lachman Prasad.
5. (1905) 1905 A C 480 : 74 L J P C 151 : 93 L T 489, Watson v. M'Ewan.

High Courts. In 49 MAD 315[1] and 38 CAL 880[2] complaints to a Magistrate were held absolutely privileged, even though the Magistrate dismissed them. In I L R (1939) 1 CAL 574[3] the complaint to the police was no doubt followed by an actual trial, but there is nothing in the judgment to suggest that that fact influenced the learned Judges in coming to their decision. Both Judges apply the principle in (1905) A C 480[5] to a complaint to the police, and Ghose J. points out on p. 580 that the reason for the privilege is stronger in the case of a complaint to the police than in the case of statements to a solicitor for the question whether a prosecution shall follow upon the complaint is taken out of complainant's hands by his own action. I am accordingly of opinion that the weight of authority is in favour of the view that a complaint to a police officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath is absolutely privileged. I must accordingly allow this appeal, and dismiss respondents' suit. As the main ground in the appeal was never pleaded in the Court of first instance I make no order as to costs.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 27

BURN AND MOCKETT JJ.

In re Thalappil Thithachumma

Prisoner.

Referred Trial No. 69 and Criminal Appeal No. 318 of 1940, Decided on 17th July 1940.

Penal Code (1860), S. 302 — Sentence — Deliberate and brutal murder by woman — Existence of extremely young baby born to her since murder is not ground for passing lesser sentence.

In case of a murder committed after deliberation and in a brutal manner by a woman the existence of an extremely young baby born to her since the murder might perhaps be taken into consideration by the Provincial Government when she prefers an application for clemency but would not be a ground for passing the lesser sentence. [P 27 C 2; P 28 C 1]

P. Basi Reddi — for Prisoner.

The Public Prosecutor — for the Crown.

Burn J. — This is one of the many cases of murder of a child for the sake of jewels worn upon the person. An unusual feature of the case is that the murder in this case was committed by a young woman aged about 20. There is no possible doubt about the facts. On 2nd January 1940 the appellant decoyed a child named Katheesa aged twelve to her house, strangled her by putting a cloth round her neck and pulling it tight, took her silver jewels worth about Rs. 5 off and then threw the body into a well in the compound. With the jewels she went straightaway to a silversmith (P. W. 14) and requested him to make them over for her. The silversmith deducted one rupees weight of silver for his own wages and turned the rest of the jewels into chitters which were recovered from the appellant by the police very shortly afterwards. There was no eye-witness of this crime and the evidence against the appellant consists almost entirely of confessions made by herself. When she was questioned on 3rd January by a member of the local vigilance committee (P. W. 11) it is alleged that she admitted the murder. She was sent immediately to the village Munsif (P. W. 3) and to him also she admitted her guilt and she made a statement which the village Munsif reduced to writing (EX. E). She was sent to the Sub-Magistrate and on 6th February the police asked the Sub-Magistrate to record her confession. The Sub-Magistrate having given the woman time for reflection till 11th January recorded her confession which is EX. B, and finally when the preliminary investigation was being made the appellant said to the Magistrate, "it is true that I killed Katheesa and took the jewels. I committed a folly. I have nothing else to state." In the Sessions Court she retracted the confession before the Sub-Magistrate and she alleged that she had not made any confessions out of Court.

Her story was confirmed by the evidence of the younger sister of the deceased (P. W. 6) who said that on the morning of 2nd January the appellant came and asked her sister Katheesa to go with her to pick tamarind. Katheesa never returned. The evidence of the silversmith (P. W. 14) also confirms her story. He produced the bits of silver (material objects 3, 3-a, 4, 4-a and 5) which he had kept for his own remuneration and he spoke to M. Os. 6 to 26 which he said he had made for the appellant out of the silver jewels brought to him on 2nd January. The appellant was advanced in pregnancy and has given birth to a child since this murder. This was apparently made a ground for urging before the learned Sessions Judge that the extreme sentence should not be passed; but the learned Sessions Judge, we think, has dealt with this matter in the proper manner. He has pointed out that the crime was obviously committed after deliberation and in a brutal manner. There was no suggestion that the appellant was in any way unbalanced in mind or that she was unaware of the nature of her act or the

consequences of it. There was no suggestion made at the trial that the appellant might not have been in full control of her faculties. The learned Session Judge has therefore said quite rightly that the existence of an extremely young baby born to the appellant since the murder might perhaps be taken into consideration by the Provincial Government when the appellant prefers an application for clemency but would not be a ground for passing the lesser sentence. We agree with the learned Sessions Judge that the offence was clearly established. We confirm the conviction for murder and the sentence of death and dismiss this appeal.

C.R.K./D.S. *Appeal dismissed.*

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* A. I. R. 1941 Madras 28

Full Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

Gunturu Seeta Ramanjaneyulu (minor) — Appellant

v.

Vishnubhotla Ramayya and others — Respondents.

Appeal No. 181 of 1938, Decided on 30th September 1940, against appellate order of Dist. Court, Kistna at Masulipatam, D/- 26th January 1938.

(a) Civil P. C. (1908), O. 21, R. 90 and S. 47— Application under O. 21, R. 90 and S. 47 for setting aside sale dismissed so far as relating to O. 21, R. 90 — Appeal by applicant — Appellate Court agreeing with dismissal of application relating to O. 21, R. 90 but instead of requiring lower Court to proceed with application so far as it related to S. 47 directing appellant to file fresh application under S. 47 — Order directing fresh application held not justified.

An application for setting aside sale was filed under O. 21, R. 90 and S. 47 on ground of material irregularity and that property sold was self-acquired and the sale bad for want of notice under O. 21, R. 22. The application in so far as it related to O. 21, R. 90 was dismissed for applicant's default in furnishing security. The applicant went up in appeal and the Appellate Court agreed with the trial Court's dismissal of the application in so far as it related to O. 21, R. 90 but instead of directing the trial Court to proceed with the application so far as it related to S. 47, directed the applicant to file a fresh application under S. 47 with regard to his grounds under that section:

Held **that the Appellate Court should not have directed the appellant to file a fresh application under S. 47.** [P 29 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Application under O. 21, R. 90 dismissed for applicant's default to furnish security — No second appeal lies — Revision is competent.

No second appeal lies from an order dismissing an application under O. 21, R. 90 for applicant's default in furnishing security. Revision, however, is competent. [P 29 C 2]

** (c) Civil P. C. (1908), O. 21, R. 90, proviso 1 (Madras, as it stood in 1937) — O. 21, R. 90, proviso 1 as amended by Madras High Court was intra vires — Applicant had right to be heard on matter of security before being asked to furnish same — Court hearing applicant and after giving opportunity to show cause ordering him to furnish security—Dismissal of application in default is justified — Court has power to order security to be furnished.*

O. 21, R. 90 as originally framed by the Madras High Court and as it stood in 1937 was intra vires the High Court's powers under S. 122. Under O. 21, R. 90 as it stood in 1937 security could be required before the application was admitted. That did not mean, however, that an order requiring security might be passed without hearing the person affected by the order. The proviso as re-framed puts it beyond all controversy that an opportunity must be given to an applicant of showing cause before an order requiring security is passed against him and the proviso, as it stood in 1937 should be read as giving a right to the applicant to be heard on the matter of security. Consequently an applicant who was heard and given an opportunity to show cause before being ordered to furnish security cannot be said to have a grievance when his application is dismissed for default: AIR 1937 Rang 419, *Disting.* [P 30 C 1, 2]

A person has the right of being heard, but once he has been heard, the Court can put him on terms before allowing him to proceed further with such a matter and consequently the Court has power to insist on security being furnished. [P 30 C 1]

B. V. Ramanarasu — for Appellant.

A. Lakshmayya — for Respondents.

Leach C. J. — On 9th May 1934 respondent 1 obtained a money decree in the Court of the District Munsif of Masulipatam against respondent 3 and his son, the appellant, who is a minor. So far as the appellant was concerned, the decree was limited to his share in the family property and the assets of the estate of his deceased grandfather in his hands. On 15th March 1937, 19.26 acres of land were sold by the Court in execution of this decree. This land had been attached by the decree-holder on the ground that it represented joint family property. Respondent 2 became the purchaser on 14th April 1937. The appellant then filed an application in execution proceedings asking that the sale be set aside. He asserted that the property sold was his self-acquired property, that no notice had been issued to him as required by O. 21, R. 22, Civil P. C., and that there had been material irregularity in the publication of the sale, the result of which was that the property had been sold at considerably less than its real value. This application purported to be made under the provisions of Ss. 47 and 151 and O. 21, R. 90, Civil P. C. The Court has not been informed of the reason for invoking S. 151, but it is said that

S. 47 was invoked because under that section the appellant was entitled to an inquiry into his allegations that the property belonged to him and that the sale was bad by reason of notice not having been issued under O. 21, R. 22. O. 21, R. 90, applied in so far as the appellant sought to obtain the setting aside of the sale on the ground of material irregularity in its publication.

The petition was not in order and it was returned to the appellant to remedy the defect. This was done and the petition was re-presented on 21st June 1937. On 26th June 1937 the Court ordered the appellant to enter into a security bond in the amount for which the property had been sold, namely Rs. 1450 and directed that the security bond should be filed by 6th July 1937. In requiring security to be furnished the Court acted under the provisions of O. 21, R. 90. It is not disputed that before this order was passed the appellant had an opportunity of being heard. The security was found to be unsatisfactory, and on 19th August 1937 the Court ordered the appellant to deposit in Court the amount in cash if he wished to proceed with his application. The appellant failed to deposit the amount within the time allowed by the Court—the time had been extended to 23rd September 1937—and in consequence the District Munsif dismissed his application. The appellant then appealed to the District Judge of Kistna. The District Judge, while agreeing with the dismissal of the application for default so far as the application related to O. 21, R. 90, pointed out that the Court should nevertheless have proceeded with the application so far as it came under the provisions of S. 47, but instead of directing the District Munsif to hear and decide that part of the application, the District Judge indicated that the proper course would be for the appellant to file a separate application under S. 47 and limit it to his allegations that the property was self-acquired and that the sale was bad because of the failure to give notice under O. 21, R. 22. The appellant has now appealed to this Court with regard to (a) the dismissal of his application for default in making the required deposit and (b) the requirement of the District Judge that he should file a separate application in so far as he claims under S. 47.

It has been accepted by the learned advocate for respondent 2, who alone is concerned with this appeal, that the District Judge should not have directed the appellant to file a fresh application under S. 47, and to that extent he agrees that the appeal should be allowed. But he says that no second appeal lies from that part of the decree which relates to the dismissal of the application for failure to find security under O. 21, R. 90. That contention must be accepted. A second appeal will not lie on that question, although we think that the present appeal so far as it relates to the provisions of O. 21, R. 90 may be treated as an application in revision, because, if the District Munsif had no power to require security to be given, his insistence on it would amount to a wrongful exercise of jurisdiction. Therefore we will proceed to treat the rest of the appeal as an application for revision. At the time when the District Munsif required the appellant to furnish security, O. 21, R. 90, as amended by this Court read as follows:

> Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :
>
> Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less, or to deposit such amount in Court ;
>
> Provided also that the security furnished or the deposit made as aforesaid, shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale;
>
> Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

This rule has been amended since then and the nature of the amendment will be indicated presently. The appellant contends that this rule is ultra vires of the powers conferred on this Court by S. 122 of the Code in that it says that the Court hearing the application may, before admitting it, call upon the applicant to furnish security. He would have it held that the decision of the Rangoon High Court in 1937 R L R 268[1] has application here. In that case a Full Bench of the Rangoon High Court of which I was a member, held that O. 21, R. 90, as framed by the Rangoon High Court, was ultra vires. But that rule differed very materially from the corresponding rule of this Court. Under the Rangoon rule no application could be heard unless the applicant, on

1. ('37) 24 A I R 1937 Rang 419 : 172 I C 102 : 1937 R L R 268 (F B), Chettiar Firm v. Central Bank of India Ltd.

filing his application deposited the amount mentioned in the sale warrant or an amount equal to the sum realized by the sale, whichever was less. If this rule were to be enforced it meant that no one aggrieved by a sale held in execution proceedings could cross the threshold of the Court with an application for an order setting it aside as unlawful for non-compliance with the provisions of the Code, unless he brought with him in cash the amount mentioned in the sale warrant or the amount for which the property had been sold. This Court's rule as it stood even at the time of the sale did not go so far as that. The Court has full power to regulate its procedure, but that does not mean that a man may not be heard at all until security is furnished by him. Under O. 21, R. 90, as originally framed by this Court, security could be required before the application was admitted. That did not mean, however, that an order requiring security might be passed without hearing the person affected by the order. In fact it would be wrong of a Court to pass any such order without hearing the applicant. In order to prevent any misunderstanding as to the effect of proviso 1 to O. 21, R. 90 this Court has reframed it and the proviso now reads as follows :

Provided that the Court may, after giving notice to the applicant, call upon him before admitting the application either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or to that realized by the sale whichever is less, or to deposit such amount in Court.

This puts it beyond all controversy that an opportunity must be given to an applicant of showing cause before an order requiring security is passed against him. Although this amendment was made subsequent to the District Munsif's order in this case, the proviso, as it then stood, in 1937 should be read as giving a right to the applicant to be heard on the matter of security. That opportunity was given to the appellant and consequently he has no grievance. His learned advocate has, however, argued that the Court has no power in any circumstances to require security to be furnished. He says that although the filing of an application may be entirely unwarranted, the Court cannot insist on security being furnished. That is an argument which we are not prepared to accept. A person has the right of being heard, but once he has been heard, the Court can put him on terms before allowing him to proceed further with such a matter. We hold that the rule as it stood in 1937 was intra vires the Court's powers and that therefore the District Munsif had power to pass the orders which he did on 26th June and on 19th August 1937.

The result is that the appeal succeeds so far as it concerns the decree of the District Court requiring the appellant to file a fresh application under S. 47, but it stands dismissed in all other respects. In as much as respondent 2 has succeeded on the main question, that relating to the validity of proviso 1 to O. 21, R. 90, we consider that he is entitled to his costs. The District Munsif will now be directed to proceed with the hearing of the petition so far as it concerns the allegations which do not relate to O. 21, R. 90, and security will not be required. The second petition filed in pursuance of the order of the District Judge is unnecessary and will be withdrawn by the appellant.

C.R.K./G.N. *Order accordingly.*

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KING J.

Nanjunda Chetty — Appellant

v.

Y. P. R. L. M. L. Lakshmanan Chettiar and others — Respondents.

Appeals Nos. 21 and 22 of 1940, Decided on 8th August 1940, against appellate orders of Dist. Court Coimbatore, D/- 28th and 27th October 1939 respectively.

Execution—Decree against family property in hands of judgment-debtor — Application for his arrest is application in accordance with law.

The granting of a decree against assets in a judgment-debtor's hands does not necessarily preclude execution against him personally. Hence an application for the arrest of the judgment-debtor is in accordance with law even if the decree is only against the family property in his hands : A I R 1917 Mad 623, *Foll*; A I R 1918 Mad 396 and 13 Bom 237, *Ref.* [P 30 C 2; P 31 C 1]

K. S. Desikan and C. D. Venkataramanan — for Appellant.

A. C. Sampath Ayyangar — for Respondents.

Judgment. — The question at issue in these two appeals is whether two applications for execution filed by the decree-holder on 17th February 1936 were or were not in accordance with law. The prayer in each application was for the arrest of defendant 1. The decrees, as they then stood amended, did not in either case make defendant 1 personally liable, but were only against the family properties in his hands. Both Courts below have held that these applications were in accordance with law. In appeal it

is argued that the applications were not in accordance with law as the relief asked for was one which the decree did not permit of being granted. If this premise is correct, I think the conclusion must follow. 43 I C 537[1] and 13 BOM 237[2] are instances in which this legal principle has been applied. But I am bound by a Bench decision of this Court to hold that the premise is not correct. That decision is 35 I C 614[3] and it deals with precisely similar facts. It is there held in effect that the granting of a decree against assets in a judgment-debtor's hands does not necessarily preclude execution against him personally. In certain circumstances which are provided for by S. 52 (2), Civil P. C., such a mode of execution may be permitted. It is also pointed out that the judgment-debtor in that case was not asked to explain whether such circumstances existed or not which is also true here. I find that in Rustomji's commentary on the Limitation Act it is doubted whether this decision is good law but as it has never been overruled in Madras or, so far as I am aware, dissented from in any reported decision, it is binding upon me. The result is then that these appeals must fail and are dismissed with costs. Leave refused.

C.R.K./D.S. *Appeals dismissed.*

1. ('18) 5 A I R 1918 Mad 396=43 I C 537, Ramakrishna Kadir Velu Swami v. E. D. Corporation Ltd., London.
2. ('89) 13 Bom 237, Pandarinath Bapuji v. Lilachand Hatibhai.
3. ('17) 4 A I R 1917 Mad 623=35 I C 614, Ramchandra Naidu v. Tirupathi Naidu.

** A. I. R. 1941 Madras 31

LEACH C. J AND HORWILL J.

Messrs. Devidoss and Co., a firm of cloth merchants, Bangalore —

Appellants

v.

Alathur Abboyee Chetty and Co., a firm of piece goods merchants, Madras —

Respondents.

Appeal No. 5 of 1939, Decided on 13th September 1940, from judgment and decree of Gentle J., in C. S. No. 206 of 1935, D/- 7th December 1938.

** *(a) Trade Mark—Passing off action—Plea of acquiescence — Plaintiff must have stood by for substantial period and encouraged defendant to expend money in building up business associated with mark — Delay simpliciter is no defence—No hard and fast rule can be laid down as to when person loses his right to stop another from using his mark as result of inaction — Each case depends on its own circumstances — Plaintiffs held lost their right of action by their acqauiescence.*

To support a plea of acquiescence in a trade mark case it must be shown that the plaintiff has stood by for a substantial period and thus encouraged the defendant to expend money in building up a business associated with the mark. Although delay simpliciter is no defence to a suit for infringement of a trade mark but where a trader allows a rival trader to expend money over a considerable period in the building up of a business with the aid of a mark similar to his own he will not be allowed to stop his rival's business : (1896) 13 R P C 464; (1923) 40 R P C 133 and (1906) 23 R P C 1, *Rel. on;* (1880) 15 Ch D 96, *Disting.* [P 34 C 2]

No hard and fast rule can be laid down for deciding when a person has, as the result of inaction, lost the right of stopping another using his mark. Each case must depend on its own circumstances, though obviously a person cannot be allowed to stand by indefinitely without suffering the consequence : (1897) 14 R P C 37, *Rel. on.* [P 34 C 2]

During a period of four years the defendants built up a very large business by the use of the trade mark complained of and the plaintiff had full knowledge of all that was going on. In addition to the capital sunk in their business the defendants spent during this period Rs. 20,000 in popularizing the mark. There was no question of the defendants having the intention to steal the plaintiff's trade. They were dealing in a better class of goods and adopted the plaintiff's trade mark in ignorance of the fact that the plaintiff was using it :

Held that the plaintiff had lost his right of action against the defendants by reason of his acquiescence in the defendants' use of the mark complained of. [P 34 C 2; P 35 C 1]

(b) Trade Mark—Passing off action—Costs—Defendant taking plaintiff's trade mark in ignorance and using it under bona fide though mistaken belief that he was acting within law — Plea of acquiescence succeeding — Defendant is entitled to his costs.

Where in a passing off action a plea of acquiescence or abandonment succeeds, especially where the defendant has taken the trade mark of another in ignorance and has used it in the mistaken belief, but sincerely entertained, that he is acting within the law it would be wrong to deprive him of his costs. [P 36 C 1]

C. Srinivasachari — for Appellant.

V. Radhakrishnayya — for Respondents.

Leach C. J.—The suit out of which this appeal arises was instituted by the appellants on the original side of this Court for a declaration that they were entitled exclusively to the use of a certain trade mark and for a perpetual injunction restraining the respondents from using a similar mark. The defence was threefold. In the first place it was said that the respondents had the right to use the mark complained by reason of concurrent user. In the second place it was said that the appellants had in any event lost the right to exclusive user by reason of their acquiescence in the respondents using the marks now complained of. The third plea was that the appellants

had abandoned any rights they might have had in the mark. The learned trial Judge (Gentle J.) held that the use by the respondents of the mark complained of was an infringement of the rights of the appellants, but the appellants had acquiesced in the course of conduct pursued by the respondents and therefore they were not entitled to relief. On this ground he dismissed the suit but without costs. The appellants challenge the finding of the learned Judge that they acquiesced in the use of the mark by the respondents and the respondents support the judgment on the grounds advanced by them at the trial. They further contend that the learned Judge should have allowed them their costs. The appellants are piece-goods merchants carrying on business in Bangalore and the respondents are piece-goods merchants carrying on business in Madras. The parties do not, however, confine their businesses to these places. The appellants deal in longcloth, shirtings and twill of Indian manufacture. Except for one shipment of goods in 1930 they have never dealt in piece-goods manufactured in England. The respondents do not deal in piece goods of Indian manufacture, but import from England longcloth shirtings, twill and similar goods. The goods dealt in by the respondents are admittedly of superior quality to those dealt in by the appellants and command considerably higher prices. The learned Judge found as a fact that the business of the respondents caused no financial loss to the appellants and it is manifest that anybody who applied to the respondents for cloth would not get an inferior, but a superior article.

The mark of which the appellants claim the exclusive right of user consists of a figure of a baby sitting on four pieces of cloth and holding a rattle in the right hand. Above the figure is the word "baby" in English, and at the sides the same word in Nagiri, Urdu, Kanarese and Tamil. The mark complained of consists of the figure of a baby kneeling with its hands upon a single piece of cloth, partly unrolled, and underneath are the words "baby brand" in English, and the word "baby" in Nagiri, Urdu, Telugu and Tamil. It is conceded by the respondents, as it must be, that if the appellants are entitled to the exclusive use of their mark, the mark adopted by the respondent will constitute an infringement of the appellants' right. According to the plaint the appellants adopted their mark in the year 1927, but this has not been proved. Despite the allegations of acquiescence and abandonment advanced by the respondents no one from the appellants' firm has ventured to go into the witness box. Therefore it has not been proved that the appellants adopted the mark in 1927, but the respondents have admitted that the appellants used it in 1929 and for the purpose of this case it may be taken that it was adopted by the appellants in that year. The respondents decided to use the mark which they now claim as theirs in the early part of 1930 and they used it on goods imported into this country in August of that year. It was conceded by the appellants in the course of the hearing of the appeal that in instructing their suppliers in England to mark their goods with the mark complained of the respondents acted in good faith and in entire ignorance that the appellants had already adopted the mark of a baby. Further, it was accepted that the respondents have never used their mark on piece-goods of Indian manufacture, but that they have confined it exclusively to goods manufactured in and imported from England.

In the course of his judgment the learned Judge has observed that it would appear at one time that piece-goods merchants in India were under the impression that if a trade mark were registered in England this would result in protection in India. That there was this impression is shown from the conduct of the parties in this case. On 25th September 1930 the respondents wrote to their suppliers in Manchester asking them to obtain the registration of the mark in suit as their own trade mark. The suppliers took steps to carry out their instructions, but it was discovered that other merchants were using a "baby" trade mark and that the appellants had themselves applied for registration in England of their mark. It was also ascertained that the appellants' application had not been granted and the mark claimed by them had been placed on the "refused list." In a letter dated 5th February 1931 the suppliers wrote to the respondents stating that by allowing their mark to go on the "refused list" no one could obtain registration of a similar mark and if they continued to use it for two or three years they might make an application for it to be put on the registered trade mark list, this privilege being given as the result of user of the mark. There was lengthy correspondence between the respondents and their suppliers with regard to registration in England and letters also passed between the

respondents and a firm of trade mark agents from whom the respondents sought and obtained advice at the suggestion of their suppliers. The result of the advice was that the respondents decided not to proceed with their application for registration in England and not to expend money in advertising their claim to the mark in India, but to continue to use the mark on the goods imported by them. The appellants were confining the use of their mark to goods of Indian manufacture and in following the course which they did I am of the opinion that the respondents considered that they were acting within their rights.

On 18th April 1931 the appellants' legal adviser wrote to the respondents complaining of the infringement of their trade mark. The respondents were called upon to refrain from using the mark, to withdraw all goods bearing the mark from the market and to pay Rs. 5000 by way of damages. On 28th April 1931 the legal adviser of the respondents replied to this letter and denied that the mark had in the minds of the public become associated with the appellants' goods. It was asserted that the respondents were merely using the mark on English goods and that if a suit were filed it would be defended. The appellants took no further steps in the matter and the business of the respondents in the goods bearing the mark complained of continued to increase greatly year by year. From 14th August 1930 to 31st December 1935 the total value of the goods imported by the respondents bearing this mark amounted to nearly Rs. 17,000,00, or over £127,000. In addition to the capital which the respondents had to provide for the shipments they expended Rs. 20,000 in advertising and in other ways in popularising their goods. That the appellants knew of this cannot be doubted for a moment and they were content to allow the respondents to use the mark on the imported goods until 27th July 1935 when they filed the present suit. For the purpose of stamping the goods which the appellants imported from England in 1930 they sent a block to their suppliers. On 30th March 1931, a few months after they had imported their one and only lot of English manufactured goods they wrote to the suppliers to return to them the block, which clearly indicated their intention not to deal any more in goods of this class made in England. At this stage it will be convenient to inquire how the doctrine of acquiescence has been applied in trade-mark cases. For the appellants it has been contended that before this doctrine can be applied all the conditions stated by Fry J. in (1880) 15 Ch D 96[1] at p. 105 must be complied with. That case did not relate to a trade-mark, but to an agreement for the lease of land. After stating that a man is not to be deprived of his legal rights unless he has acted is such a way as would make it fraudulent for him to set up those rights, Fry J. stated in the following words the elements or requisites necessary to constitute fraud of this description :

> In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment nothing short of this will do.

These observations relate to a situation in which the plaintiff has in good faith expended money on another's land. They cannot apply in their entirety to an action for passing off where the defence is acquiescence. It is here not a case of the plaintiff being mistaken as to his legal rights and having expended money on the faith of his mistaken belief; the defendant is not the possessor of the legal right and it cannot matter whether the defendant knows that the plaintiff has a mistaken belief as to his rights. To support a plea of acquiescence in a trade-mark case it must be shown that the plaintiff has stood by for a substantial period and thus encouraged the defendant to expend money in building up a business associated with the mark. In (1896) 13 R P C 464,[2] Romer J. observed :

> If the plaintiff really does stand by and allow a man to carry on business in the manner complained of to acquire a reputation and to expend money he cannot then after a long lapse of time, turn round and say that the business ought to be stopped.

1. (1880) 15 Ch D 96 : 43 L T 95 : 28 W R 911, Wilmott v. Barber.
2. (1896) 13 R P C 464, Rowland v. Michell.

In the same case, but on appeal Lord Russel C. J. said in(1897) 14 R P C 37[3] at p. 43:

> Is the plaintiff disentitled to relief under that head by injunction because of acquiescence? Of course it is involved in the consideration of that that the plaintiff has a right against the defendant and that the defendant has done him a wrong and the question is whether the plaintiff has so acted as to disentitle him from asserting his right and from seeking redress from the wrong which has been done to him. Cases may occasionally lay down principles and so forth which are a guide to the Court, but each case depends upon its own circumstances.

Dealing with the question of standing by in (1923) 40 R P C 133[4] at p. 142, Eve J. said:

> For the purpose of determining this issue I must assume that the plaintiffs are traders who have started in this more or less small way in this country, and have been continuously carrying on this business. But I must assume also that they have not, during that period, been adopting a sort of Rip Van Winkle policy of going to sleep and not watching what their rivals and competitors in the same line of business were doing. I accept the evidence of any gentleman who comes into the box and gives his evidence in a way which satisfies me that he is speaking the truth when he says that he individually did not know of the existence of a particular element or a particular factor in the goods marketed by his opponents. But the question is a wider question than that: ought not he to have known: is he entitled to shut his eyes to everything that is going on around him, and then when his rivals have perhaps built a very important trade by the user of indicia which he might have prevented their using had he moved in time, come to the Court and say: 'Now stop them from doing it further, because a moment of time has arrived when I have awakened to the fact that this is calculated to infringe my rights.' Certainly not. He is bound, like everybody else who wishes to stop that which he says is an invasion of his rights, to adopt a position of aggression at once, and to insist, as soon as the matter is brought to his attention, or as soon as, in the opinion of the Court, it ought to have come to his attention, to take steps to prevent its continuance; it would be an insufferable injustice were the Court to allow a man to lie by while his competitors are building up an important industry and then to come forward, so soon as the importance of the industry has been brought home to his mind, and endeavour to take from them that of which they had legitimately made use; every day when they used it satisfying them more and more that there was no one who either could or would complain of their so doing. The position might be altogether altered had the user of the factor or the element in question been of a secretive or surreptitious nature; but when a man is openly using, as part of his business, names and phrases, or other elements, which persons in the same trade would be entitled, if they took steps, to stop him from using, he gets in time a right to sue them which prevents those who could have stopped him at one time from asserting at a later stage their right to an injunction.

In (1906) 23 R P C 1,[5] acquiescence for four years was held to be sufficient to preclude the plaintiff from succeeding. In 1897 the plaintiffs in that case registered the word 'glacier' as a trade mark in respect of transparent paper as a substitute for stained glass. As the result of user the word had become identified with the plaintiffs' goods. In 1900 the defendants commenced to sell similar goods under the name "glazine." In 1905 the plaintiffs commenced an action for infringement. The defendants denied that the use of the word "glazine" was calculated to deceive and also pleaded acquiescence. A director of the plaintiff company admitted that he had known of the use of the word "glazine" by the defendants for four years—he would not say it was not five years. It was held that the plaintiffs failed on the merits and by reason of their delay in bringing the action.

Delay simpliciter may be no defence to a suit for infringement of a trade mark, but the decisions to which I have referred to clearly indicate that where a trader allows a rival trader to expend money over a considerable period in the building up of a business with the aid of a mark similar to his own he will not be allowed to stop his rival's business. If he were permitted to do so great loss would be caused not only to the rival trader but to those who depend on his business for their livelihood. A village may develop into a large town as the result of the building up of a business and most of the inhabitants may be dependent on the business. No hard and fast rule can be laid down for deciding when a person has, as the result of inaction, lost the right of stopping another using his mark. As pointed out in (1897) 14 R P C 37[3] at p. 43, each case must depend on its own circumstances, but obviously a person cannot be allowed to stand by indefinitely without suffering the consequence.

I consider that in this case there is ample material to support the finding that the appellants have lost their right of action against the respondents by reason of their acquiescence in the respondents' use of the mark complained of. During a period of four years the respondents built up a very large business and it has not been suggested, indeed it would be idle to do so, that the appellants did not know of all that was going on. In addition to the capital sunk in their business the respondents spent during

3. (1897) 14 R P C 37, Rowland v. Michell.
4. (1923) 40 R P C 133, Codes v. Addis and Son.
5. (1906) 23 R P C 1, Mc. Caw Stevenson & Orr Ltd. v. Lee Bros.

this period Rs. 20,000 in popularizing the mark. There is no question of the respondents having the intention to steal the appellants' trade. They were dealing in a better class of goods and as I have already stated it was admitted by the appellants in this Court that the respondents adopted the "Baby" mark in ignorance of the fact that the appellants were using it. On 27th August 1934 a Madras piecegoods merchant named K. R. Narayana Ayyar wrote to the appellants stating that he desired to use the "Baby" mark on piecegoods and asked whether they had any objection to this course. It was pointed out to the appellants that the respondents were using this mark on their goods and it was suggested that he should be allowed the same privilege. The letter concluded:

> If, however, you have any objection to my using "Baby" brand on my goods, kindly let me know of same immediately on receipt of this letter and also let me know as to the reason for you having allowed Messrs. Alathur Abboy Chetty & Co., Madras, to use 'Baby' brand. I have addressed this letter to you because, I understand that you are the prior user of "Baby" brand and not Messrs. Alathur Abboy Chetty & Co.

On 4th September 1934 the appellants replied as follows:

> You should know that we have long registered our "Baby" trade mark and running in all the markets. Any colourable imitation of our marks will make you liable under law for penalty for 'infringement of trade mark' which kindly note.

No reference was made in this letter to the fact that the respondents had been using the mark. K. R. Narayana Ayyar wrote again the next day to the appellants as no reference was made to the position of the respondents in the appellants' reply. In this letter he said:

> As stated in my letter of the 27th ultimo Messrs. Alathur Abboy Chetty & Co., Madras, have been using "Baby" brand and I am very much surprised to see that since you say that you have long registered your 'Baby' trade mark, they, the said Messrs. Alathur Abboy Chetty & Co., Madras, also should be using "Baby" brand. How is this? I am advised that any trade mark used by more than one is a common property, to say plainly, it is not the exclusive property of any one, and can therefore be used by others also, having regard to the fact, that 'Baby' brand is being used by you and also by Messrs. Alathur Abboy Chetti & Co., Madras. I have no hesitation in saying that the said 'Baby' brand is a common property and can therefore be used by me and others also. If you alone had been using 'Baby' brand and not anybody else, then it is different matter altogether, but now there is also another person using the 'Baby' brand.

The reply to this letter was sent on 13th September 1934 and consisted of these words:

> In reply to your letter dated the 10th instant we wish to refer you to our letter No. 1973, dated 4th September 1934.

There is here a deliberate evasion of K. R. Narayana Ayyar's pointed question with regard to the respondents' user of the mark and the next day he wrote to the appellants a letter in which he said:

> Unless you give me a satisfactory reply to the points raised in my letter of 5th September 1934, I am advised that you are not the exclusive owner of the "Baby" brand, because it is also being used by another party, Messrs. Alathur Abboy Chetty & Co., and you have therefore no right to prevent me or anybody else from using "Baby" brand on piecegoods.

To this letter no reply at all was sent and the present suit was not launched till some ten months later. Obviously the appellants were unable to give an effective reply to these pointed questions because they knew that the respondents had built up a very large business by the use of this mark. No one from the appellants' firm has ventured to go into the witness-box to explain why they stood by for this long period and allowed the respondent to build up this large business associated with the "Baby" mark. The appellants have also failed to give any indication of the size of their business. In these circumstances and bearing in mind that the respondents' goods are of better quality and higher in price there is ground for the contention raised by the learned advocate for the respondents in argument that this suit has not been filed bona fide, but for the purpose of enabling the appellants to take advantage of the successful efforts made by the respondents to popularize the mark. In my opinion, it would certainly involve grave injustice to the respondents if the appellants were allowed to step in at this late stage and stop a business which has been built up openly as the result of the energy of the respondents and the expenditure by them of large sums of money. As the appellants' suit fails by reason of their acquiescence in the use of the mark by the respondents I agree with the learned Judge that it is unnecessary to decide whether the respondent's pleas of abandonment and user are well founded.

With regard to memorandum of cross-objection I consider that the respondents should have their costs in the Court below. That they adopted the mark in ignorance of the fact that it was being used by the appellants is not disputed, and in answer to a question put by the Court, Mr. Nugent Grant, on behalf of the appellants, made it clear that the appellants were not suggest-

ing that the respondents had continued to use this mark in order to steal the appellants' business. Where a plea of acquiescence or abandonment succeeds, especially where the defendant has taken the trade mark of another in ignorance and has used it in the mistaken belief, but sincerely entertained, that he is acting within the law it would be wrong to deprive him of his costs. I would dismiss the appeal with costs and allow the cross-objections with costs. There will be a certificate for two counsel in both Courts.

Horwill J. — I agree.

C.R.K./G.N. *Appeal dismissed.*

*** * A. I. R. 1941 Madras 36**

Full Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

Ponnapalli Venkatappayya and another — Appellants

v.

Pushadapu Ramaswami and others — Respondents.

Appeals Nos. 185 and 186 of 1938 and Civil Misc. Petns. Nos. 4171 and 4172 of 1940, Decided on 30th September 1940, against appellate orders of Sub-Judge, Tenali, D/-31st March 1938.

* * *Civil P. C. (1908), S. 144 — Landlord obtaining possession of his tenant's land in execution of decree for ejectment—Decree subsequently reversed — Application by tenant under S. 144 for mesne profits — Landlord is entitled to deduct rent payable by tenant from mesne profits for period of his possession* : 3 M L W 405 : A I R 1917 Mad 314 : 34 I C 2, OVERRULED.

Where a landlord obtains possession of his tenant's land in execution of a decree for ejectment and on the subseqent reversal of the decree the tenant applies under S. 144 for restitution and mesne profits the landlord is entitled to deduct from the mesne profits the rent which would have been payable by the tenant for the period of his possession : 3 MLW 405 : A I R 1917 Mad 314 : 34 IC 2, *OVERRULED;* A I R 1923 Mad 557 and A I R 1937 Cal 478, *Approved.* [P 37 C 1]

The tenant however is entitled to interest on mesne profits from the date of the order for payment thereof to the date of payment or realisation. [P 37 C 2]

V. Govindarajachari — for Appellants.

Y. G. Krishnamurthy — for Respondents.

Leach C. J. — These appeals can conveniently be disposed of in one judgment. They arise out of two suits, O. S. No. 209 of 1922 and O. S. No. 212 of 1922 of the Court of the District Munsif of Repalle. The appellants were the plaintiffs. They asked for the ejectment of the respondents from lands which the respondents had held as their tenants, notices to quit having been served upon them. It was the case of the appellants that the notices terminated all right of occupancy. The respondents strongly contested this contention. Their case was that the lands constituted part of an estate within the meaning of the Madras Estates Land Act, 1908. The District Munsif rejected the respondents' plea and decreed the suits. The District Munsif's judgment was concurred in by the subordinate Judge of Tenali and by this Court in second appeals. The respondents however carried the matter to the Privy Council and the Judicial Committee reversed the decisions of this Court and of the Courts below on the ground that the lands did form part of an estate within the meaning of the Act. Consequently the appellants were only entitled to the melwaram right, the kudiwaram right being vested in the respondents.

As the result of the decree passed by the District Munsif the appellants went into possession on 3rd July 1923, but by reason of the decision of the Privy Council the respondents were entitled to resume possession, which they did soon after judgment had been pronounced by Judicial Committee. Notwithstanding this the respondents did not apply for restitution until 1936. Having won in the Privy Council they were entitled under the provisions of S. 144, Civil P. C., to be placed in the position which they would have occupied but for the decrees passed by the District Munsif. Therefore they were entitled to recover from the appellants what they had lost by being deprived of the kudiwaram right. They claimed however that they were entitled to the whole of the mesne profits of the lands from 30th September 1922, the date on which the suits were decreed, to the date in 1931 when they regained possession, without any deduction in respect of rent. In the course of the hearing of the restitution application before the District Munsif the respondents abandoned their contention that they were entitled to restitution as from 30th September 1922, and accepted 3rd July 1923, the date on which the appellants went into possession, as being the proper starting point, as it obviously was. The District Munsif held that the period expired in 1929 when the respondents regained possession and not in 1931, but he upheld their main contention that they were entitled to the whole of the profits of the lands without any deduction for rent. In this connexion the District

Munsif relied on 3 M L W 405.[1] The appellants appealed to the Subordinate Judge of Tenali, who also felt himself bound by that decision and therefore concurred in the judgment of the District Munsif. The present appeals are from the decrees of the subordinate Courts. They have been placed before a Full Bench as King J., before whom the appeals came in the first instance, was of the opinion that the decision in 3 M L W 405[1] required re-consideration.

In 3 M L W 405[1] Sadasiva Iyer and Moore JJ. held in similar circumstances that the tenants who had been dispossessed as the result of proceedings taken by the landholder were entitled to the mesne profits of the lands for the period for which they were out of possession without any deduction of rent. The basis of this decision was that the expression "mesne profits" meant "those profits which the person in wrongful possession of such property actually received." The learned Judges however overlooked the real position. The tenants were only entitled to restitution and therefore they were merely entitled to be put in the position which they would have been in had they been enjoying the kudivaram right throughout the period of dispossession. The value of the kudivaram right is represented by the net value of the produce, less the portion which must be delivered to the landholders as the holder of the melwaram right. It is not a matter of the awarding of mesne profits in the sense ordinarily meant. As already indicated the tenants are merely entitled to recover the value of that part of the produce of the land which would have been theirs had they been allowed to remain in possession. We consider that the decision in 3 M L W 405[1] is clearly wrong and should be overruled. It may be added that the correct view was taken by another Bench of this Court (Oldfield and Venkatasubba Rao JJ.) in 44 M L J 486.[2] A similar decision was given by the Calcutta High Court in 41 C W N 1015.[3] It follows that the appellants are entitled to succeed in their appeals.

The respondents have filed memoranda of cross-objections. They raise two questions. The first one is whether the subordinate Judge has correctly calculated the yield from the lands. The second one is whether the respondents are entitled to more interest than was granted to them. There is no substance in the first contention. The subordinate Judge after a detailed examination of the evidence came to the conclusion that the District Munsif was right in the figures at which he arrived. As there was evidence to support the finding of the subordinate Judge it is conclusive. The first point therefore goes, but there is substance in the second contention. The subordinate Judge refused to allow the respondents interest on the amounts which they were entitled to by way of restitution after the date of the institution of the applications. Here he was wrong. It is true that the respondents were guilty of delay, but having succeeded they were entitled to an order requiring the appellants to pay interest from the date of the order to the date of payment or realization. The two cases will be remanded to the trial Court with the direction to calculate in the light of this judgment the sums to which the respondents are entitled and they will receive interest at the Court rate on the amounts due from the date of the order of the District Munsif on the restitution applications to the date of payment or realization. The appellants have filed applications for the scaling down of the debts under the Madras Agriculturists Relief Act. These applications will also be remanded to the trial Court for disposal. The parties will pay and receive proportionate costs throughout.

C.R.K./G.N. *Appeals allowed.*

1. ('17) 4 AIR 1917 Mad 314 : 34 I C 2 : 3 M L W 405, Lakshminarasimha Rao v. Seetharamaswami.
2. ('23) 10 AIR 1923 Mad 557 : 73 IC 670 : 44 MLJ 486, Ramachandradu v. Venkatanarasimha Rao.
3. ('37) 24 AIR 1937 Cal 478 : 173 I C 391 : 41 C W N 1015, P. C. Tagore v. Mathura Kanta Das.

A. I. R. 1941 Madras 37

WADSWORTH J.

Yelamanchilli Basavayya — Petitioner

v.

Jaldu Manikyala Rao — Respondent.

Civil Revn. Petn. No. 534 of 1939, Decided on 1st May 1940, to revise order of Dist. Munsif, Masulipatam, D/- 11th March 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 23 — Court cannot reopen sale held before 1st October 1937.

Section 23 empowers the Court to reopen sales held under a decree on or after 1st October 1937 notwithstanding the fact that the sales have been confirmed. There is no provision in the Act empowering the Court to reopen a sale held before the 1st October 1937 : O. S. A. No. 21 of 1939, *Ref.*

[P 38 C 1]

K. Krishnamurthy — for Petitioner.

N. Vasudeva Rao — for Respondent.

Order. — This petition raises a question under Act 4 of 1938. The petitioner was the judgment-debtor under a decree which was executed on 20th September 1937 by the sale

of five acres of his property. For some reason apparently connected with proceedings under the Debt Conciliation Act, the sale was not confirmed until February 1939. Meanwhile, Madras Act 4 of 1938 having come into force, the debtor applied on 20th June 1938 to scale down the decree. He does not, however, appear to have filed any application under S. 20 to stay proceedings in execution of the decree. The result was that, before the application under Madras Act 4 of 1938 was heard, in the ordinary course a confirmation order was passed with reference to the sale held in September 1937. In March 1939 the learned District Munsif dismissed this application as incompetent, the sale having been held before the date 1st October 1937 stipulated in S. 23 of the Act and the decree having been satisfied. It seems to me that the decision of the learned District Munsif is correct. Section 23 empowers the Court to reopen sales held under a decree on or after 1st October 1937 notwithstanding the fact that the sales have been confirmed. There is no provision in the Act empowering the Court to reopen a sale held before 1st October 1937. Assuming but not deciding that the petition at the date on which it was filed was competent, on the theory that the proceeds of the sale had not yet been applied to the satisfaction of the decree, by the time when the order of the District Munsif was passed, there was no decree outstanding and nothing left which could be scaled down and certainly the District Munsif had no power merely because this application was filed before the confirmation of the sale to treat the sale as null and void by reason of that application. This view is in accordance with that expressed by the Bench which decided O. S. A. No. 21 of 1939. In the result the petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 38

LAKSHMANA RAO J.

In re K. Sannaya — Petitioner.

Criminal Revn. Case No. 551 and Petn. No. 524 of 1940, Decided on 4th September 1940, to revise order of Stationary Sub-Magistrate, Coondapur, D/- 11th July 1940.

Government of India Act (1935), S. 270 — Postman charged under S. 471, Penal Code, for misappropriating amount of money order entrusted to him by forging thumb impression of payee and using forged document by returning it to post office in token of payment—Consent of Governor-General is necessary for prosecution.

Where a charge sheet has been filed against a Postman under S. 471, Penal Code, for misappropriating the amount of a money order entrusted to him by forging the thumb impression of the payee in the money order form and using the forged document by returning it to the post office in token of payment the consent of the Governor-General is necessary for the prosecution for the offence under S. 471, Penal Code. [P 38 C 2]

K. S. Jayarama Ayyar and G. Gopalaswami — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The petitioner is a Postman attached to the Coondapur Sub-post Office and a charge sheet has been filed against him for offences under Ss. 409, 467 and 471, Penal Code, for misappropriating the amount of a money order entrusted to him by forging the thumb impression of the payee in the money order form and using the forged document by returning it to the post office in token of payment. The offences were committed on 10th April 1939, i. e., before the relevant date as defined in S. 270, cl. 3, Government of India Act, which in relation to acts done by persons employed about the affairs of the Government of India is the date of the establishment of the Federation, and being a servant of the Crown in a department of the Central Government the petitioner would unquestionably be a person employed in connexion with the affairs of the Government of India. Section 270 (1) provides that no proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India before the relevant date except with the consent, in the case of a person who was employed in connexion with the affairs of the Government of India, of the Governor-General in his discretion and the forged document was used in the execution of the duty of the petitioner as Postman of returning the paid money order forms to the Post Office in token of having made the payment. The consent of the Governor-General is therefore necessary for the prosecution for the offence under S. 471, Penal Code, but there is no bar to the trial of the offence under Ss. 409 and 467, Penal Code, and the trial can proceed in respect of these charges.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1941 Madras 39

PANDRANG ROW AND ABDUR RAHMAN JJ.

Tiruchendur Sri Subramaniaswami Temple through its Dharmakartha A. C. S. Kandaswami Reddiar — Appellant

v.

P. Ramasamia Pillai (insane) through his wife and guardian R. Muthara-mal and others — Respondents.

Appeal No. 360 of 1937, Decided on 1st May 1940, against decree of Sub-Judge, Tuticorin, D/- 23rd February 1937.

Will — Construction — Will held conveyed absolute estate to testator's son.

A testator whose wife had predeceased him and who had only one son provided as follows: "I have bequeathed to my son the right to all my properties and moneys etc., and he shall alone enjoy them. If he or his son has no child the said properties shall pass to certain deity."

Held that the bequest to the son conveyed an absolute estate to him and the last sentence did not operate as a condition affecting the character of the bequest made in favour of the son.

[P 39 C 2]

K. V. Sesha Aiyangar and T. Thyagaraja Ayyar — for Appellant.

K. R. Rama Aiyar — for Respondents.

Pandrang Row J. — The main point argued in this appeal is that the finding of the Court below on a question of construction of a will is wrong. The will is one about which there is no dispute so far as its execution and validity are concerned. The testator was a retired Deputy Collector, Minakshisundaram Pillai, who was lying very ill in hospital at the time he made the will and died the very next day. The will is very short, being in fact, a model of brevity and it runs as follows:

I am now an in-patient in the hospital at Madura, having undergone an operation for carbuncle. As I have suspicions about my surviving, I have bequeathed to my son Pichai Pillai the right to all my properties and moneys etc., and he shall alone enjoy them. If he or his son has no child, the said properties shall pass to Subramaniaswami at Tiru-chendur.

This was executed on 20th May 1919. The next day a codicil was added to the effect that with the money due to the testator his elder brothers should purchase immovable properties such as lands etc., in the name of his son. The testator died on the same day soon after the codicil was executed. The question is whether there is an executory devise in favour of subramaniaswami under the will. If it can be regarded as containing an executory devise in favour of the deity, it is obvious from *Soorjeemony Dossee* v. *Denobundoo Mullick*[1] and the subsequent cases which are all referred to in a recent judgment of their Lordships of the Judicial Committee in 51 M L W 493[2] that there is nothing in the Hindu law which makes such a devise void or invalid. The real point therefore for our determination is whether on a proper construction of the will it can be regarded as containing only a conditional bequest in favour of the son or, in other words, whether there is an executory devise in favour of the deity. The words used in the will are very simple and there is no dispute about the correctness of the translation of the will which is in Tamil. The two sentences are not connected with each other except that one follows the other. In other words there is no connecting conjunction and there is nothing to show that the last sentence was intended to operate as a condition affecting the character of the bequest made in the previous sentence in favour of the son. The bequest to the son in the earlier sentence is unconditional and appears to convey an absolute estate to him. There is nothing improper or unreasonable in this construction, because the bequest is one made by the testator on his deathbed to his only son, a minor, the testator's wife having predeceased him and there being no other child. There is thus no reason to suppose that it was intended to give only a limited estate to the son who, it must be remembered, would have taken an absolute estate of inheritance if there had been no will at all.

The question therefore would arise whether, in spite of these considerations, the last sentence in the will must be read as if it imposed a condition affecting the character of the bequest in favour of the son. After careful consideration we see no reason to take this view which has been pressed before us on behalf of the appellant. It seems to us as if the testator merely as an afterthought wanted to determine the devolution of the property in case his son died without issue and not in any way to limit either the character of the estate that was given by the earlier bequest in favour of the son or to make it conditional and liable to be divested at his death without issue. In this view of the case which, though supported by other reasons, is the view which has commended itself to the Court

1. ('61-63) 9 M I A 123 : 1 Sar 291 (PC).
2. ('40) 27 AIR 1940 P C 45 : 187 I C 108 : I L R (1940) 1 Cal 415 : I L R (1940) Kar 109 : 67 I A 129 : 51 M L W 493 (PC), Gadadhar Mullick v. Official Trustee of Bengal.

below, it is not necessary to consider whether, if the bequest in favour of the son is to be regarded as conditional or if it should be assumed that there is an executory devise in favour of the deity, the conditions which the law imposes on such devises have been satisfied in the present case. We may, however, add that we are not satisfied that any such condition has been violated in this case. In view of the construction which we find it impossible to avoid, it follows that the principal ground of appeal must fail.

It is, however, sought to be argued that, even though the appeal has to fail on this ground, nevertheless the lower Court ought to have given a decree for actual partition in respect of these shares of the plaint property which are covered by the compromises between some of the defendants and the plaintiff-appellant. There might have been a good deal to be said in support of this contention if these defendants who had compromised and whose shares are now sought to be partitioned and handed over to the plaintiff-appellant had been made parties to this appeal. The plaintiff-appellant, however, deliberately refrained from making them parties because the case had been compromised so far as they were concerned. Such being the case, it is not now open to the plaintiff-appellant to ask that any decree should be made for the purpose of actual partition when these defendants are not parties to the appeal. And we may as well add that a belated oral application made after this defect was pointed out is certainly not deserving of serious attention. The result is the appeal fails and it is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1941 Madras 40

KING J.

Oorakkarai Seetharama Chettiar — Appellant

v.

Sheik Abdul Rahiman Sahib and others — Respondents.

Appeal No. 141 of 1938, Decided on 12th April 1940, against Appellate Order of Dist. Court, Salem in A. S. No. 148 of 1937.

Limitation Act (1908), Art. 182 (2) — Word "appeal" in Art. 182 (2) means appeal which affects decree sought to be executed— Application by judgment-debtor more than three years after passing of decree for recording satisfaction dismissed—Appeal by judgment-debtor also dismissed — Appeal does not fall within purview of Art. 182 (2) — Decree-holder cannot claim date of dismissal of appeal as starting point of limitation.

The word "appeal" in Art. 182 (2) means any appeal which 'affects' the decree sought to be executed. It does not mean any appeal the result of which may affect not the decree itself, but only the decree-holder's right to execute it at a particular time and in particular circumstances. [P 41 C 2]

The judgment-debtor more than three years after the passing of the decree applied to the executing Court to record satisfaction of the decree. The application however was dismissed. An appeal from the order dismissing the application was also dismissed. The decree-holder contended that under Art. 182 (2) time began to run only from the date on which the appeal was dismissed :

Held **that the judgment-debtor's appeal was not an appeal within the meaning of Art. 182 (2), and hence time did not run from the date of its dismissal: AIR 1939 Mad 157, *Rel. on*; AIR 1932 P C 165, *Expl.* and *Rel. on.** [P 41 C 2]

K. Rajah Aiyar — for Appellant.

P. S. Narayanaswami Aiyar— for Respondents.

Judgment.—This appeal arises out of an application filed on 21st August 1935 to execute a decree passed on 9th November 1929 and the question is whether it is barred by limitation. Prima facie it is so barred, but the appellant claims that by reason of certain proceedings taken by the respondent he is entitled to count time as beginning to run at a much later date. In November 1931 respondent applied to the executing Court to record satisfaction of the decree. The Court dismissed his application. He appealed. His appeal was dismissed on 20th March 1933. Appellant contends that under Art. 182 (2), Limitation Act, time began to run only from that date.

The point for determination is whether the appeal by the respondent is an appeal within the meaning of that Article. I have been referred by appellant's learned advocate to a judgment of a Bench of which I was myself a member, reported in I L R 1939 Mad 252,[1] and have been asked to extend the principles of that judgment to the facts of this case. To some degree that is a very plausible argument. In the judgment prominence is given to the rule formulated by the Privy Council in 60 Cal 1,[2] that

> so long as there is any question sub judice between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage.

That rule certainly applies to the facts in this case; for, if respondent's appeal had been allowed appellant would have had no

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1. ('39) 26 AIR 1939 Mad 157 : 181 I C 491 : (1938) 2 M L J 1048 : I L R (1939) Mad 252, Sriramachandra v. Venkateswara.
2. ('32) 19 A I R 1932 P C 165 : 137 I C 529 : 59 I A 283 : 60 Cal 1 (PC), Nagendranath De v. Sureschandra De.

right to execute his decree. And, from a practical point of view, there is no difference between a decree-holder whose decree may be set aside, and a decree-holder who may be told by the Court that his decree has already been satisfied. But I cannot think that the rule so formulated by the Privy Council is intended to be the sole guide for the interpretation of the Article. On p. 255 of I L R (1939) Mad 252,[1] the meaning of the word 'appeal' is discussed; and it is held that an appeal in this context means any appeal which 'affects' the decree sought to be executed. It cannot be successfully argued that respondent's appeal in the present case 'affects' the decree in any way. However it may have been decided the decree remains valid and without modification. There is here in the words of their Lordships of the Privy Council in 60 Cal 1,[2] no application 'to set aside or revise the decision of a Subordinate Court' which is embodied in the decree; and on p. 7 of the same judgment their Lordships emphasise the principle that in construing the provisions of the Limitation Act 'equitable considerations are out of place, and the strict grammatical meaning of the words is the only safe guide.' To accept the contention of the appellant's learned advocate that 'appeal' in Art. 182 means any appeal the result of which may affect not the decree itself, but only the decree-holder's right to execute it at a particular time and in particular circumstances is to apply just one of those equitable considerations against which the warning of the Privy Council is directed. I am accordingly of opinion that the present case does not fall within the principles in I L R (1939) Mad 252[1] and that if I am bound by that decision I am bound by it to dismiss and not to allow this appeal. The appeal is dismissed with costs. Leave granted.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 41

LAKSHMANA RAO J.

In re Vitta Venkatasubbarayudu — Petitioner.

Criminal Revn. Case No. 731 and Petn. No. 688 of 1939, Decided on 7th November 1939, to revise order of Sub-Divisional Magistrate, Tenali, D/- 21st April 1939.

Penal Code (1860), S. 379 — Auction sale of land belonging to accused — Delivery of land ordered but not delivery of crop raised by lessee of accused after sale — Removal of crop by accused held not offence under S. 379.

In execution of a decree against the accused his land was sold. Delivery of the land was ordered but delivery of the crop which was raised by the lessee of the accused after Court sale was not ordered. The accused removed the crop :

Held that the removal of the crop could not be said to be dishonest and the accused could not be convicted under S. 379. [P 41 C 2]

K. Kameswara Rao — for Petitioner.

Public Prosecutor — for the Crown.

Facts.—The petitioner was convicted of an offence under S. 379, I. P. C., by the Stationary Sub-Magistrate of Tenali for an offence of removing the paddy from the land purchased by P. W. 1, auction-purchaser in court auction. The appellant was indebted to the daughter of P. W. 1 and in execution of a decree obtained by her against the petitioner his land was put to sale and purchased by P. W. 1 in court auction on 14th March 1938. The sale was confirmed on 19th April 1938 and delivery was made by Court amin on 3rd November 1938 with crop on the land. The crop was harvested by P. W. 1 on 12th December 1938 and stocked on the land purchased and on 22nd December 1938 the crop was found removed to the another land belonging to the petitioner. The petitioner was charged under S. 379, I. P. C., for theft of the crop. The defence was that the land was leased out to D. W. 3, who cultivated the land and raised the crop and that it was he who cut the crop and removed it to another field and that they never knew of the delivery of the land. On evidence the Stationary Sub-Magistrate found the petitioner guilty and convicted him and on appeal the Divisional Magistrate confirmed the conviction. Against this order of conviction, the petitioner has preferred this revision petition among other grounds on the ground that only the land was delivered to P. W. 1 and not the crop and since it is not the case of P. W. 1 that he raised the crop he had no right to the crop and so the removal of the crop by the person who raised it is no offence and much less an offence of theft.

Order.—The crop was raised by the lessee of the petitioner after the court sale and delivery of the crop was not ordered by Court. The removal of the crop cannot therefore be said to be dishonest, and the conviction of the petitioner under S. 379, I. P. C., is unsustainable. It is therefore set aside and the fine if levied will be refunded.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1941 Madras 42

WADSWORTH AND VENKATARAMANA RAO JJ.

M. M. Shahul Hameed Marakayar and others — Appellants

v.

Kazi Mohammad Hussain Sahib and others — Respondents.

City Civil Court Appeal No. 39 of 1937, Decided on 6th September 1939, against decree of Addl. City Civil Judge, Madras, in O. S. No. 651 of 1936.

(a) Mahomedan Law—Mutwalli—Mutwalli of mosque himself being peish imam — Such person surrendering his functions as mutwalli to managing committee of mosque—Power to dismiss that person acting as peish imam cannot be said to have been vested in committee.

Doubtless it is customary in many mosques for the mutwalli to exercise full disciplinary powers over the servants of the mosque such as peish imam. But this power cannot be said to have vested in the mutwalli of a mosque, if the mutwalli was himself the peish imam because it is absurd to contemplate the exercise of the power of dismissal by the individual who is himself liable to be dismissed. Hence, the surrender by such person of his functions as mutwalli to the managing committee of the mosque cannot be said to have invested that committee with a power of dismissal over that person, which he as mutwalli could not have exercised. [P 42 C 2 ; P 44 C 1]

(b) Mahomedan Law — Mutwalli — Power of nomination and appointment of imam to mosque in absence of mutwalli by whom to be exercised, stated.

In the absence of a mutwalli the power of nomination and appointment of an imam to a mosque is given to the wakif's descendants and the member of his family preferentially to others. If the person appointed by the wakif is incompetent or unfit, the congregation have a right to select a more fit person but with the proviso that an application will have to be made to the kazi for the removal of the incompetent servant and the appointment of the person selected by the congregation. [P 44 C 1]

P. Viswanatha Iyer and S. K. Ahmed Meeran — for Appellants.

C. Srinivasachari and C. A. Mohamad Ibrahim — for Respondents.

Wadsworth J. — This appeal arises out of a suit brought by respondent 1 for an injunction restraining the defendants (appellants) from interfering with him in performing his services as peish imam in the Masjiday Mohmood, Pudupet, Madras. He also prayed for damages. The suit was decreed and the defendants appeal. We are this day passing judgment in a connected appeal (C. C. C. A. No. 36 of 1935) from a suit brought by the present defendants against the present plaintiff for an injunction restraining him from interfering with the defendants' management of the same mosque and from collecting subscriptions in the guise of mutwalli of that mosque. It is alleged that the Pudupet mosque was founded by one Ghulam Mohammad in 1849 and has been financed from its inception by public subscriptions. It was founded to serve the needs of the Mahomedans living in the neighbourhood of Pudupet. The first mutwalli was the maternal grandfather of the plaintiff. The plaintiff bases his title to the offices of both of mutwalli and peish imam on what is called a towliatnama (Ex. 1) of the year 1887 in which the plaintiff's grandfather purports to assign to the plaintiff the offices of mutwalli and peish imam. The instrument purports to be attested by Ghulam Mohammad, the original founder of the mosque. The lower Court has given various reasons for rejecting this document as a forgery. Besides those reasons set forth by the learned Judge, there are two circumstances which in our opinion go to confirm this conclusion. One is the improbability that Ghulam Mohammad who founded this mosque in 1849 would have been alive in 1887. There is of course no evidence of his death, but ordinarily the founder of a mosque would be a man of some standing in the community and it is unlikely that in 1849 he was very young. Even if he was in early middle age, it is hardly probable that he would have been alive 38 years later. The more decisive circumstance is the fact that the plaintiff at the time of this towliatnama appears to have been only about 12 years old and it is not very probable that the offices of mutwalli and peish imam would have been conferred upon an immature boy. The probability therefore seems to be that this document is not genuine.

In our opinion however this does not seriously affect the plaintiff's case, for it is common ground that the plaintiff did exercise the functions of mutwalli and peish imam of this mosque without challenge to his title for very many years upto the year 1918, when the leading members of the congregation including the plaintiff himself formed themselves into a registered society for the purpose of managing the affairs of the mosque and raising subscriptions to finance it. It is indubitable that this society known as the Masjiday Mohamood Jamait Managing Committee was in control of the business affairs of the mosque from 1918 until the quarrels started in 1932. During this period it appears that the office of mutwalli was treated as having lapsed, the function of the mutwalli being performed by the com-

mittee. The plaintiff, though he ceased to describe himself as the mutwalli and ceased to exercise the functions of that office, continued to be one of the two peish imams of the mosque and in that capacity he was paid a salary by the committee. He also functioned for a considerable period as the assistant secretary of the committee and received additional emoluments for that office. In 1932 quarrels began and the plaintiff resigned from the committee and repudiated its authority. He also attempted to revive the office of mutwalli which he had not in fact exercised for a period of about 14 years. In the connected appeal we have held that the Jamait Committee, whatever be the defects of its original constitution, has prescribed for the right to manage the secular affairs of the mosque and to perform those functions which had hitherto been performed by the mutwalli and that it is not open to the present plaintiff to revive the lapsed office of mutwalli by virtue of which he claims the right of exercising those functions which have in effect been established as the legitimate functions of the Jamait Committee.

It is contended for the appellants in the present appeal that once their committee is recognized as the legitimate successor of the mutwalli with his powers of control over the mosque and its servants, it follows that the committee has the right to dismiss the plaintiff from his office of peish imam of the mosque; and that the plaintiff having repudiated the authority of his master, there can be no question as to the propriety of his dismissal. It seems to us that this argument overlooks the weakness of the position of the committee based as it is on prescription. It does not appear that any powers were conferred upon the committee at its inception otherwise than by the general consent of the congregation of the mosque including the plaintiff himself. The nature of the objects with which this committee started its work can be ascertained from its memorandum of association. Quite clearly it was intended firstly to collect subscriptions for the maintenance of the mosque and secondly to pay the expenses of the committee and of the mosque and utilise any balance for religious, educational and charitable purposes connected with the mosque and for the creation of endowments for the mosque. The rules purport to carry out these objects, but do not expressly confer upon the committee any disciplinary powers. The proceedings of the committee throughout the following years indicate that the committee has exercised a general control over the servants of the mosque including the two peish imams, has required that they should not absent themselves without leave, has reproved them for unpunctuality and has paid the wages and when subscriptions were insufficient to meet the wages has decided on the proportionate reductions. There is a record of the removal from service of an acting muazzin, but even that is not clearly shown to have been a disciplinary act. Taking the history of this period as shown in the records, it must be conceded that there is no instance of an assertion by the committee of a right to punish the peish imam, though there are instances of the exercise of a general supervision over him along with other servants.

It is contended that if the committee has power to supervise and control, it must necessarily have a power of dismissal in case its authority is flouted. It is doubtful whether this proposition is sound. The peish imam was certainly not appointed by this committee. Whatever be the origin of the plaintiff's appointment, he had certainly been in unquestioned enjoyment of the office of peish imam for very many years before the committee came into being. Although the committee took over the functions hitherto exercised by the mutwalli, it never described itself as a mutwalli of the mosque and there are obvious difficulties in asserting that the surrender by the plaintiff himself of the functions of mutwalli to the committee automatically invested this committee with the power of dismissal of the peish imam. Doubtless it is customary in many mosques for the mutwalli to exercise full disciplinary powers over the servants of the mosque. But this power cannot have vested in the mutwalli of the suit mosque, for the mutwalli was himself the peish imam and it is absured to contemplate the exercise of the power of dismissal by the individual who is himself liable to be dismissed. It seems therefore necessary to postulate that at the time when the plaintiff was the mutwalli, the disciplinary control over him in his capacity of peish imam must ultimately have resided elsewhere, whether in the congregation as a whole or in the descendants of the founder or in the Court as representing the Kazi. The natural conclusion therefore is that the surrender by the plaintiff of his functions as mutwalli to the committee cannot have invested that committee with a power of

dismissal over the plaintiff, which he as mutwalli could not have exercised.

Ameer Ali in his Mahomedan Law (Edn. 4, p. 465) states that in the absence of a mutwalli the power of nomination and appointment of an imam to a mosque is given to the wakif's descendants and the members of his family preferentially to others. At p. 467 it is suggested that if the person appointed by the wakif is incompetent or unfit, the congregation have a right to select a more fit person but with the proviso that an application will have to be made to the Kazi for the removal of the incompetent servant and the appointment of the person selected by the congregation. Now, in this case though the committee has doubtless for many years functioned with the consent and approval of the congregation, it is not constitutionally a representative body acting for the congregation, but an independent self-constituted society owing no formal allegiance to any general body. It cannot therefore have any disciplinary powers over the staff of the mosque by the force of Mahomedan law. Any powers which it has must have been acquired by prescription or by grant. There is no evidence of any valid grant of powers to this committee. The extent of its powers must therefore be governed by the extent to which it has established those powers by the exercise of them during the 14 years during which those powers were unquestioned. There having been no acquisition during this period of a power to dismiss a peish imam of the mosque, the necessary conclusion is that the committee is not clothed with such a power.

It is contended that the absence of such a power will make the proper control of the mosque impossible. The answer to that contention is that there is now pending a suit for framing a scheme for the proper control of the mosque in which any defects in the system whereunder it is administered can be put right. For the present we are only concerned with the powers of the parties as they stood at the time when these disputes began. Our conclusion must be that the plaintiff was in lawful possession of the office of peish imam and was entitled to perform its functions and receive its emoluments and that the defendants were not clothed with any authority to remove him from that office. It follows therefore that the dismissal of the plaintiff was without authority and that the plaintiff is entitled to the injunction which he seeks. It is represented that the plaintiff does not press for the nominal damages of Rs. 25 awarded by the trial Court. The decree will therefore be modified by the exclusion of the relief of damages. In other respects the appeal is dismissed with costs. We desire to observe that this judgment in no way affects the relation between the committee and the other peish imam who is not a party.

C.R.K./D.S. *Decree modified.*

A. I. R. 1941 Madras 44

KING J.

Puthanveettil Cheeru — Appellant

v.

Chenenkeel Punnoron Chathu Nambiar and another — Respondents.

Appeal No. 14 of 1939, Decided on 24th July 1940, against appellate order of District Court, North Malabar, D/- 7th January 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 15—Assignment by original tenant — Arrears before assignment can be said to be payable by assignee—Assignee can take advantage of S. 15.

It is true that an assignee from original tenant is not personally liable to pay rent for the period before the assignment to him but, the landlord can in the final accounting between himself and the assignee insist upon the assignee's paying him the whole of the arrears as a set off against whatever might be payable to the assignee as compensation for his improvements. In a very real sense therefore the whole of the arrears is 'payable' by the assignee and the assignee can take full advantage of S. 15. [P 44 C 2]

C. K. Viswanatha Iyer — for Appellant.

P. Govinda Menon — for Respondents.

Judgment. — This appeal relates to a claim for arrears of rent by the respondent and a claim by the present tenant (the appellant) that by his payment of the rent due for Faslis 1346 and 1347 all those arrears have been wiped out under S. 15, Madras Agriculturists Relief Act. The appellant was not the original tenant but an assignee from him in 1936. The question is whether the arrears of rent claimed by the respondent are 'rent payable' by the appellant. It is true that appellant is not personally liable to pay rent for the period before the assignment to him, but it is to my mind clear that, apart from the Agriculturists Relief Act, respondent could in the final accounting between himself and appellant insist upon the appellant's paying him the whole of the arrears as a set-off against whatever might be payable to appellant as compensation for his improvements. In a very real sense therefore the whole of the arrears is 'payable' by appellant; and I cannot accept

respondent's further argument that money claimed by him as rent, and payable by appellant ceases to be rent when he pays it merely because he was never personally liable to pay it. I am of opinion that S. 15 of the Act is a section of which the appellant can take full advantage and regard it as clearly in accordance with the policy of the Legislature that an assignee should be in no worse position in this respect than an original lessee. The appeal will be allowed and the order of the District Munsif restored with costs throughout. Leave to appeal granted.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 45

WADSWORTH J.

Katachikandi Thiyyathikandi Abdulla Kaka — Appellant

v.

Kadumandra K. Muthanna — Respondent.

Appeal No. 42 of 1937, Decided on 15th August 1939, against the appellate order of Dist. Court, North Malabar, D/- 29th October 1936.

Civil P. C. (1908), S. 67 (2), Rule under, promulgated by Local Government of Coorg — Rule restraining execution of decree by sale of land does not apply when decree is transferred for execution in British India.

The rule embodying the restriction upon sales of land in execution of decrees of civil Courts, applies only to sales of land within the jurisdiction of the Local Government of Coorg. The rule cannot be read as restraining the execution of a Coorg decree for money by the sale of lands even when the decree has been transferred for execution in British India. [P 46 C 1]

O. T. G. Nambiar and C. K. Kerala Verma — for Appellant.

B. Sitarama Rao — for Respondent.

Judgment.—This appeal raises the question of the effect of a special rule promulgated by the Local Government of Coorg to govern the execution of decree in that province, upon the execution of such decrees, when transferred to a Court in British India. The appellant is the judgment-debtor. The subordinate Judge of Coorg passed a money decree against him and that decree was transferred for execution to the Court of the District Munsif of Cannanore. Under S. 67 (2), Civil P. C., the Chief Commissioner of Coorg has promulgated a rule to the effect that

> lands, houses and other buldings and all immovable property shall not be liable to attachment or sale in excution of decrees of Civil Courts in Coorg with the exception of such immovable property as shall have been mortgaged or otherwise specifically pledged as security for the debt which is the subject-matter of the decree sought to be executed.

The argument of the appellant is that this rule must be read as restraining the execution of a Coorg decree for money by the sale of lands even when the decree has been transferred for execution in British India. As the rule stands, the words 'in Coorg' might be read either as qualifying 'decrees of civil Courts' or as qualifying the words 'shall not be liable to attachment or sale in execution'. The former interpretation is possibly the more natural reading of the English words. But I am of opinion that it cannot be the proper interpretation of the clause. The reason for the rule is doubtless the curious tenures in Coorg whereunder the person in separate enjoyment of land commonly has no power of alienation without the consent of distant relatives, who are all notionally regarded as having an interest in land given for enjoyment to each member of a large family. Sub-s. (1) of S. 67, Civil P. C., expressly restricts the power of making special local rules regarding the sale of any class of interests in land in execution of decrees for money, to those cases in which the interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value. Sub-s. (2) does not contain any such restriction but it empowers the Local Government to re-enact any special rule already in force before the Code came into operation in the province. It is reasonable to suppose that the object of sub-s. (2) is to deal with cases substantially similar to those dealt with in sub-s. (1).

Having regard to the language of S. 67 (2), one must, I think, read this rule as a rule merely governing the execution of decrees within the province of Coorg, for the power to re-enact such special rules seems to contemplate only the enactment of rules restricting execution of money decrees within the local area. One may even doubt whether any local rule purporting to restrict or control the execution of decrees in another province would have any validity, having regard to the provisions of S. 40 which prescribes that where the decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province. Clearly the Code contemplates the exercise of the rule making power with reference to execution in any province by the Government of that pro-

vince. One must therefore read this special rule in the light of the general provisions of the Code of Civil Procedure and in so far as it is ambiguous, it must be interpreted having regard to the powers which the Local Government of Coorg could legally exercise under the Code of Civil Procedure. In my opinion, the Local Government of Coorg had not the power, nor is it likely to have intended to frame rules to restrict the execution of its decrees when transferred to a Court in the Madras Presidency.

I am therefore of opinion that the rule embodying the restriction upon sales of land in execution of decrees of Civil Courts, applies only to sales of land within the jurisdiction of the Local Government of Coorg. It follows therefore that the Courts below are right in holding that the decree-holder can execute his decree in the Madras Presidency by the sale of land situated there, in spite of the restrictions under the special rule upon its execution within the province of Coorg. The appeal is therefore dismissed with costs. Leave to appeal is refused.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1941 Madras 46

HORWILL J.

Jagadambal and another — Petitioners

v.

Sundarammal (minor) and others — Respondents.

Civil Revn. Petn. No. 84 of 1939, Decided on 17th April 1940, to revise order of Sub-Judge, Cuddalore, D/- 13th December 1938.

Civil P. C. (1908), O. 23, R. 1 (2) and S. 115— Suit by minor represented by next friend against widow alleging acts of waste and mismanagement —Application to amend plaint by alleging further acts of waste and mismanagement dismissed — Application to withdraw suit with permission to file fresh suit granted without indicating whether there was formal defect or not—Case held proper for interference in revision.

The grounds in R. 1 (2) (b) must be, if not ejusdem generis with the ground in R. 1 (2) (a), at any rate analogous to it: *Case law referred.* [P 47 C 1]

A minor represented by a next friend, brought a suit as a reversioner against the widow of the last male owner, in possession, alleging acts of waste and mismanagement. A number of specific acts of waste and mismanagement were set out in the original plaint. An application was put in to amend the plaint, alleging further acts of waste and mismanagement. That petition was refused on the ground that it was very belated and that the facts alleged must have come to the notice of the plaintiff's next friend long before the time alleged. The order dismissing the second application to amend was brought to the High Court in revision; and the revision petition was dismissed. The plaintiff filed an application to withdraw the suit with permission to file a fresh suit on the same causes of action. That petition was allowed but the Judge did not indicate any ground for granting permission; and there was no finding that there was a defect in the suit which prevented the plaintiff from going on :

Held that the case was proper for interference in revision. [P 48 C 1]

K. V. Sesha Iyengar and T. E. Ramabhadrachariar — for Petitioners.

A. C. Sampath Iyengar — for Respondents.

Order. — The plaintiff is a minor represented by a next friend and she has brought this suit as a reversioner against the widow of the last male owner, in possession, alleging acts of waste and mismanagement. A number of specific acts of waste and mismanagement were set out in the original plaint, which was filed on 2nd October 1933. In 1934 an application was put in by the plaintiff to be allowed to amend the plaint on the ground that fresh acts of waste had come to the notice of the next friend. That petition was allowed in the High Court. In 1938 another application was put in to amend the plaint, alleging further acts of waste and mismanagement. That petition was refused on the ground that it was very belated and that the facts alleged must have come to the notice of the plaintiff's next friend long before the time alleged. The order dismissing the second application to amend was brought to the High Court in revision; and the revision petition was dismissed. The plaintiff has now filed an application to withdraw the suit with permission to file a fresh suit on the same causes of action. That petition was allowed and the defendants have preferred this revision petition against that order.

Permission can be given to a plaintiff to file a fresh suit on the same cause of action where, in the words of O. 23, R. 1 (2), the Court is satisfied (a) that a suit must fail by reason of some formal defect or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. It has been consistently held by this Court that the sufficient grounds referred to in R. 1 (2) (b), must be *ejusdem generis* with the ground specified in R. 1 (2) (a), i. e., there must be some formal defect. Sadasiva Ayyar J., sitting with Oldfield J. in 41 MAD 701[1] doubted whether this was the case; but Oldfield J., reviewing the previous decisions

1. ('19) 6 A I R 1919 Mad 1071 : 46 I C 265 : 41 Mad 701 : 85 M L J 27, Kannuswami Pillai v. Jagathambal.

of this Court, was satisfied that that was the rule. In all the Madras cases since then, as well as in the decisions of the other High Courts, it has been held without exception that the grounds in R. 1 (2) (b) must be, if not *ejusdem generis* with the ground in R. 1 (2) (a), at any rate analogous to it. 23 M L W 525,[2] 21 M L W 282,[3] 22 M L W 535,[4] A I R 1928 MAD 1085,[5] 42 BOM L R 143[6] and AIR 1934 ALL 137[7] are among the cases quoted, where this principle has been laid down and confirmed. No cases to the contrary have been cited. It is true that a Bench of this Court in A I R 1929 MAD 36[8] allowed an amendment of a plaint where the defect was apparently not a formal one; but the question whether such an amendment could be allowed or not, did not there come up for decision and the point was not considered. In 27 Mad 377,[9] where a suit of a minor was withdrawn because the next friend was not possessed of sufficient funds to further conduct the suit, the Court set aside the order dismissing the petition to review the order of dismissal of the suit on the ground that the minor ought not to be prejudiced by making it impossible for him to agitate a genuine grievance merely because his next friend did not have any money. The suit was restored. Whether or no an application was put in to withdraw the suit with permission to file a fresh one we do not know; but that was a case in which it might be said that there was a formal defect or something analogous to it.

The principal argument of Mr. Sampath Ayyangar for the petitioner is that this Court has no jurisdiction to interfere with the learned subordinate Judge's order. He very rightly points out that the mere fact that the lower Court made a mistake in law is not a sufficient ground for interference by this Court. I also with respect agree with the learned Judges in 13 M L W 537[10] and 40 ALL 612,[11] that if the lower Court had considered whether there was a formal defect or not and had decided it wrongly, this Court should not interfere in revision although Mr. Sampath Ayyangar has not been able to find any Madras decision that goes so far. I am, however, satisfied that not only did the lower Court act without jurisdiction in granting leave in a class of case in which he had no power to grant leave to file a fresh suit; but that he never purported to consider whether he had jurisdiction or not. If he had been aware of the fact that he could only grant leave to file a fresh suit if there had been something like a formal defect and he had come to the conclusion that there was only a formal defect in the plaintiff's case, then I would have doubted whether I had jurisdiction to interfere with the lower Court's order. The petition asking for permission to withdraw with permission to file a fresh suit is very vague in its terms; and the learned Subordinate Judge does not really attempt to consider whether a case had been made out for granting permission or no. He merely says :

> It is stated in the affidavit that numerous matters came to be known to plaintiff's next friend by proceedings taken after the suit was instituted and that these have to be shown in the plaint. Under these circumstances, I hold that plaintiff should be given leave to withdraw the suit regarding A schedule properties with liberty to sue afresh.

It is therefore seen that the learned subordinate Judge did not indicate any ground for granting permission; and there was no finding that there was a defect in the suit which prevented the plaintiff from going on. This is therefore a case in which this Court can interfere in revision. The remaining question is whether this Court should interfere in revision. In the many cases cited above, the learned Judges of this Court felt that they ought to interfere. No doubt in some of those cases the case for granting permission was even weaker than in the present case. Evidence had been let in or there was some action on the part of the plaintiff which amounted to a fraud on the Court. But as O. 23, R. 1 lays down a principle which is an exception to the general rule that a fresh suit cannot be filed on the same cause of action, it should be exercised very sparingly. In the present case, the object of the plain-

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2. ('26) 13 AIR 1926 Mad 863 : 94 I C 983 : 23 M L W 525, Palikanji Chettiar v. Krishna Iyer.

3. ('25) 12 AIR 1925 Mad 617 : 88 I C 665 : 21 M L W 282, Venkataramayya v. Veerasami.

4. ('25) 12 AIR 1925 Mad 1268 : 91 I C 292 : 22 M L W 535, Naimatulla Khan v. Abdul Razak.

5. ('28) 15 A I R 1928 Mad 1085 : 112 I C 312, Nagamma v. Lakshminarasu.

6. ('40) 27 AIR 1940 Bom 121 : 187 I C 409 : I L R (1940) Bom 299 : 42 Bom L R 143 (F B), Rama Rao Bhagwantrao v. Babu Appanna Samage.

7. ('34) 21 AIR 1934 All 137 : 147 I C 776 : 1934 A L J 450, Jumma v. Ram Sahai.

8. ('29) 16 AIR 1929 Mad 36 : 114 I C 557, Krishnan Somayajipad v. Raman Nair.

9. ('04) 27 Mad 377, Dorasami Pillai v. Thungasami Pillai.

10. ('21) 8 A I R 1921 P C 129 : 63 I C 521 : 5 Rang 1 : 13 M L W 537 (P C), Balthazar & Son v. E. M. Abowath.

11. ('18) 5 A I R 1918 All 418 : 46 I C 71 : 40 All 612 : 16 A L J 495, Jhunku Lal v Bisesher Das.

tiff's next friend in asking for permission to withdraw the suit and to file a fresh one is undoubtedly to circumvent the orders passed by the lower Court on the second amendment application and of this Court in revision. It would be improper, I consider, to allow a fresh suit to be filed under these circumstances. As pointed out in the order on the amendment application, the plaintiff can file a fresh suit on such causes of action as have arisen since the filing of his earlier suit, and evidence regarding them may even be relevant in the present suit, although I do not purport to decide that point. I am therefore satisfied that this is a proper case for interference. The petition is therefore allowed with costs in this Court and in the Court below and the suit restored. This necessitates that the order of the lower Court that the plaintiffs should pay the costs of the suit to the defendants should be cancelled. It is ordered accordingly.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1941 Madras 48

LEACH C. J. AND HORWILL J.

Managing Director, Nayar Modern Bank Ltd. — Appellant

v.

Official Liquidators of the Travancore National and Quilon Bank Ltd. (in liquidation) — Respondents.

Original Appeal No. 35 of 1939, Decided on 21st August 1940, from order of Venkataramana Rao J., *Reported in A I R 1940 Mad 178.*

Banker and customer — Money deposited by company with bank in accordance with statutory obligation imposed by S. 282-B, Companies Act— Liquidation of Bank — Company is not entitled to rank in priority to ordinary creditors.

The fact that the depositor is the trustee and the money deposited is trust money, does not affect the relation which the law creates between a Bank and an ordinary customer, namely, the relation of debtor and creditor. The legal effect of the notice to the Bank that the moneys deposited were trust moneys is only to cast a duty on the Bank not to participate in a breach of trust by the trustee. Hence where money is deposited by a company with the Bank as the result of the statutory obligation imposed upon the company by S. 282-B(1), the company is not entitled to rank in the liquidation of the Bank in priority to the ordinary creditors. [P 48 C 2; P 49 C 1]

K. Kuttikrishna Menon — for Appellant.

King and Partridge — for Respondents.

Leach C. J. — The appellant is a company registered under the Companies Act and carries on a banking business at Palghat in Malabar. The appellant requires certain employees to deposit sums of money with it as security for the due fulfilment of their duties. Section 282B (1), Companies Act, states that all moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be deposited by it in a special account to be opened for the purpose in a scheduled bank as defined in cl. (e) of S. 2, Reserve Bank of India Act, 1934, and that no portion of the money shall be utilized by the company except for the purposes agreed to in the contract of service. The Travancore National and Quilon Bank Ltd. (I will refer to it for brevity as "the Bank") was a scheduled bank as defined in the Reserve Bank of India Act, but it is now in liquidation as the result of an order for compulsory winding up passed by this Court on 4th September 1938. On 30th July 1937 the appellant deposited with the Bank a sum of Rs. 1000 received as security from an employee. On 15th January 1938 and on 21st February 1938 it deposited with the Bank Rs. 5000 and Rs. 500 respectively, these sums also representing security received from employees. These moneys were credited to the appellant in an account headed "employees' cash security." They were, of course, deposited with the Bank as the result of the statutory obligation imposed upon the appellant by S. 282-B (1), Companies Act. The question involved in this appeal is whether the appellant is entitled to rank in the liquidation of the Bank in priority to the ordinary creditors. The question was decided against the appellant by Venkataramana Rao J. and this appeal is from his order.

The learned counsel for the appellant frankly and rightly concedes that the Bank did not hold the moneys as a trustee for the employees of the appellant, but he says that his client is entitled to prior payment because it is recognized that property which has been delivered to a bankrupt for a specific purpose does not pass to his trustee in bankruptcy, and quotes a passage from Halsbury's Laws of England where it is stated that property of this nature is clothed with a species of trust and is subject to the same principle as trust property: Vol. 2, p. 228, Hailsham Edition. The learned Judge rejected this contention. He recognized that in such a case as the present one the depositor is the trustee and the money deposited is trust money, but he held that this does not affect the relation which the law creates between a bank and an ordinary customer, namely, the relation

of debtor and creditor. The learned Judge pointed out that the legal effect of the notice to the Bank that the moneys deposited were trust moneys was only to cast a duty on the Bank not to participate in a breach of trust by the trustee. We agree with the opinion of the learned Judge. The appellant would be entitled to succeed only if the Bank was in the position of a trustee or if the money had been deposited for a specific purpose. The appellant has conceded that the Bank was not a trustee; and we think it is equally clear that these moneys were not deposited with it for a special purpose so far as the Bank was concerned. The appellant held the moneys for a special purpose and was required by statute to deposit them in a Bank, but the section makes no difference in the position of the Bank. Its position was still that of a banker keeping an account for a customer. The Bank, having notice of the trust, could not be a party to a breach of trust but that does not help the appellant. There has been no breach of trust. The appeal fails and will be dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1941 Madras 49

PATANJALI SASTRI J.

Velayudham Subbaya Nadar — Petitioner

v.

Kalamsetti Anjaneyalu and others — Respondents.

Civil Revn. Petns. Nos. 861 and 1184 of 1937, Decided on 30th August 1940, to revise orders of Dist. Court, Nellore, D/- 22nd June 1937 and 25th March 1937.

Civil P. C. (1908), O. 44, R. 1 — Application for leave to appeal in forma pauperis cannot be rejected without hearing applicant.

An application under O. 44, R. 1, Civil P. C., is a judicial proceeding and the order made therein should be based upon the exercise of a judicial discretion exercised on a proper consideration of the relevant material. An application for leave to appeal in forma pauperis cannot be rejected without hearing the applicant or giving him an opportunity of being heard : A I R 1936 Mad 101 and A I R 1916 Mad 636, *Dissent.* [P 49 C 1]

K. Umamaheswaran — for Petitioner.

K. Kuppuswami — for Respondents.

Order. — The short question for decision in these revision petitions is whether an application for leave to appeal in forma pauperis can be rejected without hearing the applicant or giving him an opportunity of being heard. In each case, the Court below rejected the application without hearing the petitioner and the legality of this procedure is challenged before me. It is not disputed that an application under O. 44, R. 1, Civil P. C., is a judicial proceeding and the order made therein should be based upon the exercise of a judicial discretion exercised on a proper consideration of the relevant material. A Full Bench of this Court has expressed the opinion, approving 26 MAD 437[1] that an order rejecting an application for leave to appeal in forma pauperis is an appealable 'judgment' under Cl. 15 of the Letters Patent: *see* 35 MAD 1[2] at pp. 9 & 17. It is therefore difficult to see how such a proceeding can be disposed of except in conformity with the fundamental principle in all judicial procedure that no order should be made without notice to the parties who will be prejudicially affected by the order and without affording them a reasonable opportunity of being heard. It is satisfactory to note that the practice of the Courts in this Presidency in dealing with applications of this kind has been in conformity with this principle.

The respondent relies on a recent decision of Wadsworth J. in 59 MAD 805[3] following an earlier decision of Sadasiva Iyer J., in 28 I C 957.[4] With all respect I am unable to agree with these decisions. In the latter case, the learned Judge understands 'perusal' in the proviso to O. 44, R. 1 to mean 'perusal without being supplemented by argument on petitioner's side' and he quotes in support of his conclusion a passage from the judgment of Jenkins C. J. in 28 BOM 451[5]:

> It is to be noticed that the Court must come to its conclusion upon a perusal only of the application, the judgment and the decree. This proviso is apt to be overlooked, etc.

The point now under consideration did not arise in the Bombay case, 28 BOM 451,[5] where the learned Judge was merely pointing out the desirability of the Court recording briefly the reasons for granting leave, and it is by no means clear that "only" in the passage quoted was meant to exclude a hearing of the petitioner and not material other than the application, the judgment and the decree. In the other case, 59 MAD 805,[3] the learned Judge notes the prevailing practice of hearing the applicant in such

1. ('03) 26 Mad 487, Appasami Pillai v. Somasundaram Mudaliar.
2. ('12) 35 Mad 1 : 8 I C 340 : 21 M L J 1, Tuljaram Rao v. Alagappa Chettiar.
3. ('36) 23 AIR 1936 Mad 101 : 159 I C 718 : 59 Mad 805 : 69 M L J 781, Kanthimathi Ammal v. Ganesa Iyer.
4. ('16) 3 AIR 1916 Mad 636 : 28 I C 957, *In re* Paramasivam Pillai.
5. ('04) 28 Bom 451 : 6 Bom L R 442, Sakhubai v. Ganpat.

cases, but finds no warrant for it in O. 44, R. 1, observing that,

the proviso to that rule contains no indication that it is either necessary or desirable for the Judge to hear the party before passing orders of rejection.

The mere absence of an express provision for hearing the applicant is, in my view, no justification for refusing to hear him. Hearing the parties affected before passing adverse orders is such a well established and cardinal rule governing the procedure of Courts that the Code must be taken to assume its observance in all cases a matter of course without any express provision in that behalf. There is no such provision, for instance, in S. 115 but it has never been suggested that a revision petition can be dismissed without giving the petitioner an opportunity of being heard. Nor is the reference in O. 44, R. 1, to a 'perusal' by the Court of the documents specified sufficient, to my mind, to justify a departure from the ordinary *cursus curiæ*.

Learned counsel for respondents also placed reliance on 55 MAD 982[6] as showing that the respondent to an application for leave to appeal in forma pauperis has no right to be heard, and argued that the petitioner could be in no better position. But the respondent would not be prejudiced by not being heard at the stage of the admission of the petition because he would be heard in support of the judgment and decree appealed from before the matter is finally disposed of: *cf.* the procedure under O. 41, R. 11. But the dismissal of a petition without hearing the petitioner is quite a different matter, as the judgment sought to be appealed from would become final without his having had an opportunity of showing that it was contrary to law etc. I therefore set aside the rejection of the application by the Court below in each case and remit it for disposal after giving the petitioner an opportunity of being heard. I make no order as to costs as the respondent was not responsible for the course adopted by that Court.

C.R.K./D.S. *Order accordingly.*

6. ('32) 19 AIR 1932 Mad 528 : 189 I C 652 : 55 Mad 982 : 63 M L J 28, Somasundaram Chettiar v. Arunachalam Chettiar.

A. I. R. 1941 Madras 50

BURN AND MOCKETT JJ.

In re Karuppal alias Chetty Boyachi
Accused (Prisoner).

Referred Trial No. 77 and Cri. Appeal No. 358 of 1940, Decided on 18th July 1940, for confirmation of the death sentence passed on 3rd April 1940.

Penal Code (1860), S. 302 — Woman harshly treated by her husband and living very miserable life throwing her children as well as herself in well but managing to save herself—Case held fit for not passing sentence of death.

The law gives the Sessions Judge the option of sentencing a person convicted of murder either to death or to transportation for life. Where there are extenuating circumstances, it is the duty of the Sessions Judge to award the lesser sentence and not to pass the sentence of death. [P 50 C 2]

A woman was convicted of murdering her own children. She threw her children into a well and then jumped into the well herself but afterwards apparently repenting of her intention to take her own life, managed to get out. The reason why she had decided to take her children's life and her own was that she had been very harshly treated by her husband and was living a life of the utmost misery:

Held that the case was a fit one for not passing sentence of death. [P 50 C 2 ; P 51 C 1]

P. Sivarama Krishniah — for Accused.

Public Prosecutor — for the Crown.

Burn J. — The appellant has been convicted by the learned Additional Sessions Judge of Coimbatore for the murder of her own two children, a little girl aged five and a little boy aged two on 17th December 1939. The evidence against the appellant consisted mainly of confessions of her own, said to have been made to her aunt, (P. W. 10) and to an acquaintance, (P. W. 1, Rama Boyan) and also to the Village Munsif of Pattaramangalam, P. W. 12. The appellant according to these witnesses admitted that she had thrown her children into a well and said that she had jumped into the well herself but had afterwards, apparently repenting of her intention to take her own life, managed to get out. She said that the reason why she had decided to take her children's life and her own was that she had been very harshly treated by her husband and was living a life of the utmost misery. The learned Additional Sessions Judge has accepted these confessions of the appellant and has stated that in his opinion this was a fit case for awarding as lenient a sentence as possible but, strangely enough, he goes on to say, that, having found the accused guilty of murder, he has no option but to award her the extreme penalty under law. This is of course quite incorrect. The law gives the Sessions Judge the option of sentencing a person convicted of murder either to death or to transportation for life. Where there are extenuating circumstances as in this case, it is the duty of the Sessions Judge to award the lesser sentence and not to pass the sentence of death.

We agree entirely with the reasoning of the learned Additional Sessions Judge. Since

the only evidence that the appellant took the lives of her children is derived from her own confessions, it is only fair to take into account also the reasons which she alleged for taking such a terrible step. Her husband was examined as P. W. 5 and he said that his wife had not been right in the head for some years before, but it must be borne in mind that according to the woman herself it was her husband's ill-treatment that drove her to take the lives of her children. There was no evidence of insanity such as would take away the criminality of the act ; that is to say, there is no evidence that the woman was incapable by reason of unsoundness of mind of understanding what she was doing or the consequences of her act. The conviction for murder is correct and is confirmed. The sentence of death is in this case wrong. We set it aside and substitute a sentence of transportation for life. The learned Additional Sessions Judge has made a separate recommendation to the Government to reduce the punishment imposed upon this appellant to a sentence of three years' rigorous imprisonment. The letter of the learned Additional Sessions Judge has already been forwarded to the Government and they will take such action as they deem fit in the exercise of their prerogative. We do not associate ourselves with the express recommendation that the sentence be reduced to three years' rigorous imprisonment but we are in agreement with the learned Sessions Judge that the sentence of transportation for life is excessive in the circumstances of this case.

C.R.K./D.S. *Sentence reduced.*

A. I. R. 1941 Madras 51

KING J.

Raju Mudali — Appellant

v.

Chinnaraju Naidu and others —

Respondents.

Appeal No. 150 of 1939, Decided on 14th August 1940, against order of Dist. Court, North Arcot, D/- 12th September 1938.

Civil P. C. (1908), O. 22, R. 9 and O. 43, R. 1 (k)—Appeal lies from order refusing to set aside abatement of appeal.

The use of the word "suit" in cl. (k) does not exclude the word "appeal." The expression "refusing to set aside the abatement or dismissal of a suit" is merely a compendious way of referring to the provisions of R. 9. Hence an appeal lies from an order under O. 22, R. 9 refusing to set aside abatement of appeal: A I R 1929 Cal 532, *Dissent.*

[P 52 C 1]

A. C. Sampath Ayyangar — for Appellant.

Ch. Raghava Rao — for Respondents.

Judgment.—This is an appeal filed under O. 43, R. 1, cl.(k), Civil P. C., against an order of the learned District Judge of North Arcot refusing to set aside the abatement of A. S. No. 214 of 1936. The appellant is the legal representative of the appellant who was on record in A. S. No. 214 of 1936. He applied to be impleaded and to be allowed to continue the appeal at a time when more than 90 days had elapsed since the death of his predecessor-in-interest. The reasons for his application were that he was a sepoy undergoing service at Jubbulpore, that he attempted to obtain leave from his commanding officer for the purpose of coming to Vellore and attending to this question of coming on record in the appeal, that the commanding officer refused to grant him leave and that when he eventually granted him leave on receipt of a letter from the Village Munsif, 90 days had expired. The learned District Judge refused to allow the petition on the ground that it was not necessary for the appellant to have obtained the attestation of his commanding officer in Jubbulpore to his affidavit and that he could easily have attended to this matter in the ordinary course of the post. There is no other material available, no affidavit from the commanding officer himself which in the circumstances of the case could hardly be expected, nor any affidavit from the advocate who represented the appellant or the appellant's predecessor-in-interest.

The learned advocate for the respondents takes the preliminary objection before me that no appeal lies under O. 43, R. 1 (k) and in support of that position cites the case reported in A I R 1929 CAL 532.[1] That authority certainly supports his view, but on the other hand there are cases in which the Patna High Court has interpreted the clause in O. 43 in a different way. It seems to me quite clear on an examination of both O. 22 and O. 43 that I should follow the view of the Patna High Court. Order 22, R. 9 in terms relates only to a suit. It begins: "Where a suit abates, ... no fresh suit shall be brought on the same cause of action." But R. 11 of O. 22 runs as follows: "In the application of this order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, . . . and the word 'suit' an appeal," and there is no dispute before me that an order that an appeal has abated can be set aside under O. 22, R. 9

1. ('29) 16 A I R 1929 Cal 532 : 121 I C 564 : 49 C L J 538 : 33 C W N 881, Akkas Mia v. Abdul Aziz.

as interpreted by R. 11. Order 43, R. 1 (k) reads as follows "an appeal shall lie from an order under R. 9 of O. 22 refusing to set aside the abatement or dismissal of a suit." It is argued in support of the preliminary objection that the use of the word "suit" in cl. (k) must necessarily exclude the word "appeal." I am unable to accept that argument. It seems to me that the expression "refusing to set aside the abatement or dismissal of a suit" is merely a compendious way of referring to the provisions of R. 9. As already stated, R. 11 of O. 22 makes R. 9 applicable to appeals. It would be contrary to all rules of logical interpretation, it seems to me, if the word "suit" in cl. (k) of O. 43, R. 1 is to bear a different meaning to what it bears in O. 22, R. 9. I accordingly overrule the preliminary objection and hold that this appeal does lie.

On the merits of the appeal I think the order of the learned District Judge was not one in which he has rightly exercised his discretion. It may well be that if the appellant had been more familiar with legal procedure or if it were shown that he had been in correspondence with his advocate during this period, he might have taken other steps to bring himself on record in time. But what he states in his affidavit seems to me to show that he has conducted himself with reasonable diligence in this matter. He has done what one might normally have expected a soldier serving in a foreign province to do. He states that he has prepared an affidavit and that his commanding officer would not sign it. This matter of course has not actually been proved, but it seems to me that it would never have been stated if it were not true, and once the commanding officer had refused to sign the affidavit, one could hardly have expected the appellant to have sought out any other public official in a distant place like Jubbulpore. Although the appellant does not state explicitly that in his mind the only practicable way of bringing himself on record was to come to Vellore and there prepare the necessary affidavit and take the necessary steps, I think it is a reasonable inference from a perusal of the affidavit as a whole that that was the impression which existed in his mind, an impression which in my opinion is not in all the circumstances of this case an unreasonable one. I would therefore set aside the order of the learned District Judge and the abatement of the appeal and allow the appellant to be brought on record as the legal representative of the appellant in that appeal and order that the appeal be duly heard and disposed of according to law. In the circumstances of this case I think the fairest order in regard to costs is that each party should bear his own costs throughout.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1941 Madras 52

WADSWORTH AND PATANJALI SASTRI JJ.

Palani Goundan — Petitioner

v.

Muthuswami Goundan — Respondent.

Civil Revn. Petn. No. 1723 of 1938, Decided on 26th August 1940, to revise order of Sub-Judge, Coimbatore, D/- 15th November 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 11 and 19 — Interest on costs is not excluded from scaling down operation.

There is no intention to exclude from the scaling down provisions interest on any sum decreed as costs under S. 11. Similarly, there is nothing in S. 19, which is inconsistent with the view that the appropriation therein provided for was intended to be only in respect of the principal sum for costs or that this provision had any other object than to give effect to the provisions of S. 11. When there is a decree for costs which forms part of a decree being scaled down under S. 19, the provisions of the decree relating to interest on costs should be amended by the process laid down in Ss. 8 and 9.

[P 52 C 2: P 53 C 1]

S. Ramachandra Ayyar for M. Krishna Bharathi — for Petitioner.

A. C. Sampath Iyengar — for Respondent.

Wadsworth J. — The petitioner was defendant 3 in a mortgage suit and he applied under Ss. 8 and 19, Madras Act 4 of 1938, to scale down the decree. The learned Subordinate Judge has given a decree for the principal amount of the debt with interest at 6 per cent. from 1st October 1937 and also for Rs. 1855-3-0 for costs and has provided that this amount awarded for costs shall carry interest at 6 per cent. from the date of the decree which is 12th March 1932. Petitioner seeks to revise this order by applying to the decree for costs the scaling down provisions of the Act so as to cancel the interest as on 1-10-1937. There is nothing in the Act which excludes from the scaling down operation interest on costs. The principal sections dealing with costs are Ss. 11 and 19. Section 11 states that where a debt includes any sum decreed as costs by any Court or sums lawfully expended by a mortgagee or other person in order to preserve the property mortgaged such sum or sums shall be recoverable in addition to the sum recoverable under the provisions of Ss. 8 and 9. We doubt whether this section was intended to safeguard not only costs but in-

terest thereon, for the section couples costs with sums recoverable as having been lawfully expended by a mortgagee. Such sums would normally be added to the principal amount of the mortgage and would bear interest at the contract rate. If it had been the intention to exclude interest on such sums due to the mortgagee from the scaling down provisions, surely there would have been an express indication of the fact. We are constrained to the view that there was no intention to safeguard interest on sums payable to a mortgagee and if there was no such intention, similarly there can be no intention to exclude from the scaling down provisions interest on any sum decreed as costs.

The other main provision relating to costs is found in the proviso to S. 19 which is to the effect that payments in respect of a decree shall first be applied in payment of all costs as originally decreed to the creditor. It is contended that the phrase "costs as originally decreed" means costs without any scaling down. It is equally likely that the phrase was intended to mean the principal amount of costs and to exclude interest thereon. At any rate, there is nothing in S. 19 which is inconsistent with the view that the appropriation therein provided for was intended to be only in respect of the principal sum for costs or that this provision had any other object than to give effect to the provisions of S. 11. We are of opinion that when there is a decree for costs which forms part of a decree being scaled down under S. 19, the provisions of the decree relating to interest on costs should be amended by the process laid down in Ss. 8 and 9. In the present case, the result will be that the amount decreed for costs will carry interest at 6 per cent. per annum with effect from 1st October 1937. The revision petition is allowed with costs and the decretal order of the lower Court will be amended in the light of this judgment.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1941 Madras 53

LEACH C. J. AND HORWILL J.

S. Gopalaswami Gounder — Appellant

v.

K. Krishnaswami Gounder (Interim Liquidator of the Pollachi Vellala Union Mills Co. Ltd. in Liquidation) — Respondent.

Appeal No. 26 of 1939, Decided on 5th August 1940 from order of Gentle J. in Appln. No. 1499 of 1938, D/- 15-3-1939.

Companies Act (1913), S. 235—There must be loss to company before order under S. 235 can be passed.

Section 235 contemplates a loss to the company before an order for the delivery of the books of the company can be passed under the section: (1928) 1 Ch D 861, *Rel. on.* [P 54 C 2]

P. N. Sundararajan and D. Noronha — for Appellant.

R. Venkataraman — for Respondent.

Leach C. J.—This is an appeal from an order passed by Gentle J. on a misfeasance summons taken out by the liquidator of the Pollachi Vellala Union Mills Company Ltd. The liquidator alleged that the appellant, who had been the manager of the company, was liable under S. 235, Companies Act, to pay two sums of money, one of Rs. 3448-10-6 and the other of Rs. 700-7-0. The liquidator also asked that an order be passed against the appellant, directing him to produce all books, papers, documents, and correspondence relating to the company which were still in his possession. The learned Judge held that the appellant was not liable in the sum of Rs. 3448-10-6 and the liquidator withdrew the summons so far as Rs. 700-7-0 was concerned. With regard to the books it was said that the appellant had wrongfully retained the following: (1) the inventory or stock book; (2) the directors' circulation book; (3) the shareholders' circulation book, and (4) the share transfer application register. The learned Judge found that the first two of these books were with the appellant, but that the remaining two were not with him. Accordingly he passed an order directing the appellant to deliver over to the liquidator the inventory book and the directors' circulation book. This order was not complied with and the learned Judge then called upon the appellant to show cause why he should not be committed for contempt of Court. In the meantime the appellant filed this appeal and as the result the contempt proceedings have been stayed.

Dr. John has contended that the learned Judge erred in law in confining his order to the delivery of the two books. He says that unless a loss has been suffered by the company there can be no order under S. 235 and that when an order is passed for the return of property it must also state the amount, for which the person against whom it is passed is liable in the event of the non-delivery of the property. In this connexion the learned counsel has quoted the decisions of the Court of Appeal in (1880) 14 Ch D 660[1]

1. (1880) 14 Ch D 660:42 L T 559:28 W R 775, In re Canadian Land Reclaiming and Colonizing Co

and of the House of Lords in (1887) 12 A C 652.[2] In the first of these cases the Court held that under S. 165, English Companies Act, 1862, in order to make a person liable under the section he must be shown to have been guilty of misconduct by which the company has suffered loss. The section was not for punishing a man who had been guilty of misfeasance, but for compensating the company for the loss suffered. In that case it had not been shown that there was any loss. This interpretation of the section was accepted by the House of Lords in the second case. There is, however, a great difference between S. 165, English Companies Act, 1862 and S. 235, Indian Companies Act, 1913, as amended by Act 22 of 1936. Section 165, English Act, reads as follows :

> Where, in the course of the winding up of any company under this Act, it appears that any past or present director, manager, official, or other liquidator or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any monies of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may on the application of any liquidator, or of any creditor or contributory of the company notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager or other officer, and compel him to repay any monies so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just.

Section 235, Indian Companies Act, reads as follows :

> "Where in the course of winding up of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory (made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer), examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.
>
> (2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible."

Under this section the Court may compel an officer of a company against whom a misfeasance summons has been taken out (1) to repay the money, or (2) to restore the property, or (3) to pay compensation. The difference between the two sections is that under S. 165 of the English Act the Court was not given the power to compel an officer of a company to restore property. He could only be compelled to make payment either by way of refund or compensation, and this was the position in England until the Companies (winding up) Act, 1890, was passed. There power was given to the Court to order the restoration of property and the corresponding sections of the English Acts of 1908 and 1929 have been drafted on the same lines. The appellant is in possession of two books belonging to the company and therefore he is in possession of property of the company. It is true that S. 235 contemplates a loss to the company before an order can be passed under the section. This was pointed out by Maugham J., as he then was, in (1928) 1 Ch D 861,[3] where he stated:

> The conclusion at which I have arrived is that S. 215 (the corresponding section of the English Act to S. 235 of the Indian Act) is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would include a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company.

The liquidator says that the retention of those two books by the appellant is likely to lead to considerable loss to the company. That has not been found, but obviously these books must have some value and their retention by the appellant means a loss to the company. There being a loss the learned Judge had the power to pass an order for the delivery of the books to the liquidator, and it was a proper order to pass. The appeal must be dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

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2. (1887) 12 A C 652:57 L J Ch 552:57 L T 778: 36 W R 441, Cavendish Bentinck v. Fenn.

3. (1928) 1 Ch D 861:97 L J Ch 460: (1928) B & C R 81: 140 L T 219, In re Etic Ltd.

A. I. R. 1941 Madras 55

HORWILL J.

Sri Rajah Yenumala Latchanna Dora Varu — Petitioner

v.

Sri Rajah Yenumala Mallu Dora Varu — Respondent.

Civil Revn. Petn. No. 1622 of 1938, Decided on 1st May 1940, to revise order of Dist. Court, West Godavari at Ellore, D/- 5th October 1938.

Civil P. C. (1908), S. 151—Interim orders—Suit by A against B for certain property alleged to be allotted to A in accordance with certain agreement—B not admitting that A was entitled to property claimed by him—Court has no jurisdiction to pass interim order of maintenance.

There is no inherent power in a Court to act without findings, so that if a matter is asserted by the plaintiff and denied by the defendant, the Court cannot presume that the plaintiff's allegations are true and give some interim relief pending disposal of the suit. Hence where *A* brings a suit against *B* for certain property alleged to have been allotted to *A* in accordance with certain agreement and *B* does not admit that *A* is entitled to the property claimed by him, the Court has no jurisdiction to pass an interim order of maintenance : A I R 1924 Pat 69 and C. R. P. No. 1312 of 1930, *Rel. on.* [P 55 C 2]

V. Viyanna — for Petitioner.

Ch. Raghava Rao — for Respondent.

Order. — The plaintiff brought the present suit against his brother and his father for the B schedule properties which, he said, were allotted to him in accordance with an agreement. In the alternative, he prayed for partition. The defendant's case is that the property is for the most part his self-acquired property and that the only property to which the plaintiff is entitled is that in Sch I. During the pendency of the suit the plaintiff made an application to the Court for an interim maintenance of Rs. 800 a month. The learned District Judge has awarded Rs. 250 a month.

The plaintiff is not entitled to an order of the nature passed. In 77 I C 718[1] a Divisional Bench of the Patna High Court held that a Court has no inherent power under S. 151 to pass such an order. That case was very like the present, in that the plaintiff sued on a maintenance agreement, and only differed from it in that the defendant there did not admit that the plaintiff was entitled to anything. Here, the defendant does admit that the plaintiff is entitled to something; but he does not admit that the plaintiff is entitled to any part of the land that he claims. Jackson J. in C. R. P. No. 1312 of 1930, quotes 77 I C 718[1] as an authority for the position that the Court has no inherent power under S. 151 to pass an interim order of maintenance and pertinently adds that a Court cannot interfere with a private person's property merely because he happens to be a defendant on behalf of another person merely because he happens to be a plaintiff. There is no inherent power in a Court to act without findings, so that if a matter is asserted by the plaintiff and denied by the defendant, the Court cannot presume that the plaintiff's alllegations are true and give some interim relief pending disposal of the suit.

In the face of the above decisions, I do not feel justified in taking into account the document in the plaintiff's favour, the validity of which is denied by the defendant. The defendant does however admit that the plaintiff is entitled to some property, but it would be inconvenient, I consider, during the pendency of this suit which, I hope, will not be very much longer, to compel the plaintiff to take possession of property which he does not claim and with regard to which he may have some difficulty in collecting rent. Some maintenance in proportion to the property admittedly belonging to the plaintiff can be given; and I think the fairest course would be to reduce the amount granted to the plaintiff by the lower Court to Rs. 50 a month from the date of the last payment. If it is subsequently found that Rs. 50 a month is in excess of the mesne profits from the land to which the Court finds the plaintiff is entitled, the excess will be charged on the land awarded to the plaintiff. The petition is allowed to the extent indicated. There will be no order as to costs.

A memorandum of cross-objections has been filed asking for an enhancement of the allowance. This has to be dismissed, whether on the ground that the plaintiff cannot be given even as much as was granted by the lower Court or on the ground that a memorandum of cross-objections cannot be filed in a revision petition. It could no doubt be treated as a revision petition if it had been filed within three months from the date of the passing of the order. Apparently this was not done. The memorandum has not been argued and it is not necessary to pass any order as to costs. The trial Court should expedite the disposal of the suit.

C.R.K./D.S. *Petition partly allowed.*

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1. ('24) 11 AIR 1924 Pat 69 : 77 I C 718 : 5 P L T 560, Gopal Saran Narayan Singh v. Sita Debi.

A. I. R. 1941 Madras 56

WADSWORTH AND PATANJALI SASTRI JJ.

Budiredla Ramamurti — Petitioner

v.

Matte Sitaramayya — Respondent.

Civil Revn. Petn. No. 2010 of 1939, Decided on 11th April 1940, to revise order of Sub-Judge, Coconada, D/- 6th September 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 8 — Compromise decree passed before 1st October 1932 in renewal of anterior debt—Court must scale down debt treating as principal, amount originally advanced plus sums subsequently advanced.

Where there is a decree passed before 1st October 1932 in terms of a compromise, which itself is demonstrably a renewal of an anterior debt, the Court must scale down the debt under S. 8 treating as principal the amount originally advanced together with the amount of any sums subsequently advanced. [P 57 C 1]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 19—Judgment-debtor can prove uncertified payments for purpose of satisfying decree regarding costs.

When a judgment-debtor applies under S. 19 to scale down a decree, he can prove payments which have not been certified, for the purpose of satisfying the decree regarding costs. For any other purpose, there is no express provision allowing the petitioner to prove payments made after the decree and not recorded by the Court and it follows that he will have to establish those payments in the ordinary way by getting them certified in Court, if he wants them to be taken into consideration as payments towards the decree. [P 57 C 2]

V. Viyanna — for Petitioner.

D. Narasaraju — for Respondent.

Wadsworth J. — This civil revision petition raises the question of the powers of a Court to scale down a compromise decree under S. 8, Madras Agriculturists Relief Act, 4 of 1938. The relevant facts may be briefly stated. The petitioner is the judgment-debtor. He and the respondent had dealings on account starting in 1922. On 26th March 1928, the petitioner executed a promissory note in settlement of that account. On 3rd April 1928 he executed a second promissory note for a fresh advance. On 20th July 1929 he executed a promissory note for Rs. 4600 comprising the amounts due on two previous notes and a small amount in cash advanced at that time. It was alleged that on 27th September 1930, there was an arrangement whereby the petitioners undertook to pay the amount due on this promissory note within a given time or to execute a mortgage over certain properties. No payment having been made and no mortgage having been executed, the respondent filed a suit, O. S. No. 44 of 1931, on the promissory note of 1929, claiming a charge over the properties covered by the alleged agreement to mortgage. He also obtained an attachment before judgment of the properties in respect of which the charge was claimed. On 8th August 1932 a decree was passed in terms of a compromise. The compromise recited that the transactions between the parties had been examined by mediators who had decided that the whole of the debt claimed should be recovered from the family properties of the defendants; and that the defendants had agreed that the suit debt, costs and subsequent interest calculated at Rupees 7150 in all should be a charge on the properties mentioned in the plaint and it was agreed that the defendants were to be given time till 1st October 1932 to pay the amount so settled. It is to be noted that this compromise does not appear to have dealt with matters extraneous to the suit and that it provided for the payment of the full amount claimed by the plaintiff with interest. The lower Court following the decision of Pandrang Row J., in C. R. P. No. 86 of 1939, held that in scaling down the decree, the starting point must be the decree itself and that it was not open to the Court to go behind the compromise and treat the original debt as the debt which is to be scaled down.

Now, we have held in a very recent decision, C. R. P. No. 2543 of 1939,[1] that in the simple case of a decree on a debt, the Court must with reference to the terms of S. 8 (1) of Act 4 of 1938 look to the debt upon which the decree is passed and not regard the decree itself as the debt which has to be scaled down. A decree embodying a compromise is in one respect different from a decree merely directing payment of the debt which forms the subject-matter of the suit. The effect of the compromise is the substitution of a new contract for the contract sued on, which new contract itself forms the basis of the decree. When we come to apply Ss. 8 and 9 to such a decree, we must have regard to the provisions of S. 7 which lays down that,

> notwithstanding any contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of Chap. 2 of the Act.

The decree in terms of the compromise is in fact a decree on a contract superseding the original debt upon which the suit is laid. To the extent to which that contract can be proved to be in whole or in part a renewal

1. *Reported in* ('40) 27 A I R 1940 Mad 793 : (1940) 2 M L J 235, Ramaseshayya v. Kutumba Rao.

of the debt upon which the suit was laid, clearly Ss. 8 and 9 of the Act provide that the principal of the debt liable to be scaled down must be the principal sum originally advanced together with any sums subsequently advanced. On the facts of the present case, it is clear that we are concerned with a very simple compromise dealing only with the suit debt and agreeing that the said debt with interest at the contract rate and costs shall be payable by the defendants and shall be charged in a particular way. There can therefore be no doubt that the compromise agreement upon which the decree was based is substantially a renewal of the suit debt together with an agreement to pay the costs and to submit to the charge. It seems to us that clearly this debt is liable to be scaled down under S. 8 having regard to the principal originally advanced by the creditor together with such sums as have subsequently been advanced as principal.

It is not necessary for the purpose of this case to decide what would be the position in a more complicated case when the compromise is the result of mutual concessions and advantages which together make up an agreement from which it would be extremely difficult to disentangle that part which is a renewal of the original debt. We may however observe that the question whether the compromise forming the subject of the decree is or is not a renewal of a pre-existing liability must, to a large extent, be a question of fact in every case. We have been referred to the decision of Horwill J., in (1940) 1 M L J 225,[2] which on the facts of the particular case decided that when there was a decree on a compromise, the date on which the debt was incurred must with reference to S. 8 or S. 9 of the Act be the date of the original debt and not the date of the compromise decree. It is not necessary for the purpose of this case to consider the correctness of our learned brother's decision on the facts before him. We confine ourselves to holding that when, as in the present case, there is a decree passed before 1st October 1932 in terms of a compromise, which itself is demonstrably a renewal of an anterior debt, the Court must scale down the debt under S. 8 of Madras Act 4 of 1938, treating as the principal the amount originally advanced together with the amount of any sums subsequently advanced.

A further question has been raised with reference to the terms of S. 19 of Act 4 of 1938, whether the petitioner in applying for the scaling down of the decree can prove uncertified payments made towards that decree, having regard to the terms of O. 21, R. 2, Civil P. C. Section 19 lays down that on the application of the judgment-debtor or the decree-holder the Court which passed the decree shall apply the provisions of the Act to that decree and notwithstanding anything contained in the Code of Civil Procedure shall amend the decree accordingly or enter satisfaction as the case may be. Then follows a proviso with which we will deal separately. So far the section is concerned merely with the amendment of the decree in accordance with the terms of Act 4 of 1938 and with the addition of a power to the Court to enter satisfaction, presumably when the scaling down process under the Act itself results in the extinction of the decree. So far, the section is not concerned with execution, nor is it concerned with payments made in execution or payments made subsequent to the decree. Then follows the proviso that all payments made or amounts recovered, whether before or after the commencement of the Act, in respect of any such decree shall first be applied in payment of all costs as originally decreed. This proviso expressly contemplates the appropriation of payments made after the decree by the Court which passed the decree. We find it difficult to hold that in making these appropriations, the trial Court is acting as an executing Court. If the Court is not a Court executing the decree, then the provisions of O. 21, R. 2 (iii) would not bar the petitioner from proving payments which have not been certified in the manner necessary for establishing them in an executing Court. If this view is correct, it follows that when a judgment-debtor applies under S. 19 to scale down a decree, he can prove payments which have not been certified, for the purpose of satisfying the decree regarding costs. For any other purpose, there is no express provision allowing the petitioner to prove payments made after the decree and not recorded by the Court and it seems to follow that he would have to establish those payments in the ordinary way by getting them certified in Court, if he wants them to be taken into consideration as payments towards the decree.

In the result, therefore, we hold that this decree is liable to be scaled down under S. 8 treating as the principal of the debt the amount originally advanced and any subse-

2. ('40) 27 A I R 1940 Mad 419 : (1940) 1 M L J 225, Narayanaswami Naidu v. Rajamanikkam Pillai.

quent sums lent to the extent to which the original debt can be said to have been renewed by the agreement of compromise embodied in the decree and that the petitioner is entitled under the proviso to S. 19 to prove uncertified payments for the purpose of appropriating those payments if established towards costs of the decree. The petition is therefore remitted to the trial Court for disposal in the light of this judgment and the petitioner is entitled to his costs in this Court.

C.R.K./D.S. *Petition remitted.*

A. I. R. 1941 Madras 58

WADSWORTH AND PATANJALI SASTRI JJ.

Neelappa Reddiar — Petitioner

v.

Solaimuthu Udayan and another — Respondents.

Civil Revn. Petn. No. 113 of 1939, Decided on 21st August 1940, to revise order of Dist. Munsif, Ariyalur, D/- 29th August 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 8, Explanation — Explanation does not cover case in which debt due by A *is discharged on debt due by* B *to same creditor being substituted for it.*

Explanation to S. 8 was intended to cover the case of a debt by *A* in favour of *X* renewed by another debt by *A* in favour of *X* or included in a fresh document executed by *A* in favour of *X* for the original advance plus some further sum. It does not cover the case in which a debt due by *A* is discharged on a debt due by *B* to the same creditor being substituted for it. A I R 1940 Mad 58, *Rel. on*; C. R. P. No. 1962 of 1939, *Disting.*

[P 58 C 2; P 59 C 1]

K. Aravamudha Aiyangar—for Petitioner.

Y. Venkatasubramanian—for Respondents.

Wadsworth J. — This revision petition raises the question of the meaning of the explanation to S. 8 of Madras Act 4 of 1938. Does the term "renewed or included in a fresh document" cover the case in which a debt due by A is discharged on a debt due by B to the same creditor being substituted for it? The facts are that one Arunachala was indebted to the plaintiff under a promissory note Ex. E of the year 1918. That promissory note was discharged and in lieu of it on the same day (3rd October 1934) a promissory note Ex. D was executed by the defendant who is a distant relative of Arunachala. This has been renewed by a series of documents terminating the suit promissory note by defendant to the plaintiff dated 19th August 1936. There is a missing link in 1925, but the lower Court has found that the evidence is sufficient to prove that the missing promissory note of 1925 was part of the chain of renewals. It follows therefore that in scaling down the debt the defendant is at least entitled to go back to Ex. D of 1924. The lower Court has found that he is also entitled to go back to Ex. E of 1918 executed by his relative Arunachala and the plaintiff seeks to revise this order.

It was held by Somayya J., in (1939) 2 M L J 609,[1] that when B takes over a debt due by A, the new document is not a renewal of A's debt nor is it an inclusion in a fresh document so as to bring in the explanation to S. 8. There is a very brief judgment of Stodart J., in C. R. P. NO. 1962 of 1939 where our learned brother held that in the case of a debt by A renewed by his legal representative B, the explanation to S. 8 applies and that B's debt was a renewal of that of A. It is possible that different considerations may govern the case of two debts, one incurred by the legal representative of the debtor under the earlier debt. We are not however concerned with such a case here. The defendant was not the legal representative of Arunachala. The fact seems to be that by some private arrangement the debt due by the defendant was substituted for the debt due by his relative Arunachala. Can it be said in such circumstances that the defendant's debt is a renewal of the debt of Arunachala? We have no doubt that in ordinary parlance, when we speak of a renewal of a debt, we ordinarily mean the substitution of a fresh contract between the same parties for the same amount or the same amount plus accrued interest. That is the view taken by the Court of appeal in (1893) 68 L T 29.[2] Lindley L. J., says:

> A bill is renewed when another bill is taken in its place, the parties to the bill and the amount of it being the same, though perhaps in some cases the interest due on the one bill is added.

It seems to us clear that this is the sense in which the word 'renewed' is employed by the Legislature in the explanation to S. 8. It has been contended that though the defendant's debt may not be a renewal of the debt of Arunachala, it may be said to be an inclusion in a fresh document of Arunachala's debt and that the explanation can therefore be applied. We consider that this interpretation of the explanation to S. 8 involves violence to the language. Reading that explanation as a whole, we have no

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1. ('40) 27 AIR 1940 Mad 58 : 186 I C 722 : (1939) 2 M L J 609, In re Ramaswami Chettiar.
2. (1893) 68 LT 29 : 2 R 72 : 41 WR 341, Barber v. Mackrell.

doubt that it was intended to cover the case of a debt by A in favour of X renewed by another debt by A in favour of X or included in a fresh document executed by A in favour of X for the original advance plus some further sum. This view is confirmed by reference to the later words of the explanation regarding the principal originally advanced with such sums, if any, as have been subsequently advanced and especially by reference to the final words 'principal sum repayable by the agriculturist.' Obviously, the Legislature was dealing with the same debtor throughout. We say nothing on the question whether when A dies and B inherits his liability and executes a new promissory note in substitution for that executed by A, the explanation would or would not apply.

In the result therefore we hold that the defendant will be entitled in scaling down the debt to go back only to the promissory note Ex. D, dated 3rd October 1924. There is one other point with respect to which the lower Court's order appears to be defective. No provision is made in the lower Court's order for the costs in the suit. This is not a case to which S. 18 (1) applies as the suit appears to have been filed before 1st October 1937. The omission to provide for the costs in the suit seems to have been due to inadvertance. This will be remedied by the trial Court if the petitioner's statement that the suit was filed before 1st October 1937, is found to be correct. The civil revision petition is therefore allowed with costs and the application is remitted to the trial Court for disposal in the light of this judgment.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1941 Madras 59

WADSWORTH AND PATANJALI SASTRI JJ.

Doraikannu Odayar — Petitioner

v.

Veerasami Padayachi — Respondent.

Civil Revn. Petn. No. 602 of 1939, Decided on 22nd August 1940, to revise order of Dist. Munsif, Shiyali, D/- 11th October 1938.

Madras Agriculurists Relief Act (4 of 1938), Ss. 19, 8, expl., 10 (2) (ii) and 4 (f) — Section 8, expl., contemplates renewal of debt by same debtor — But parties to first and second debt need not be absolutely identical — Purchaser of mortgagor's equity of redemption executing pronote in favour of mortgagee to satisfy mortgage — Pronote is renewal of pre-existing liability and debt under it can be scaled down under S. 19 — Section 10 (2) (ii) is no bar to scaling down aforesaid debt —Nor does S. 4 (f) apply to such case.

The explanation to S. 8 contemplates the renewal of a debt or its inclusion in a fresh document by the same debtor. But it does not necessarily follow that the parties to the first debt and the second debt must be absolutely identical. Where the purchaser of the mortgagor's equity of redemption executes a pronote to discharge the mortgage debt, the pronote must be deemed to be a renewal of a pre-existing liability and hence the debt under it can be scaled down under S. 19 : AIR 1941 Mad 58 ; A I R 1940 Mad 58 and A I R 1939 Mad 186, *Rel. on.* [P 60 C 1, 2]

The liability sought to be scaled down in such a case is not a liability in respect of which a charge is provided under S. 55 (4), T. P. Act, and consequently S. 10 (2) (ii) is no bar to scaling down debt. Nor does S. 4 (f) have any application to the case. [P 60 C 1, 2]

A. Srirangachariar — for Petitioner.

S. Swaminatha Ayyar for M. S. Venkatarama Ayyar — for Respondent.

Wadsworth J. — This civil revision petition raises questions arising out of the explanation to S. 8 of Madras Act, 4 of 1938. The petitioner was defendant 3 in a suit on a promissory note and he applied to scale down the decree under S. 19. The promissory note relates back to a mortgage of 1922 executed by one Samiappa in favour of Pakkiri for a sum of Rs. 500. In 1929 Pakkiri assigned the mortgage to the plaintiff. Before this assignment a payment of Rs. 250 had been made towards the mortgage. On 25th August 1930 defendant 1, father of defendants 2 and 3, purchased the land covered by the mortgage from the sons of Samiappa and agreed to pay Rs. 755 in discharge of the mortgage. On 21st March 1934 defendant 1 paid Rs. 830 towards the mortgage and on the same date he and his son defendant 2 executed a promissory note for Rs. 150 in favour of the mortgagee and the mortgage was thereby discharged. The plaintiff sued on the promissory note alleging that it was a family debt binding on all the coparceners and impleading defendant 3 as a coparcener. On this basis he got a decree on 28th September 1936. Defendant 3 applied under S. 19 of Act 4 of 1938 to scale down the debt on the basis that the promissory note was in effect a renewal of the mortgage executed by Samiappa. The trial Court held that it was not a renewal and it is this decision which is now under consideration.

Now, in view of our decision in C.R.P. No. 113 of 1939[1] approving the decision of Somayya J., in (1939) 2 M L J 609[2] we must hold that the

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1. *Reported in* ('41) 28 AIR 1941 Mad 58 : (1940) 2 M L J 517, Neelappa Reddiar v. Solaimuthu Udayan.
2. ('40) 27 AIR 1940 Mad 58 : 186 I C 722 : (1939) 2 M L J 609, In re Ramaswami Chettiar.

explanation to S. 8 contemplates the renewal of a debt or its inclusion in a fresh document by the same debtor. But it does not necessarily follow that the parties to the first debt and the second debt must be absolutely identical. There may be cases in which a debt due jointly and severally from A and B is included in a fresh document executed by A alone or cases in which a debt due solely by A is included in a fresh document executed by A and B. But we are not really concerned in the present case with either of these cases. In so far as there is a mortgage by Samiappa discharged by a promissory note executed by defendants 1 and 2 it cannot be said that the promissory note is a renewal of the mortgage or an inclusion of the amount of that debt in a fresh document. But this does not dispose of the question. When defendant 1 who must be deemed in view of the decree to have been acting as manager of the joint family purchased this land and undertook to discharge the mortgage on it, although there was no obligation to the creditor which the creditor could directly enforce by suing for the money from defendant 1, there was a liability towards that creditor which the creditor could enforce indirectly by suing on his mortgage for the sale of the hypotheca which defendant 1 had purchased and this liability is a debt within the meaning of Madras Act 4 of 1938. So much follows from the decision of Varadachariar and Abdur Rahman JJ., in I L R (1939) MAD 218.[3] It also seems to follow from that decision that the liability of the purchaser being traceable to the original mortgage must be scaled down with reference to the date of the mortgage. On the basis of this decision we must hold that when defendants 1 and 2 executed the suit promissory note they were in fact renewing a pre-existing liability which bound the family or at all events, having regard to the strict definition of the term 'renewal' in (1893) 68 L T 29,[4] they were including this pre-existing liability in a fresh document binding on the same debtor. It seems to follow therefore that defendant 3, who is under S. 19 entitled to scale down the joint family debt embodied in the decree can ask that this debt be treated as a renewal of the pre-existing liability which dates back to the mortgage of Samiappa.

It has, however, been contended that the liability in question is one in respect of which a charge is provided under S. 55 (4) (b), T. P. Act, and that therefore it cannot be scaled down, having regard to the provisions of S. 10 (2) (ii) of Madras Act 4 of 1938. It seems to us that this argument involves a certain confusion of ideas. There cannot be a liability except it be due to a person. When we speak of 'the same liability' we must necessarily mean the liability to the same person. It is true that the liability to the plaintiff under the promissory note was co-extensive with the outstanding liability of defendant 1 to his vendor, in respect of which it might be contended the vendor's lien existed. But it was not identical with that liability. The liability to A may be measured by the extent of the liability to B, but when the two liabilities are due to different persons they are not the same liability. It seems to follow that the liability to the plaintiff which the applicant seeks to scale down is not a liability in respect of which a charge is provided under Section 55 (4).

It has also been contended that S. 4 (f) applies but we are unable to see how, assuming that this liability had its origin in a trust, there has been any breach of trust.

In the result therefore we are of the opinion that the decision of the lower Court is erroneous and that defendant 3 is entitled to scale down the decree on the basis that the promissory note is a renewal of a pre-existing liability which dates back to the original mortgage. The effect of the payment of Rs. 250, made by the original mortgagor, on the questions arising under S. 8 (2) and (3) will depend on the answer to the question whether the original mortgagor was or was not an agriculturist. If he was an agriculturist this payment will have to be taken into account in calculating the amount paid towards the debt.

The revision petition is allowed with costs. The application is remitted to the trial Court which will scale down the debt in the light of this judgment.

C.R.K./G.N. *Petition allowed.*

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3. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : I L R (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.

4. (1893) 68 L T 29 : 2 R 72 : 41 W R 341, Barber v. Mackrell.

A. I. R. 1941 Madras 60

WADSWORTH AND PATANJALI SASTRI JJ.

Ediga Seshanna and another —

Petitioners

v.

R. Venkataramana Rao — Respondent.

Civil Revn. Petn. No. 223 of 1939, Decided on 21st August 1940, to revise order of Dist. Munsif, Kurnool, D/- 23-6-1938.

Madras Agriculturists Relief Act (4 of 1938), S. 8, expln. — Vendee of mortgagor's property executing mortgage in favour of his vendor's mortgagee and discharging vendor's mortgage—Vendee cannot treat his mortgage as renewal of his vendor's mortgage.

A vendee of mortgagor's property who executes a mortgage of that property in favour of his vendor's mortgagee and discharges the vendor's mortgage cannot treat his mortgage as a renewal of his vendor's mortgage under S. 8, expln.: A I R 1941 Mad 58, *Foll.*; A I R 1940 Mad 58 and A I R 1939 Mad 186, *Ref.* [P 61 C 1]

S. S. Bharadwaj — for Petitioners.

J. V. Srinivasa Rao — for Respondent.

Order. — Our decision in civil revision petition No. 113 of 1939[1] makes it clear that we approve the decision of Somayya J. in (1939) 2 M L J 609[2] and cannot agree that the petitioner is entitled under the explanation to S. 8, Madras Act 4 of 1938 to treat his mortgage as a renewal of his vendor's mortgage, which he has discharged. It has however been suggested on the reasoning in I L R (1939) MAD 218,[3] that at the moment when the sale to petitioner was completed there was created a liability in petitioner himself to discharge his vendor's mortgage and that this liability has been renewed or included in a fresh document by the execution of his own mortgage. We are of opinion that this theory of a discharge of a pre-existing liability of the petitioner himself scarcely accords with the facts. No doubt the sale was in theory anterior to the mortgage, but in point of fact they were both part of a single transaction carried through on the same day and it was not in the contemplation of the parties that the mortgage executed by the petitioner should discharge any pre-existing liability of the petitioner himself. It cannot therefore be said that the petitioner's mortgage was in fact a renewal of a previous debt due by him. The petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

1. *Reported in* ('41) 28 A I R 1941 Mad 58 : (1940) 2 M L J 517, Neelappa v. Solaimuthu.
2. ('40) 27 AIR 1940 Mad 58 : 186 I C 722 : (1939) 2 M L J 609, In re Ramaswami Chettiar.
3. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : I L R (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.

A. I. R. 1941 Madras 61

LAKSHMANA RAO J.

The Public Prosecutor — Appellant

v.

Chelliah Tevan and another — Respondents.

Criminal Appeal No. 172 of 1940, Decided on 9th August 1940.

Madras Borstal Schools Act (5 of 1926), S. 7 (2) — Joint Magistrate cannot acquit adolescent offender under S. 7 (2).

The powers conferred by S. 7 (2) are neither appellate nor revisional, and the order permissible under that section is only such as can be passed upon a convicted person. S. 7 (2) does not empower a Joint Magistrate to acquit an adolescent offender: A I R 1933 Mad 728, *Rel. on.* [P 61 C 2]

Appellant in person.

N. T. Raghunathan — for Respondents.

Judgment.—The respondents were convicted by the Sub-Magistrate of Tuticorin for offences punishable under Ss. 323, 324 and 114, I. P. C., and the proceedings were submitted to the Joint Magistrate of Tuticorin under S. 7 (1), Madras Borstal Schools Act, with the opinion of the Sub-Magistrate that the respondents who are adolescent offenders as defined in S. 2 (1) of the Act are proper persons to be detained in a borstal school. The Joint Magistrate acquitted the respondents and the question is whether this is permissible. The proceedings were submitted under S. 7 (1), Madras Borstal Schools Act, which provides that when a Magistrate not empowered to pass sentence under that Act is of opinion that an adolescent offender is a proper person to be detained in a borstal school he may without passing sentence record such opinion and submit his proceedings and forward the adolescent offender to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate and the Joint Magistrate to whom the proceedings were submitted has to dispose of the case as prescribed in S. 7 (2), Madras Borstal Schools Act. That section provides that he may make such further enquiry if any as he may think fit and pass such sentence or order dealing with the case as he might have passed if the adolescent had been tried by him, and as pointed out in 57 MAD 85[1] with reference to the analogous provision in S. 380, Criminal P. C., it is not permissible to the Joint Magistrate to acquit the accused. A conviction has to be recorded before the proceedings are submitted under S. 7 (1), Madras Borstal Schools Act, as otherwise there would be no "adolescent offender" and when the proceedings reach the Joint Magistrate he has to deal with a person who has been convicted. The powers conferred by S. 7 (2), Madras Borstal Schools Act, are neither appellate nor revisional, and the order permissible under S. 7 (2) is only such as can be passed upon a convicted person. The order of acquittal is

1. ('33) 20 A I R 1933 Mad 728 : 145 I C 659 : 34 Cr L J 1045 : 57 Mad 85 : 65 M L J 405, Public Prosecutor v. Gurappa Naidu.

therefore set aside and the case will go back to the Joint Magistrate for disposal according to law.

C.R.K./G.N. *Case remanded.*

A. I. R. 1941 Madras 62

WADSWORTH AND PATANJALI SASTRI JJ.

Venkatammal

v.

K. V. Ramaswami Iyer.

Civil Revn. Petn. No. 61 of 1939, Decided on 11th September 1940, to revise order of Sub-Judge, Coimbatore, D/- 19-8-1938.

(a) Madras Agriculturists Relief Act (4 of 1938), Ss. 10 (2) (ii) and 19—Mortgage executed by A *and* B *in favour of* C *in renewal of earlier mortgage — Mortgagors selling hypotheca to* D *— D undertaking to discharge mortgage by payment of Rs. 2500 out of purchase price—On default by* D *in payment mortgagee bringing suit on mortgage — Suit resulting in compromise decree—Application by* D *under S. 19 for scaling down—Decree held not protected under S. 10 (2) (ii) to extent of Rs. 2500.*

A and *B* executed a mortgage in favour of *C* in renewal of an earlier mortgage. Subsequently the mortgagors sold the hypotheca to *D* under a sale deed according to which *D* undertook to discharge the mortgage by payment of Rs. 2500 out of the purchase price. *D* did not pay and hence the mortgagee filed a suit which resulted in a compromise decree. *D* filed an application under S. 19 for scaling down the decree :

Held that the decree was not protected to the extent of Rs. 2500 under S. 10 (2) (ii). The liability which *D* sought to scale down was not the liability to his vendors, in respect of which charge was provided, but the liability to the mortgagee. The fact that the decree was on a compromise could not affect the position of *D*. The liability was one which must be deemed to be a liability of the purchaser which he, if an agriculturist, could seek to scale down as against the mortgagee : A I R 1941 Mad 59 and A I R 1939 Mad 186, *Rel. on.* [P 62 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 19 — Mortgagor and purchaser of hypotheca both agriculturists — Purchaser can claim to have debt scaled down on basis that mortgage debt is renewal of earlier debt in favour of same creditor.

When both the mortgagor and the purchaser of hypotheca are agriculturists, the purchaser can claim to have the debt scaled down on the basis that the mortgage debt for which he became liable is itself a renewal of an earlier debt in favour of the same creditor. [P 63 C 1]

(c) Madras Agriculturists Relief Act (4 of 1938), S. 11—Provisions of S. 11 do not cover costs of execution.

The provisions of S. 11, like those of S. 19 of the Act relate to costs as decreed and do not cover costs of execution. [P 63 C 2]

V. C. Viraraghavachari — for Petitioner.

K. V. Ramachandra Iyer — for Respondents.

Wadsworth J. — This petition is preferred by defendant 4 in a mortgage suit, who filed an application under S. 19, Madras Agriculturists Relief Act, to scale down the decree. The application was unsuccessful to the extent of Rs. 2500 which the learned Subordinate Judge held to be protected by the provisions of S. 10 (2) (ii) of the Act and it is this decision which the petitioner seeks to revise. The suit was based on a mortgage dated 13th December 1923 executed by defendants 1 and 2 in favour of the plaintiff. This mortgage is alleged to be a renewal of an earlier mortgage dated 16th August 1917, executed in favour of the same creditor by Subbaraya Goundar, who is said to have been the husband of defendant 1 and the father of defendant 2. After the execution of the mortgage of 1923, the mortgagors on 27th December 1933 sold the hypotheca to the petitioner (defendant 4) under a sale deed in which she specifically undertook to discharge the mortgage by payment of Rs. 2500 out of the purchase price. She did not pay and the mortgagee filed a suit which resulted in a compromise decree, by the terms of which defendants 2 and 4 were enabled to satisfy the decree by paying Rs. 1500 by 24th August 1935 and Rs. 2050 by 16th July 1936, but in default of such payments the compromise decree was to be a final decree for the full plaint claim (Rs. 4348-8-0) with interest and costs. This default clause became operative, for the only payments made were Rs. 500 on 1st March 1936, Rs. 1000 on 13th July 1936 and Rs. 1000 on 5th January 1937.

The decision of the learned Subordinate Judge that the decree is protected to the extent of Rs. 2500 under S. 10 (2) (ii) cannot be upheld in view of our decision in C. R. P. No. 602 of 1939.[1] The liability which the petitioner seeks to scale down is not the liability to her vendors, in respect of which the charge is provided, but the liability to the mortgagee. The plaintiff-respondent has however sought to resist the scaling down on the basis that the decree is a compromise decree under which for the first time a direct liability is placed upon the purchaser. We are unable to see how the fact that the decree is on a compromise can affect the position of the petitioner having regard to the facts of the case. We have held in C. R. P. No. 2010 of 1939[2] that when it can be shown that the liability under the compromise is a renewal of a pre-existing liability to the same creditor, the debt must be scaled down

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1. *Reported in* ('41) 28 A I R 1941 Mad 59 : (1940) 2 M L J 651, Doraikannu v. Veerasami.
2. *Reported in* ('41) 28 A I R 1941 Mad 56 : (1940) 2 M L J 293, Ramamurti v. Sitaramayya.

under S. 8 (if this section applies) on the basis of the principal amount originally advanced together with the amount of any subsequent advances. There is no difficulty on the present facts in holding that the whole of the liability under the compromise was nothing else than a renewal of the previous mortgage liability. Provided that this debt was the debt of an agriculturist, the liability is one which must be deemed to be a liability of the purchaser which he, being an agriculturist, can seek to scale down as against the mortgagee : *vide* I L R (1939) MAD 218.[3]

There has been some discussion before us of the question whether the fact that the purchaser is under a liability which can be traced back to the liability under the mortgage, makes available to the purchaser the plea which would be open to the original mortgagors that the mortgage-debt is itself a renewal of an earlier debt. The question is not free from difficulty and we have been referred to no previous decision directly covering this question. But the judgment of Varadachariar J., in I L R (1939) MAD 218[3] assumes that an heir-at-law is under the same liability as the person to whom he inherits and is entitled to the same remedy under the Act and the learned Judge treats the purchaser of mortgaged property as under the same liability as his vendor. It would appear to follow that if the debt for which the purchaser is liable is essentially the same debt as the debt of the original mortgagor and the latter debt is a renewal of an earlier debt in favour of the same creditor, the purchaser will be entitled to claim that the liability which he has incurred is a renewal and that the principal must be the principal originally advanced together with the amounts subsequently advanced as principal. We must point out that this is not a case of a novatio by a different debtor such as we had before us in C. R. P. NO. 223 of 1939.[4] The compromise is a renewal of the pre-existing liability of the purchaser, which liability is traceable to the mortgage-debt, which debt is itself a renewal. We are of opinion that when both the mortgagor and the purchaser, are agriculturists, the purchaser can claim to have the debt scaled down on the basis that the mortgage-debt for which he became liable is itself a renewal of an earlier debt in favour of the same creditor. The plaintiff-respondent has contended that by reason of S. 11, the costs of execution can be recovered in addition to the amount recoverable under the provisions of Ss. 8 and 9. We are of opinion that the provisions of S. 11, like those of S. 19, relate only to costs as decreed and do not cover costs of execution. In the result the petition is allowed with costs as against the plaintiff-respondent and the application is remanded to the lower Court for fresh disposal in the light of this judgment.

C.R.K./D.S. *Petition allowed.*

3. ('39) 26 A I R 1939 Mad 186 ; 182 I C 879 : I L R (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.
4. *Reported in* ('41) 28 AIR 1941 Mad 60 : (1940) 2 M L J 837, Seshanna v. Venkataramana Rao.

A. I. R. 1941 Madras 63

Full Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

In re R, a First Grade Pleader, Vellore.

Ref. Case No. 16 of 1940, Decided on 23rd September 1940.

Legal Practitioners' Act (1879), S. 13 — Rules framed by the Madras High Court, R. 16—Vakil is bound to keep accounts for whatever work he may have — Failure to do so amounts to professional misconduct.

Even if a vakil has not much work, he is bound under R. 16 to keep accounts for whatever work he may have. Failure to keep accounts amounts to professional misconduct. [P 64 C 1]

K. Umamaheswaran for Advocate-General — In support of Notice.

Leach C. J. — The respondent is a first grade pleader practising at Vellore. He has been charged with professional misconduct in that he has failed to maintain accounts in respect of his professional work. Rule 16 of the rules framed under the Legal Practitioners' Act, states that it is the duty of every pleader to keep regular accounts of all moneys received and disbursed by him in connexion with each suit in which he is engaged as a pleader. The rule goes on to say that the failure to keep such accounts will be treated as a reasonable cause for suspension of certificate within the meaning of S. 13 (f), Legal Practitioners' Act, 1879.

In answer to the charge the respondent sent by post a communication to the District Munsif of Vellore who had framed the charge, stating that, as he had no legal work worth mentioning, there was no necessity to maintain any accounts, and that he was under the bona fide belief that he need not keep any accounts under the circumstances. He admitted that he had committed an error and asked to be excused. The enquiry into the charge framed against the respondent was fixed for 16th and 17th April of this

year. On each occasion the respondent failed to put in an appearance. We agree with the District Munsif that, even if a vakil has not much work, he is bound to keep accounts for whatever work he may have, and in failing to keep accounts the respondent has been guilty of professional misconduct. The respondent is at present under suspension by an order of this Court dated 17th October 1939 passed in another case in which he was charged with professional misconduct. The suspension in that case does not expire until the end of the summer vacation of the District Court of North Arcot in 1941. It is necessary that the respondent should be punished for this further act of misconduct and we direct that he be suspended from practice on the present charge from the end of the summer vacation of the District Court of North Arcot in 1941 until the end of that year.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 64

KING J.

Narasimhulu Naidu — Appellant

v.

Pemmati Naga Reddy — Respondent.

Appeal No. 164 of 1939, Decided on 30th July 1940, against order of Sub-Judge, Chittoor, D/- 11th February 1939.

Madras Abkari Act (1 of 1886)—Abkari auction — A, a bidder at auction after date of bid but before issue of license entering into partnership business with B—Agreement held illegal.

A, a licensee of toddy shop entered into a partnership with *B* after the date of the bid at auction but before issue of license. According to the partnership *A* was to bear one-half of the expenses of running the business and the sale proceeds were to be divided between *A* and *B*. *B*'s duties were confined to the supervision of the procuring of toddy from the trees :

Held that the privilege of supply and sale was transferred by *A*. Such agreement was illegal and could not be enforced : A I R 1935 Mad 440 (F B), *Rel. on*; A I R 1936 Mad 557, *Dissent.*

[P 65 C 1, 2]

A. Viswanatha Ayyar and K. Sundaresan — for Appellant.

S. A. Seshadri Ayyangar — for Respondent.

Judgment.—The appellant in this appeal was the licensee of the toddy shop at Minnal for the year beginning 1st October 1932. The auction at which defendant's bid was accepted was on 8th August 1932. On 31st August appellant entered into an agreement with the respondent which is embodied in EX. A. This is a brief document called a "partition" and apart from a penalty clause with which I am not now concerned, its terms are that appellant should bear one-half of the expenses of running the business and that the sale proceeds should be divided between appellant and respondent every month. Respondent alleging that appellant had not paid him his half share of the profits, filed a suit for accounts. Appellant contended, amongst other things, that the agreement was illegal and could not therefore be enforced. The District Munsif of Sholinghur accepted this contention; the Subordinate Judge of Chittoor rejected it and remanded the suit for disposal after taking accounts. Against that order of remand the present appeal has been filed.

The decision of the appeal depends upon the determination of the question whether the privilege of the supply and sale of toddy has or has not been transferred by the appellant. Such a transfer is admittedly prohibited by the terms of the license. The learned Subordinate Judge holds that there is no such transfer on two grounds : (i) because appellant and respondent did not enter into any partnership; and (ii) because their agreement was anterior to the actual issue of the license. It is difficult to understand how the Subordinate Judge arrived at the first of these conclusions. The issues framed by the District Munsif assume that the relation between appellant and respondent was a partnership. They certainly agreed in the words of the definition (Contract Act, S. 239) to "combine their property, labour or skill" in the business and to "share its profits." I find that the agreement constituted appellant and respondent partners.

The question then arises whether by the constitution of this partnership there was any transfer of the privilege of selling toddy in this particular shop. The Subordinate Judge holds in effect that that privilege comes into existence only with the grant of the license and therefore on the date of the agreement there was nothing to transfer. It is argued for the appellant on the other hand that the privilege was acquired as soon as appellant's bid was accepted. If that be so, it is clear that appellant has transferred that privilege to the partnership. Though the issue was not perhaps raised in this direct form it seems to me that the decision of the Full Bench in 58 MAD 727[1] is conclusive on this point in favour of the appellant. That was a case of a partnership constituted after the date of the auction and before the date

1. ('35) 22 A I R 1935 Mad 440 : 155 I C 544 : 58 Mad 727 : 68 M L J 570 (F B), Ramanaidu v. Seetharamayya.

of the issue of license. The judgment sets out these dates on page 733 and states :

The money was therefore lent to the partnership after defendant 1 had become the successful bidder at the auction and was the person in whose name the license would be issued.

Again on page 734 it is stated :

The partnership was formed after defendant 1 had become the successful bidder. The license would therefore be issued in his name.

These passages seem to me to show that the learned Judges in that case took it for granted that the issue of a license was something following automatically upon the acceptance of a bid and that it is the acceptance of the bid which confers the privilege. The decision, I think, can be explained on no other ground. The learned Subordinate Judge, however, has preferred to rely upon two later decisions each that of a Single Judge. The first of these, 69 M L J 490,[2] is obviously of no assistance to the respondent. That is a clear case of a partnership formed before the auction and in giving his decision Venkatasubba Rao J., expressly distinguishes the Full Bench ruling by quoting the words, "the partnership was formed after defendant 1 had become the successful bidder." The second case is reported in 70 M L J 691[3] and this certainly does support the Subordinate Judge's judgment. But this is only because in my opinion, and with all respect to him, the learned Judge who decided it has not correctly stated what the Full Bench decided. In 70 M L J 691[3] no dates are given, but it is stated that the partnership was formed "at least a month before the actual grant of license." On page 692 the learned Judge says :

If a case is authority for what it decides, the Full Bench decision is only an authority for the proposition that where a partnership is entered into subsequent to the grant of license it would be illegal. . . .

I am entirely unable to see how such an appreciation of the Full Bench decision can be formed when the Full Bench after setting out the dates, declares to be illegal a partnership formed before the grant of a license. I am accordingly of opinion that the facts of this case are covered by the Full Bench decision and that the formation of the partnership was a transfer. One final argument is however urged for the respondent and that is that what was transferred was not the privilege of supply and sale of toddy because respondent's duties in the partnership were confined to the supervision of the procuring of toddy from the trees and had nothing to do with the actual process of selling it. I am unable to accept any such narrow interpretation of the words 'privilege of supply and sale.' The privilege or right which was conferred upon appellant by the Government was that of carrying on the whole business of selling toddy, and in that business the procuring of toddy from trees is obviously a necessary part. The agreement contains no clause to the effect that respondent was prohibited from controlling in any way the operation and methods of sale—and from the legal point of view, appellant, his partner, is also his agent in the business which he personally carries on on behalf of the partnership. It is argued further that the reasons for the prohibition of transfer are in no way affected by the agreement in this case. It is not for me to speculate upon those reasons. It is enough to recognize that transfer is in fact prohibited, and to hold, as I do hold, that the partnership in this case amounts to such a transfer. This appeal must therefore be allowed, and the decree of the District Munsif restored, and respondent's suit be dismissed with costs throughout. Leave refused.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 65

LAKSHMANA RAO J.

Patnam Sidda Reddi and others — Petitioners

v.

Ambati Venkata Girianna — Respdt.

Criminal Revn. Case No. 277 and Petn. No. 255 of 1939, Decided on 29th September 1939, to revise order of Sess. Court, Anantapur, D/- 6th February 1939.

Criminal P. C. (1898), S. 436—It is not permissible to direct Magistrate to frame charge and dispose of case.

It is not permissible under S. 436 to direct the Magistrate to frame a charge and dispose of the case. [P 65 C 2]

A. Bhujanga Rao — for Petitioners.

N. Somasundaram — for Respondents.

Public Prosecutor — for the Crown.

Order. — There is no ground for interference with the order directing further inquiry but it is not permissible under S. 436, Criminal P. C., to direct the Magistrate to frame a charge and dispose of the case. The direction of the Sessions Judge to frame a charge under S. 147 is therefore set aside and otherwise this petition is dismissed.

C.R.K./D.S. *Order accordingly.*

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2. ('35) 22 A I R 1935 Mad 895 : 158 I C 1055 : 69 M L J 490, Satyala Sanyasi v. Bhogavalli Sanyasi.
3. ('36) 23 A I R 1936 Mad 557 : 162 I C 266 : 70 M L J 691, Rangasami Pillai v. Narayanasami Naicken.

A. I. R. 1941 Madras 66

KING J.

Induru Pattabirami Reddi—Appellant

v.

Kakarala Venkatappayya and others—Respondents.

Second Appeal No. 30 of 1937, Decided on 12th April 1940, against decree of Sub-Judge, Nellore, D/- 16th July 1936.

Transfer of Property Act (1882), S. 82 — D *mortgaging 3 items of property to* P's *father and settling equity of redemption on his* (D's) *mother —Mother selling item 1 to* A *who undertook to pay entire mortgage debt*—A *making certain payments towards mortgage debt and selling item 1 to* P *who had succeeded to his father's rights as mortgagee for sum which did not suffice to satisfy mortgage* —P *instituting suit for balance—Contract between mother and* A *is "contract to the contrary" within meaning of S. 82 and is binding on* P — P *held could not proceed against items 2 and 3 in mother's possession.*

In 1922 *D* mortgaged three items of property to *P*'s father. In 1925 *D* settled the equity of redemption upon his mother. In September 1925 the mother sold item 1 to *A* the main consideration for the sale being the promise by *A* to discharge the whole of the mortgage debt. In 1926 and 1927 *A* made two part payments. In January 1932 *A* sold item 1 to *P* who had succeeded to his father's rights as mortgagee for a sum which did not suffice to discharge the mortgage. *P* accordingly sued to recover the balance :

Held that the contract that *A*, the purchaser, should pay the whole debt and would not be entitled to call upon items 2 and 3 for contribution was a "contract to the contrary" within the meaning of S. 82 : A I R 1930 P C 183, *Rel. on*; 24 Mad 85, *Held no longer good law.* [P 66 C 2]

Held further that it could not be said that because the benefit of the contract in question did not necessarily pass to an assignee from one party, the burden of it similarly did not pass to an assignee from the other who had full notice of its existence. Such an assignment could not give the assignee rights under S. 82 which his assignor did not possess and consequently the contract was binding on *P* who could have no claim against the mother : AIR 1936 Mad 106, *Rel. on*; 33 Mad 211, *Ref.* [P 66 C 2]

Ch. Raghava Rao—for Appellant.

K. Umamaheswaran—for Respondents.

Judgment. — The facts of this case are simple. On 7th November 1922, defendant 1 mortgaged three items of property to plaintiff's father. In January 1925, he settled the equity of redemption upon defendant 2 his mother. In September 1925, defendant 2 sold item 1 to one Ademma, the main consideration for the sale being the promise by Ademma to discharge the whole of the mortgage debt. In 1926 and 1927 Ademma made two part payments of Rs. 650 and Rs. 600 respectively. In January 1932, Ademma sold item 1 to the plaintiff who had succeeded to his father's rights as mortgagee for Rs. 3000 a sum which did not suffice to discharge the mortgage. Plaintiff accordingly sued to recover the balance, and the question at issue is whether on these facts, and with reference to S. 82, T. P. Act, items 2 and 3 which have remained since 1925 in the possession of defendant 2, can be called upon to contribute any sum to the satisfaction of the mortgage. It is found that item 1 is five times as valuable as items 2 and 3.

The first question to decide is whether there is a 'contract to the contrary' within the meaning of S. 82. At one time it was held, *see* 24 Mad 85,[1] that such a contract must be between mortgagee and mortgagor, but since the decision of the Privy Council in 52 ALL 358,[2] that is no longer good law, and a contract, as here, between an assignee from the mortgagor, and the purchaser of a part of the equity of redemption certainly falls within the section. What is that contract ? The contract clearly is that Ademma, the purchaser, shall pay the whole debt, which means that Ademma shall not be entitled to call upon items 2 and 3 for contribution.

Is that contract still in force ? It would certainly be in force if this were an action between defendant 2 and Ademma. Does the sale to plaintiff make any difference ? It is argued for the appellant that it does on the ground that contracts of this kind do not "run with the land." I have been referred to 33 Mad 211,[3] and other authorities for the position that the benefit of a contract of this kind does not automatically pass to an assignee but only if it itself be specifically assigned. But here it is defendant 2 herself and not any assignee, who is opposing the plaintiff. I cannot agree that because the benefit of a contract such as this does not necessarily pass to an assignee from one party, the burden of it similarly does not pass to an assignee from the other who has full notice of its existence. In 59 Mad 121[4] at p. 137, it is pointed out that such an assignment cannot give the assignee rights under S. 82 which his assignor did not possess. 59 Mad 121[4] is a decision of a Bench of this Court which I think clearly binds me in deciding the present appeal. Not only

1. ('01) 24 Mad 85, Ramabhadrachar v. Sreenivasa Iyengar.
2. ('30) 17 A I R 1930 P C 183 : 124 I C 911 : 52 All 358 : 57 I A 189 (P C), Ganeshi Lal v. Charan Singh.
3. ('10) 33 Mad 211 : 4 I C 1049 : 6 M L T 119, Seshagiri Iyer v. Vythilinga Pillai.
4. ('36) 23 A I R 1936 Mad 106 : 163 I C 977 : 59 Mad 121 : 69 M L J 303, Muthiah Bhagavathar v. Venkatarama Aiyer.

on the proposition of law there laid down is plaintiff bound by the terms of Ademma's contract with defendant 2, but also, on the arithmetic of this case he can have no claim. For it is further pointed out on p. 137 that if plaintiff is not bound by his predecessor's contract he cannot take advantage of payments which his predecessor has made. If in the present case, plaintiff cannot credit the sum of Rs. 1250 as payments made by his item of property, defendant 2 will have fully discharged the one-sixth share of the mortgage debt due from her items. The appeal fails and is dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 67 (1)

WADSWORTH AND PATANJALI SASTRI JJ.

P. R. S. A. R. Periakaruppan Chettiar — Petitioner

v.

Marappa Goundan and others — Respondents.

Civil Revn. Petn. No. 946 of 1939, Decided on 22nd August 1940, to revise order of Dist. Munsif, Tiruppur, D/- 5th November 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 8 (1) — Payments prior to 1st October 1937 appropriated towards interest cannot be ignored for purpose of S. 8 (1).

Where the creditor appropriates in his plaint all payments prior to 1st October 1937, towards interest the appropriations cannot be ignored for the purpose of S. 8 (1). But the Court should, for the purpose of scaling down, adopt the reduced principal shown in plaint and cancel interest remaining due on 1st October 1937. [P 67 C 1]

M. Krishna Bharathi — for Petitioner.

Order. — The plaintiff having appropriated all the payments towards interest in his plaint which was filed before 1st October 1937 these appropriations cannot be ignored for the purpose of S. 8 (1). The most favourable way of scaling down the debt is to adopt the reduced principal of rupees one hundred and seventy one, annas two and pies six (Rs. 171-2-6) arrived at according to the plaint, cancel the interest remaining as on 1st October 1937 and credit to the debt the balance of the post decree payment of rupees fifty-four annas three and pies nine (Rs. 54-3-9) minus rupees forty and annas eight (Rs. 40-8-0) due for costs and give to the plaintiff a decree for the balance with interest at 6 per cent. per annum from 1st October 1937. The petition is allowed with costs and the decree will be scaled down accordingly.

C.R.K./G.N. *Petition allowed.*

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* * A. I. R. 1941 Madras 67 (2)

Full Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

Ramachandra (minor) — *Plaintiff* — Petitioner

v.

Shantarama (minor) and others — *Defendants* — Respondents.

Civil Revn. Petn. No. 579 of 1937, Decided on 16th October 1940, to revise decree of Dist. Munsif, Kundapur, D/- 18th December 1936.

* * *Limitation Act (1908), S. 20 — Mortgagee as part of mortgage consideration undertaking to discharge debt due by mortgagor — Mortgagee's duty is to discharge debt in full — He has no authority to make payments under S. 20 and thus keep debt alive*—(Per Full Bench; Patanjali Sastri J., *contra.*)

(Per *Leach C. J.* and *King J.*)—Where a mortgagee undertakes as part of the consideration for the mortgage to discharge a debt due by the mortgagor he cannot be deemed to have authority to keep the debt alive by making a payment of interest or a part payment of principal under S. 20. In such a case no discretion can be said to be given to the mortgagee in the matter of payment at all and his only duty is to discharge the promissory note in full. Consequently, a payment by the mortgagee cannot be regarded as having been made by him as the agent of the mortgagor duly authorized in that behalf within the meaning of S. 20. Whether there is authority to make a part payment is a question of fact and the decision in each case must depend upon the particular facts: A I R 1914 Mad 381, *Approved;* A I R 1929 P C 297, *Disting.* [P 69 C 1, 2]

(Per *Patanjali Sastri J.*)—The payment by the mortgagee should be regarded as having been made with the authority of the mortgagor who gets the benefit of it by virtue of the stipulation. Section 20 does not require authority to keep the debt alive. The authorization must relate to the payment of interest on the debt or to the part payment of the principal as the case may be, and the debt is kept alive as the legal consequence of such payment, irrespective of the intention of the debtor or his agent. It is therefore not strictly relevant, and may, indeed, be somewhat misleading, to enquire whether the person paying was authorized to keep alive the debt. The true principle however is that a man can be an 'agent' within the meaning of the Act, not only when he acts for a principal properly so called but also when he makes the payment on behalf of the debtor, because he has bound himself by deed for value so to do: A I R 1929 P C 297, *Rel. on;* AIR 1941 Mad 6 and AIR 1914 Mad 381, *Disapproved;* (1835) 2 Bing (N C) 241, *Expl.* [P 70 C 1]

K. Sanjiva Kamath — for Petitioner.

K. Vittal Rao — for Respondents.

OPINION

Leach C. J. — This petition appeared originally in the list of Patanjali Sastri J., but he adjourned the hearing under the provisions of R. 1 of the appellate side rules of this Court in order that the petition might

be determined by a Bench. The learned Judge was of the opinion that the judgment of the Privy Council in 57 I A 1=5 Luck 1[1] called for the reconsideration of the decision of this Court in 51 M L W 453[2] and of a number of earlier decisions to the effect that a power to pay off a debt does not carry with it a power to keep the debt alive by a payment of interest or part payment of principal. The petition has been placed before a Full Bench at my direction under R. 6 in order that there may be greater freedom of action if necessary.

Section 20, Limitation Act, provides that a payment of interest or a payment in part of principal by the person liable to pay the debt or by an agent duly authorized in this behalf starts a fresh period of limitation from the date of payment, provided that the acknowledgment appears in the handwriting of or in a writing signed by the person making the payment. In 51 M L W 453,[2] Venkataramana Rao J., pointed out that under this section the agent whose payment would keep alive the debt must be one who is duly authorized to make the part payment of interest or principal and that this Court has consistently taken the view that a direction to discharge a debt does not make the donee of the power an agent authorized to make a part payment so as to keep the debt alive. In this connexion Venkataramana Rao J., referred to 6 M L W 640,[3] 26 M L J 509,[4] 48 M L J 506,[5] 1927 M W N 356[6] and 1932 M W N 1193.[7]

It is not necessary to discuss all the decisions of this Court. I consider that it will be sufficient to state the position in 26 M L J 509[4] where the facts were very like the facts in the present case. There, a mortgagee undertook to discharge a debt due by the mortgagor and retained in his hands sufficient of the mortgage consideration to discharge the debt. Instead of paying off the mortgage he retained the whole of the money for nearly two years and then only paid the interest due on the debt. The question was whether in these circumstances, it could be said that he was authorized to pay the interest on the bond so as to keep alive the mortgagor's liability to the creditor. It was held that he had authority to pay the debt in full, but no authority to make a payment of interest so as to bring the case within S. 20, Lim. Act. The learned Judges (Wallis and Sadasiva Iyer JJ.) relied on (1835) 2 Bing (N C) 241[8] where the defendant, a trustee under a deed of composition, was instructed to tender to the plaintiff a part of the debt in discharge of the whole. The plaintiff refused to accept the money on this basis and it was then tendered and accepted as a payment in part. It was held that there was no authority for this and the part payment did not prevent the law of limitation operating.

In 5 Luck 1[1] the facts were these. A director of the bank, Bishambar Nath by name, induced the manager of the bank to allow him a large overdraft, but as the half-yearly audit was approaching it was deemed advisable to eliminate this debt from the books. With this object in view the director persuaded respondent 1 in the appeal to execute in favour of the bank a promissory note for the amount and the bank manager to accept it in discharge of the overdraft. The arrangement between the director and the maker of the promissory note was that the director should himself pay the principal and interest. Twelve months after this arrangement was entered into, the director paid to the bank a sum out of which the bank allocated Rs. 908 to the payment of interest then due upon the promissory note. The director had notice of the allocation and made an appropriate entry in his own books. The question which arose for decision was whether this payment of interest saved limitation as against the maker of the note and it was held that it did. The director was authorized to discharge the debt due by the maker of the promissory note to the bank in respect of both principal and interest and the director was left to do this as it best suited him. He had not the money to do it there and then. Under these circumstances, the Judicial Committee had no difficulty in finding an authority from the maker of the promissory

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1. ('29) 16 AIR 1929 P C 297: 121 I C 193: 5 Luck 1 : 57 I A 1 (PC), National Bank of Upper India v. Bansidhar.
2. ('41) 28 AIR 1941 Mad 6 : (1940) 2 M L J 726 : 51 M L W 453, Thinnappa Chettiar v. Krishna Rao.
3. ('19) 6 AIR 1919 Mad 998: 48 I C 865: 6 M L W 640, Chidambaram Pillai v. Veerappa Chettiar.
4. ('14) 1 AIR 1914 Mad 881: 23 I C 810: 26 M L J 509, Alagappa Chettiar v. Subramania Pandia Thevan.
5. ('25) 12 AIR 1925 Mad 703 : 87 I C 989 : 48 M L J 506, Balaguruswami Naicken v. Guruswami Naicken.
6. ('28) 15 AIR 1928 Mad 226 : 108 I C 529 : 1927 M W N 356, Ramaswami Pillai v. Kasinatha Iyer.
7. ('32) 1932 M W N 1193, Subbakka v. Venkata Setti.
8. (1835) 2 Bing (N C) 241 : 2 Scott 399 : 1 Hodges 305 : 5 L J C P 40 : 132 E R 95, Linsell v. Bonser.

note to the director to pay the interest on his behalf as it became due. This decision of the Privy Council does not travel beyond the particular facts of the case, and in my opinion it cannot be read as an authority for the proposition that where a mortgagee undertakes as part of the consideration for the mortgage to discharge a debt due by the mortgagor he must be deemed to have authority to make a payment of interest or a part payment of principal. I consider that the judgment of the Judicial Committee leaves entirely unaffected the decision in 26 M L J 509[4], and the earlier decisions of this Court on the point. Whether there is authority to make a part payment is a question of fact and the decision in each case must depend upon the particular facts. Of course where the person who is to make the payment is left a discretion in the matter his principal will have to suffer the consequences of a payment to account, if the conditions of S. 20 for the saving of limitation are also complied with.

Turning to the facts of the case now before us, on 30th September 1926, respondent 1's father executed a promissory note in favour of the mother of the petitioner for a sum of Rs. 100. In 1930, the mother died and as the petitioner was a minor a guardian of his property was appointed. On 20th December 1932 respondent 1's mother as his guardian, his father being dead, executed a usufructuary mortgage of certain lands in favour of the husband of respondent 2. The consideration for this mortgage was the sum of Rs. 475. The mortgage deed provided that the mortgagee should discharge the promissory note executed in favour of the petitioner's mother. The direction to the mortgagee was that he was to make payment in full and the District Munsif who tried the suit out of which this petition arises has held that the mortgagee had no authority to make a part payment on behalf of the promissor so as to keep the debt alive. On 29th May 1933 the mortgagee made a payment of Rs. 8-10-0 on account of interest and an acknowledgment of the payment was endorsed on the promissory note. On 16th July 1934 he made a payment of one rupee on account of principal and Rs. 7-1-0 on account of interest and acknowledgments of these payments were also endorsed on the promissory note. A suit was filed on the instrument on 18th June 1936 but by then it was time-barred, unless the payment made on 16th July 1934 could be regarded as having been made by the mortgagee as the agent of the maker of the promissory note duly authorized in that behalf. The District Munsif held that the mortgagee could not be so regarded and I have no hesitation in concurring in his decision. There was no discretion given to the mortgagee in the matter at all. His duty was to discharge the promissory note in full and he had no authority to do anything else. He did not carry out the duty of his agency but did something quite beyond what he was expected to do. Therefore the maker of the promissory note was not bound by his action and the suit was rightly dismissed. It follows that in my opinion the petition should be dismissed with costs.

King J. — I agree with my Lord that for the reasons which he has given this revision petition should be dismissed and I wish to add just a few words. Whether an agent has been duly authorized within the meaning of S. 20 to make a particular payment is a question of fact. Here, I take it, the facts are simple. There was an authorization in general terms to the mortgagee to pay off the promissory note debt. No time limit was set. The District Munsif held that the meaning of this authorization was that the mortgagee should pay off the debt in full and with reasonable promptitude. The petitioner here can succeed, in my opinion, only if he can show that on these facts no other interpretation of the mortgagor's instructions is in law possible than that the mortgagee was given full discretion to pay off the debt as and when he pleased. As my Lord has said, I do not think that the Privy Council in 5 Luck 1[1] lays down any such general proposition. On the facts in that case the conclusion that Bishambhar was authorised to discharge Bansidhar's debt as and when he could was inevitable. But in the absence of unusual facts it appears to me that the plain and ordinary meaning of a direction as part of the consideration for a mortgage to discharge a debt is a direction to discharge it in full and to discharge it quickly. What are the facts here? The mortgagor is in need of money and applies to the mortgagee who presumably has money to lend him. He borrows Rs. 475. About Rs. 100 of this sum is not to be paid in cash, but is to be paid to the creditor under the promissory note. How can it be presumed in law that when in these circumstances the mortgagor directs the mortgagee to pay off this comparatively insignificant debt, he has impliedly authorised him to spend eighteen months in paying

off the paltry sum of Rs. 15-11-0? Such a conclusion seems to me to be repugnant to common sense. I am accordingly of opinion that the District Munsif was entitled on the evidence to hold that the authorisation to the mortgagee was for the complete and speedy discharge of the debt ; and with such a finding of fact there can be no interference in revision.

Patanjali Sastri J.—In this case I have the misfortune to be of a different opinion from my Lord whose judgment I have had the advantage of reading. As the facts of the case are all set out in that judgment I will content myself with briefly stating the position as I conceive it in the light of the Privy Council decision in 5 Luck 1[1] on the question of authority to pay for purposes of S. 20, Limitation Act. It will be observed that the section does not require authority to keep the debt alive, an expression sometimes used in the discussion of this question. The authorization must relate to the payment of interest on the debt or to the part payment of the principal as the case may be, and the debt is kept alive as the legal consequence of such payment, irrespective of the intention of the debtor or his agent. It is therefore not strictly relevant, and may, indeed, be somewhat misleading to enquire whether the person paying was authorized to keep alive the debt. The question of limitation hardly enters into the minds of the parties at the time of the transaction from which Courts are subsequently called upon to imply authority in cases of the kind now before us. I refer to this because I cannot help thinking that the decision of the question has sometimes been allowed to be coloured by the supposed hardship to the debtor of implying authority to pay in such cases.

Where a debtor transfers his property in consideration either in whole or in part of the transferee undertaking to discharge the former's liability to a creditor, I agree that if the stipulation is that the transferee should pay off the debt all at once with no discretion left to him as to paying it in parts, as if he were a messenger sent with the amount required to make the payment, no authority to make a payment of either interest or part of the principal can be implied. But, if all that appears from the transaction is that the party paying has bound himself to the debtor to discharge the latter's liability, I find it difficult to see, with all respect, why the case is not governed by the Privy Council ruling in 5 Luck 1.[1] In that case in setting out the true legal effect of the transaction, their Lordships observe at p. 7 that 'as between Bishambhar and respondent 1 (the debtor) the former undertook to *discharge* the liability to the bank' and, again at page 9 :

> Upon what they have already held to be the true meaning and effect of the transaction of 22nd December 1917, it was agreed between Bishambhar and respondent 1 that the former would *discharge* the latter's debt to the bank in respect of both principal and interest, and it is clear from respondent 1's evidence that he left it to Bishambhar to do so. (Italics mine.)

No doubt, it would appear from the facts in that case that Bishambhar was not in a position to pay off the debt immediately, for, that indeed occasioned the transaction there in question, and that therefore the parties must have contemplated payment at sometime in future. But is the position essentially different when a transferee of the debtor's property agrees, in consideration of the transfer, to discharge a debt of the transferor? The arrangement, as in that case, imposes on the transferee, as between himself and the debtor, an obligation to pay the principal of the debt as well as the interest due upon it as long as it remains unpaid. This obligation continues whether the debtor thought the debt subsisted or not, and the payment by the transferee under the contract reduces the liability of the debtor. In such circumstances, I can see no reason why the payment should not be regarded as having been made with the authority of the debtor who gets the benefit of it by virtue of the stipulation. And, viewed as a question of authority to keep alive the debt, there would seem to be as much ground in the case before the Privy Council as in this for saying that the contract or mandate to discharge the debt did not imply a power to keep alive the debt, for it is only reasonable to suppose that the debtor there also would naturally have refused to allow the debt to be kept alive beyond the period of limitation. The true principle would seem to be what Farwell L. J., deduced from (1902) 2 Ch 430[9] in (1907) 1 Ch 330[10] at p. 350. The learned Judge observed :

> I read it as a decision on the words 'or agent', and as showing that a man can be an 'agent' within the meaning of the Act, not only when he acts for a principal properly so called *but also when he makes the payment on behalf of the debtor, because he has bound himself by deed for value so to do.* (Italics mine.)

That, I venture to think, is the principle

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9. (1902) 2 Ch 430 : 71 L J Ch 627 : 86 L T 726 : 50 W R 561, Bradshaw v. Widdrington.

10. (1907) 1 Ch 330 : 76 L J Ch 316 : 96 L T 306 : 51 S J 67, In re Lacey Howard v. Lightfoot.

which their Lordships of the Privy Council applied in 5 Luck 1[1] where they also refer to Farwell L. J.'s view of the matter. It seems to me, therefore, that the broad view expressed without any qualification in 51 M L W 453[2] that

> a power to extinguish the debt would not, in our opinion, carry with it a power to keep alive the debt. Our High Court has consistently taken the view that a direction or power to discharge a debt does not make the donee of the power an agent authorized to make a part payment so as to keep alive the debt

referring to the earlier decisions of this Court to the same effect, cannot be accepted as correct in view of the Privy Council decision in 5 Luck 1.[1] I may also observe in this connexion, that the decision in (1835) 2 Bing (NC) 241[3] does not, as it seems to me with all respect, lend support for the above broad proposition as was supposed in 26 M L J 509[4] which has been followed in the later cases. There was a clear prohibition in the English case to make any part payment towards the debt.

Turning now to the facts of the present case, the mortgage deed has not been produced and all that appears about its terms from the judgment of the lower Court is that the mortgagee was directed thereunder to pay the amount due under the suit promissory note. Nearly two months after the mortgage, both the debtor and the mortgagee sent a notice (EX. B) to the petitioner informing him of the mortgage and suggesting a novation to which the petitioner, however, did not agree. These facts indicate to my mind that the mortgagee was not required or expected to discharge the debt all at once, but to pay it off as it suited him. The Privy Council ruling therefore applies and the finding of the Court below which relying on the decisions of this Court, refused to imply authority in such circumstances cannot stand. I would allow the civil revision petition with costs throughout.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 71 (1)

LAKSHMANA RAO J.

In re A. Rahim Sahib — Petitioner.

Criminal Revn. No. 27 and Petn. No. 24 of 1940, Decided on 11th April 1940, to revise order of Joint Magistrate, Tindivanam, D/- 20th November 1939.

Madras Local Boards Act (1920), Ss. 194, 223 —Complaint within twelve months is in time — Mere application for permission is not sufficient — Actual permission is necessary.

In a prosecution for installing a rice mill without the permission of the local authority if the complaint is made within twelve months from the commencement of the offence it is within time. Merely applying for permission will not suffice. [P 71 C 2]

K. Desikachari — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The prosecution was for installing a rice mill without the permission of the local authority and the complaint was made within twelve months from the commencement of the offence. The complaint was thus within time and there is no substance in the contention that permission of the local authority need only be applied for. The revision petition therefore fails and is dismissed.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1941 Madras 71 (2)

LAKSHMANA RAO J.

In re Perumal Konan and others — Petitioners.

Criminal Revn. No. 149 and Petn. No. 142 of 1940, Decided on 22nd February 1940, to revise judgment of Sub-Divisional Magistrate, Chidambaram, in Criminal Application No. 76 of 1939.

Penal Code (1860), Ss. 147, 380 and 457 — Accused breaking into temples and removing idols for celebrating festival are guilty under S. 147 but not under S. 457 or S. 380.

Where accused, in pursuance of common object, have broken into temples and removed idols for celebrating a festival without any dishonest intention they are guilty under S. 147 but not under S. 457 or S. 380. [P 71 C 2]

V. T. Rangaswami Ayyangar and T. E. Ramabhadrachariar — for Petitioners.

Public Prosecutor — for the Crown.

Order. — The temples were broken into and the idols were removed for celebrating a festival and the taking was not dishonest. The conviction under Ss. 457 and 380, I. P. C., is therefore unsustainable but the petitioners would be guilty under S. 147, I. P. C., as their common object was to enforce a right by means of criminal force, and violence was used in prosecution of the common object. The conviction under Ss. 457 and 380, I. P. C., is therefore set aside and the conviction under S. 147, I. P. C., will stand. But the consequences were not serious and the case was taken up on a private complaint. Under the circumstances the sentences already undergone are sufficient and the sentence of the petitioners under S. 147, I. P. C., is reduced to the period already undergone.

C.R.K./D.S. *Sentence reduced.*

A. I. R. 1941 Madras 72

PATANJALI SASTRI J.

Kaza Suryanarayana—Petitioner

v.

Sree Rajah Sobhanadri Apparao Bahadur Zamindar Garu of Talaprolu Estate at Nuzvid and another —

Respondents.

Civil Revn. Petn. No. 1044 of 1937, Decided on 9th August 1940, to revise order of Deputy Collector, Nuzvid, D/- 14th April 1937.

Madras Estates Land Act (1 of 1908), S. 192, as amended by Act 7 of 1934—S. 192 does not make O. 21, R. 90, Civil P. C., applicable to sales in execution of decrees for rent passed under that Act.

Section 192, Madras Estates Land Act, even after its amendment by Act 7 of 1934 does not make O. 21, Rr. 90 and 92, Civil P. C., applicable to sales in execution of decrees for rent passed under the former Act. Hence the Court has no power to set aside such sale under O. 21, R. 90, Civil P. C. : A I R 1927 Mad 1035 and A I R 1939 Mad 609, *Foll.* [P 72 C 2]

P. Somasundaram—for Petitioner.

G. Ramakrishna Rao—for Respondents.

Order.—This is a petition to revise the order of the Deputy Collector, Nuzvid Division setting aside a rent sale held on 19th December 1936. The petitioner who is the agraharamdar of Singanagudem village obtained a decree for arrears of rent due by a tenant and brought his holding to sale in execution of the decree. The revenue inspector, Nuzvid, was appointed as the selling officer and he posted the sale to be held on 19th December 1936. Meanwhile on 2nd December 1936, respondent 1 herein, the zamindar of Talaprolu Estate, which adjoined the agraharam addressed a letter to the Deputy Collector alleging that the holding which had been proclaimed for sale formed part of Ranganagudem village comprised in his estate and that the petitioner had no right to bring it to sale as part of his Singanagudem agraharam. This letter was forwarded by the Deputy Collector to the selling officer, "for information and necessary action." No notice of this letter was given to the petitioner but on the date fixed for sale, the selling officer called upon the agent of the petitioner who had come there to attend the sale to answer the allegations in the letter sent by respondent 1. The agent filed a counter statement alleging that the property sought to be sold was part of the petitioner's agraharam, that it was in the possession and enjoyment of the judgment-debtor as a 'ryot' of the agraharam village and that the claim of respondent 1 was unfounded. The officer took statements from the karnam and two ryots of Ranganagudem who supported respondent 1's claim, while the judgment-debtor and his brother filed statements supporting the petitioner's case. On these statements, the revenue inspector came to the conclusion that the land in question did not belong to the petitioner's village but formed part of respondent 1's zamindari village Ranganagudem. In spite of this conclusion, he conducted the sale and knocked down the property to respondent 2 who was the highest bidder, and submitted the sale records together with the record of his enquiry to the lower Court. That Court, however, set aside the sale on the ground that the selling officer having found that the land ordered to be sold was not part of the petitioner's village ought to have postponed the sale and submitted the records of his enquiry for orders of the Court and that the petitioner played a fraud on the Court by attempting to bring to sale a holding which was no part of his village. It accordingly directed the refund of the purchase money to respondent 2. In passing this order, the Court purported to act under O. 21, R. 90, Civil P. C., read with S. 192, Madras Estates Land Act, though no application was made by respondent 1 under that provision.

Learned counsel for the petitioner has challenged the validity of this order mainly on the ground that the Court has no power to set aside the sale under O. 21, R. 90, Civil P. C., as that provision is not made applicable, by S. 192, Madras Estates Land Act, to sales in execution of decrees for rent passed under that Act. The respondent raised a preliminary objection to the maintainability of the revision petition. It was contended for him that O. 21, R. 90, as well as O. 43, R. 1 (j) applies to proceedings under the Estates Land Act and that therefore the petitioner's remedy was to appeal from the order now sought to be revised. The question whether S. 192, Madras Estates Land Act, makes O. 21, Rr. 90 and 92 applicable to sales in execution of decrees for rent passed under the former Act was decided in the negative by a Bench of this Court in 51 Mad 76[1] and that decision is binding on me. It was, however, pointed out by learned counsel for respondent 1 that that case was decided before S. 192 of the Act was amended

1. ('27) 14 A I R 1927 Mad 1035 : 105 I C 83 : 51 Mad 76 : 53 M L J 688, Jagannatha Pillai v. Kathaperumal Pillai.

by Act 7 of 1934 and that the reasoning based on the specific exclusion of Chap. 43, Civil P. C. of 1882 corresponding to O. 43, R. 1 of the present Code from the provisions made applicable to proceedings under the Act could no longer apply. Jackson J., observed at p. 82:

> Under the procedure, which, as now suggested, S. 192 is supposed to import the sale is confirmed and the aggrieved party has no appeal, because S. 192 excludes Chap. 6, (Order 43) and no suit, because O. 21, R. 92 precludes a suit.

This anomaly, it is urged, cannot occur after the amendment of S. 192 as it does not now specifically exclude the application of O. 43 to proceedings under the Estates Land Act. I do not consider that this makes any difference. The substantial reasoning on which the decision in 51 Mad 76[1] is based is that S. 132 by making the provisions of Chap. 6, Estates Land Act, applicable to the execution by a revenue Court of any decree for arrears of rent, provides a complete Code of procedure, and S. 192 which applies the provisions of the Code of Civil Procedure to proceedings under the Act must be read subject to S. 132. In fact, the decision was followed and applied even after the amendment of S. 192 in (1939) 2 M L J 120.[2] It follows that the preliminary objection should be overruled and the revision petition should be allowed. The petitioner will have his costs here and below to be paid by respondent 1.

C.R.K./D.S. *Petition allowed.*

2. ('39) 26 A I R 1939 Mad 609 : (1939) 2 M L J 120, Gopalakrishnayya v. Narasimha Rao.

A. I. R. 1941 Madras 73 (1)

WADSWORTH J.

Kamakshi Chetti — Petitioner

v.

A. S. Alaganan Chettiar — Respondent.

Civil Revn. Petn. No. 905 of 1938, Decided on 29th July 1940, to revise order of Sub-Judge, Dindigul, D/- 29th July 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 27—Local Board's certificate is not conclusive of facts which it states — Other side can prove that certificate is not true.

There is nothing in S. 27 to warrant the view that a certificate given by a Local Board is conclusive of the facts which it states. It is open to the other side to let in evidence that the certificate is not true—whether the error alleged relates to the amount of the tax or the nature of the income in respect of which it was levied. [P 73 C 2]

S. Panchapagesa Sastri and K. R. Krishnaswmi Iyer — for Petitioner.

T. P. Gopalakrishna Iyer — for Respondent.

Order. — There is nothing in S. 27 of Madras Act 4 of 1938 to warrant the view that a certificate given by a Local Board is conclusive of the facts which it states. It is open to the other side to let in evidence that the certificate is not true—whether the error alleged relates to the amount of the tax or the nature of the income in respect of which it was levied. The petition is allowed and remanded to the trial Court for disposal in the light of this judgment after receiving such evidence as the parties may adduce. The costs of this petition will abide by the result.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1941 Madras 73 (2)

KING J.

S. K. Subba Naicker — Appellant

v.

Savarimuthu Pillai and others — Respondents.

Appeal No. 44 of 1939, Decided on 30th August 1940, against appellate order of Sub-Judge, Tuticorin, D/- 16th February 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 23 — Order under S. 23 is not appealable.

No appeal lies from an order under S. 23 as it does not relate to the execution, discharge or satisfaction of the decree under S. 47, Civil P. C.: A I R 1939 Mad 796, *Foll.* [P 73 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 23 — Clause 'Notwithstanding that the sale has been confirmed'—Interpretation.

The clause "Notwithstanding that the sale has been confirmed" in no way affects the main provisions of S. 23 and obviously cannot be used to introduce any new provisos as, for example, the proviso "that a sale shall not have been followed by delivery of property." [P 74 C 1]

A. Swaminatha Aiyar and S. Thiyagaraja Iyer — for Appellant.

R. Ramamurthi Iyer — for Respondents.

Judgment. — This appeal is entitled to succeed on the ground that no appeal lay to the lower Appellate Court: *see* (1939) 2 M L J 398,[1] but the correct interpretation of S. 23 of the Act (Agriculturists Relief Act—Act 4 of 1938) is an important matter coming within the scope, in my opinion, of S. 115, Civil P. C., and I accordingly proceed to deal with the decision of the learned District Munsif in revision. The interpretation of S. 23 in my opinion admits of no doubt whatever. It enacts that any sale held in execution of any decree can be set aside provided that (i) it was of immovable property in which an agriculturist had an

1. ('39) 26 AIR 1939 Mad 796 : (1939) 2 M L J 398, Viswanatha Iyer v. Narayanaswami Iyer.

interest; (ii) it was on or after 1st October 1937; (iii) the judgment-debtor must be an agriculturist entitled to the benefits of the Act; (iv) the application must be made within 90 days of the commencement of the Act.

The clause "Notwithstanding that the sale has been confirmed" in no way affects the main provisions of the section, and obviously cannot be used to introduce any new provisos as, for example, the proviso, which the District Munsif reads into the section "that a sale shall not have been followed by delivery of property." The section would retain exactly the same meaning without this clause. It is merely a recognition by the Legislature that the new enactment is at variance with older enactments in the Limitation Act and Civil Procedure Code. I am accordingly of opinion that the view of the learned Subordinate Judge though expressed in an appeal which he was incompetent to hear is the right view and agree that the matter must be remanded to the District Munsif for disposal. Costs of this appeal will abide the event.

C.R.K./D.S. *Case remanded.*

A. I. R. 1941 Madras 74 (1)

KING J.

Sanampudi Kodandaramayya — Appellant

v.

Gurrala Venkatareddi — Respondent.

'Appeal No. 306 of 1939, Decided on 13th August 1940, against order of Dist. Court, Guntur, D/- 20th March 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 3 (v)—Definition of 'creditor' extends to any successive assignee.

The definition of the word 'creditor' in S. 3 (v) extends to a first assignee as well as to any subsequent assignee. The number of links in the chain of succession makes no difference. [P 74 C 1]

K. Kotayya — for Appellant.

P. Satyanarayana Rao — for Respondent.

Judgment.—As I have already held in C. M. A. No. 207 of 1939 the definition of the word 'creditor' in the Act is conclusive in showing that a renewal of a debt to the assignee of the original creditor is a renewal to the 'same' creditor within the meaning of the explanation to S. 8, Madras Act 4 of 1938. I am now, however, asked to hold that the definition of the word 'creditor' in S. 3 (v) though it may extend to a first assignee cannot be extended to any subsequent assignee. The number of links in the chain of succession makes, in my opinion, no difference. The point is simply this that the ultimate assignee has, in respect of the debt, succeeded to the legal right of the original creditor in exactly the same sense as the first assignee has. The appeal is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1941 Madras 74 (2)

WADSWORTH J.

Thiravia Nadar — Petitioner

v.

Paulraj Chelliah Nadar and others — Respondents.

Civil Revn. Petn. No. 131 of 1939, Decided on 29th July 1940, to revise order of Dist. Munsif, Srivaikuntam, D/- 9th August 1938.

Madras Agriculturists Relief Act (4 of 1938) —Deposit made under O. 21, R. 89, Civil P. C., withdrawn by decree-holder in full satisfaction —There is no debt to found an application under Act or decree to scale down.

Where the amount doposited under O. 21, R. 89, Civil P. C., necessary to have the sale set aside has been withdrawn by the decree-holder in full satisfaction, there no longer remains a debt to found an application under Madras Act 4 of 1938 or a decree to scale down. And the fact that the deposit under O. 21, R. 89, Civil P. C., was made on the day when the Act came into force has no bearing, when the application under the Act was made long after the decree had been satisfied. [P 74 C 2]

J. S. Vedamanikam — for Petitioner.

Order. — The petitioner having deposited under O. 21, R. 89, Civil P. C., the amount necessary to have the sale set aside and this amount having been withdrawn by the decree-holder in full satisfaction, there no longer remains a debt to found an application under Madras Act 4 of 1938 or a decree to scale down. No refund of amounts paid can be ordered except under provisions of Ss. 22 to 25, which have no application when there is no subsisting sale to set aside. And the fact that the deposit under O. 21, R. 89, Civil P. C., was made on the day when the Act came into force has no bearing, when once it is conceded that the application under the Act was made long after the decree had been satisfied. The petition is dismissed. There will be no costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1941 Madras 76

WADSWORTH J.

P. N. M. M. Muthupalaniappa Chettiar — Appellant

v.

N. A. R. R. M. Raman Chettiar and another — Respondents.

Appeal No. 288 of 1937, Decided on 24th August 1939, against orders of Dist. Court, Ramnad at Madura, D/- 19th July 1937.

(a) Provincial Insolvency Act (1920), S. 77— Insolvency Court authorizing official receiver of auxiliary Court to take possession to sell property and send net proceeds to insolvency Court — Auxiliary Court has no jurisdiction to conduct inquiries subsequent to sale into claims by third parties alleging that that possession was wrongfully delivered.

Where insolvency Court has under S. 77 authorized the official receiver of another Court to take possession and sell the property and send the net proceeds to the insolvency Court, the auxiliary Court has the same powers of control over the official receiver as it would have exercised, had the insolvency been a local insolvency. But this does not involve the exercise by the auxiliary Court of a power to conduct the inquiries subsequent to the sale and subsequent to the delivery of possession into claims by third parties who allege that possession was wrongfully delivered. [P 75 C 2; P 76 C 1]

(b) Civil P. C. (1908), O. 21 — Order 21 does not apply to sales by official receiver.

Order 21 does not ordinarily apply to sales by an official receiver, who is not required to follow the procedure laid down in this order and has powers different from those of an executing Court. [P 76 C 1]

(c) Provincial Insolvency Act (1920), Ss. 56 and 4—Possession taken under S. 56—Insolvency Court cannot order re-delivery of possession except on adjudication as to title under S. 4.

There is no jurisdiction in the insolvency Court to order a re-delivery of possession from the official receiver when once possession has been taken under the powers in S. 56 except on an adjudication as to title under S. 4. [P 76 C 2]

K. Rajah Ayyar and K. Ramanathan Chettiar — for Appellant.

T. Nallasivam Pillai — for Respondents.

Judgment.—This appeal raises the question of the right of the insolvency Court, after property sold as the property of the insolvent has been delivered to the purchaser, to entertain an application for redelivery by a person alleged to have been dispossessed when holding adversely to the insolvent. The insolvency was one of 1931 in the Court of the District Judge of Amherst, Burma. The insolvency Court sent letters of request to the District Judge of Ramnad under S. 77, Provincial Insolvency Act, seeking the aid of the official receiver of Ramnad in realizing the property of the insolvent. On 28th August 1934, the official receiver, Ramnad, held a sale. A claim was preferred by the present petitioner in the Amherst Court to the property advertised for sale. The claim was based on a sale from his sister-in-law in March 1934, the petitioner having married a daughter of the insolvent. The District Judge, Amherst, asked the District Judge, Ramnad, to investigate this claim. The claim was not pressed by the petitioner and was dismissed. The sale was subsequently confirmed and on 12th February 1936, the official receiver executed a sale deed in favour of the appellant. In September 1936, the District Judge of Ramnad, asked the District Judge of Amherst to authorize him to deliver possession of the property to the purchaser. On 25th November 1936, delivery was effected, apparently under the orders of the District Judge of Ramnad to break open a lock. No one appears to have been in physical possession of the property at the time, though the present petitioner contends that he was in notional possession through his tenant who was absent. On 7th December 1936 after delivery had been made to the purchaser the present petition was filed under O. 21, Rr. 100 and 101, Civil P. C., and S. 5, Provincial Insolvency Act, praying for re-delivery of the house. A preliminary objection was taken to the jurisdiction of the District Judge of Ramnad to order re-delivery when the insolvency Court was the Amherst Court. That was overruled and the learned District Judge held that the petitioner was in possession at the time of the sale and that delivery having been ordered to the purchaser from a person who was not in possession under the insolvent, the Court must necessarily have power to rectify its own error and he directed re-delivery to the petitioner. Against this order the purchaser appeals.

The question of jurisdiction is not without difficulty. All that the letter of request from the District Judge of Amherst authorises the official receiver of Ramnad to do is to take possession and sell the property and send the net proceeds to the insolvency Court. Under section 77 a letter of request shall be deemed sufficient to enable the auxiliary Court to exercise in regard to the matters directed by the order such jurisdiction as either of such Courts could exercise, in regard to similar matters within their respective jurisdictions. The official receiver has been directed to take possession of the property, sell it, and transmit the net sale proceeds. His jurisdiction is subject to the control, as laid down in the Provincial Insol-

vency Act, of the District Judge, Ramnad. It may therefore be taken that in so far as the taking possession, selling and transmission of the sale proceeds to Burma are concerned, the District Judge has the same powers of control over the official receiver as he would have exercised, had the insolvency been a local insolvency. But to my mind this does not involve the exercise by the District Judge of Ramnad of a power to conduct the enquiries subsequent to the sale and subsequent to the delivery of possession into claims by third parties who allege that possession was wrongfully delivered.

The further contention relates to the power of the insolvency Court to entertain an application for re-delivery when once the sale has been held and possession has been given. I think it is well established that O. 21, Civil P. C., does not ordinarily apply to sales by an official receiver, who is not required to follow the procedure laid down in this order and has powers different from those of an executing Court. The power of the Court to assist the official receiver to get possession of the insolvent's property is derived not from O. 21, Civil P. C., but from S. 56, Provincial Insolvency Act, and under cl. 3 of that section the Court may remove a person in possession of the property of the insolvent, provided that that person is one whom the insolvent has a present right to remove. Presumably, with reference to this section the insolvency Court can hear a claim by an obstructor and if that claim establishes possession hostile to the insolvent, the only order that could be passed under this section would be to refer the official receiver to proceedings either under S. 4, Provincial Insolvency Act, or by a separate suit to establish the title of the insolvent to the property. But it is to be noted that in dealing with an obstruction the insolvency Court does not act under O. 21, Civil P. C., though the questions at issue may be somewhat analogous. When so much is conceded what is the position where there is no obstruction. The insolvency Court authorises the official receiver to take possession of an unoccupied house by forcing the lock, the order being based on the theory that the house has been locked by the insolvent in whose possession it is alleged to be and who is subject to the control of the insolvency Court.

It seems to me that when a third party claiming adversely to the insolvent comes forward after the official receiver has taken possession and asserts that that official receiver has wrongfully got possession of his property with the assistance of the Court, the matter has got beyond the stage at which the Court is entitled under S. 56, Provincial Insolvency Act, to consider who is in possession. The proper provision of law governing any adjudication by the insolvency Court of the rights to this property of which possession has been delivered by the official receiver to the purchaser would have to be S. 4 of the Act; and in dealing with an application under S. 4, the question to be decided would not be who was in possession at the time of the delivery, but who is entitled to possession. It seems to me therefore to follow that the order of the learned District Judge, even assuming that he had jurisdiction and assuming that the order is not vitiated by quoting the wrong provision of law, cannot be regarded as a correct order, for the order has concerned itself not with title but with actual possession. It seems to me that there is no jurisdiction in the insolvency Court to order a re-delivery of possession from the official receiver when once possession has been taken under the powers in S. 56 except on an adjudication as to title under S. 4. In the result therefore I allow the appeal, set aside the order for re-delivery to the petitioner and direct the petitioner to re-deliver within one month the property to the purchaser from the official receiver who will be entitled to his costs throughout. It is of course open to the petitioner to establish his right to this property by such separate proceedings as he may be advised to take.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 76

WADSWORTH J.

Vedala Vallabhacharyulu

v.

Vedala Rangacharyulu.

Civil Revn. Petns. Nos. 1123 and 1124 of 1939, Decided on 23rd July 1940, to revise orders of District Court, Kistna, D/- 27th January 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 19 — Court hearing appeal from decision in suit wherein plaintiff seeks to escape liability from decree of another Court has no jurisdiction to scale down decree which is being attacked at instance of plaintiff.

The Court hearing an appeal from a decision in a suit wherein the plaintiff seeks to escape liability from a decree of another Court, has no jurisdiction under S. 19 or any other section of Madras Act 4 of 1938 to scale down the decree which is being attacked at the instance of the plaintiff. [P 77 C 1]

C. Rama Rao — for Petitioner.

P. V. Vallabhacharyulu — for Respondents.

Order.—It seems to me apparent that the Court hearing an appeal from a decision in a suit wherein the plaintiff seeks to escape liability from a decree of another Court, has no jurisdiction under S. 19 or any other section of Madras Act 4 of 1938 to scale down the decree which is being attacked at the instance of the plaintiff. The petitions are dismissed with costs in civil revision petition No. 1123 of 1939.

C.R.K./D.S. *Petitions dismissed.*

A. I. R. 1941 Madras 77

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

President, Co-operative Credit Society, Kaikaran — Appellant

v.

Sanam Narasimha Rao and others — Respondents.

Appeal No. 316 of 1937, Decided on 9th April 1940, against decree of Sub-Judge, Ellore, in O. S. No. 8 of 1937.

Civil P. C. (1908), O. 21, R. 63— Mortgagor's property attached in execution proceedings against him — Mortgagee applying under O. 21, R. 58, Civil P. C., that his mortgage was not to be affected by subsequent sale—Court ordering mortgage to be brought to notice of bidders at auction—Order does not fall within purview of O. 21, R. 63—Limitation Act, Art. 11 does not apply.

The mortgagor's property was attached in execution of an award against him and was ordered to be sold. The mortgagee put in an application under O. 21, R. 58, Civil P. C., that his position as mortgagee was not going to be prejudiced by the sale. The Court satisfied the mortgagee by ordering that the existence of the mortgage should be brought to the notice of the bidders at the auction and the property was sold. In the suit for enforcement of the mortgagage:

Held that the order disposing of the mortgagee's application was neither an order of dismissal nor an order against the mortgagee and therefore it did not fall within the purview of O. 21, R. 63 and consequently Art. 11, Limitation Act, did not apply : AIR 1919 Mad 788 (FB), *Disting.*; AIR 1935 Mad 1015, *Rel. on* ; A I R 1923 Mad 76; AIR 1924 Mad 111; A I R 1935 Mad 328 and A I R 1935 Mad 547, *Approved.* [P 78 C 2]

V. Suryanarayana — for Appellant.

Ch. Raghava Rao and M. Sriramamurthy — for Respondents.

Leach C. J.—On 7th April 1936 respondent 1 filed the suit out of which this appeal arises in the Court of the Subordinate Judge of Ellore to recover the sum of Rs. 7248-10-8, which he claimed to be due on a mortgage created by respondent 2 in favour of respondent 3, who had assigned his interest to him. On 2nd March 1931 the appellant, who was defendant 3 in the suit, obtained in proceedings before the registrar of co-operative societies an award entitling him to recover Rs. 1116-6-2 from respondent 2. On 18th May 1931 the appellant attached in execution proceedings in the Court of the District Munsif of Ellore two items of the properties covered by the mortgage in suit. On 15th December 1932 respondent 3 filed a petition asking that the District Munsif should direct the properties attached by the appellant to be sold subject to his mortgage. On 25th January 1933 the District Munsif passed this order on respondent 3's petition :

Heard pleaders. The mortgage is said to be collusive. Its existence and decree-holder's allegation about it will be notified at the time of the sale which comes on on 27th February 1933. No further order.

The attached properties were in due course put up for sale by auction and the appellant purchased respondent 2's equity of redemption in them. The appellant defended the mortgage suit on the ground that respondent 1 had lost all interest in the two items by reason of the fact that the suit was not filed within twelve months of the order dated 25th January 1933. His argument was that the petition filed by respondent 3 asking that the property be sold subject to his mortgage was a claim petition and that the order of 25th January 1933 amounted to an order against him within the meaning of O. 21, R. 63. The Subordinate Judge rejected this contention and granted respondent 1 a mortgage decree for Rs. 3475 with interest and costs. Order 21, R. 58 provides that, where any claim is preferred, or any objection is made to an attachment on the ground that the property attached is not liable to attachment, the Court shall proceed to investigate the claim or objection. Rule 60 deals with the circumstances in which the Court shall release the property from attachment and R. 61, the circumstances in which it shall disallow the claim. Rule 62 says that, where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to the mortgage or charge. Rule 63 says that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of a suit, the order shall be conclusive. Article 11, Limitation Act, provides that a suit to set aside an order falling within O. 21, R. 63 shall be filed within one year from the date of the order. If the order of 25th January 1933

is an order which falls within the purview of R. 63, the suit is out of time. Respondent 1 however, contends that the order of 25th January 1933, is not an order against him and that therefore the case does not fall within Art. 11, Limitation Act.

For the appellant great reliance is placed upon the decision of a Full Bench of this Court in 41 Mad 985.[1] In that case a zamindarini applied for the removal of the attachment of property which was about to be sold in execution, claiming it as her own. The District Munsif passed an order on this petition in these terms. As this petition was filed late, this claim is ordered to be notified to the intending bidders. A further petition was then presented and the District Munsif passed this order:

> The allegations of the zamindarini will be notified to the bidders with the remark that the zamindarini did not take steps for her claim being enquired into during the last ten months.

The Full Bench, which consisted of Wallis C. J., and Oldfield and Seshagiri Ayyar JJ., held that the second order amounted to a rejection of the zamindarini's claim on the ground that it had been filed late. The Court was there considering a particular order and the decision which it gave must be confined to the facts of that case. It is true that Seshagiri Ayyar J., said that an order on a claim petition which expresses no final judgment upon the right put forward, but simply directs the sale after notifying the claim, is an order against the claimant and the claimant is bound to institute a suit under Art. 11, Limitation Act, but that was not the decision of the Court. The decision of the Court was expressed in the concluding words of the judgment of Wallis C. J., which are these:

> Though the order only was that the allegations of the zamindarini would be notified to bidders, we think it amounted, and was understood to amount, to a rejection of the claim on the ground that it was filed too late.

Both Oldfield and Seshagiri Ayyar JJ. agreed with this statement. This decision has been read in the same way in 45 Mad 827;[2] 47 Mad 160;[3] 41 M L W 500;[4] 42 M L W 710[5] and 58 Mad 936.[6] Before Art. 11, Limitation Act applies, there must be an order against the applicant, whether claimant or decree-holder. If the order is not adverse, Art. 11, Limitation Act, can have no application. The observations of Varadachariar J., in 42 M L W 710[5] are very much in point. After he had discussed the Full Bench decision in 41 Mad 985,[1] the learned Judge went on to say:

> Neither the learned Chief Justice nor any of the other Judges of the Full Bench suggested how a mere rule of conclusiveness as against a successful claimant is to be evolved or implied from a previous order which merely refused to investigate the claim. It seems reasonable to conclude that the conclusiveness even as against a defendant can arise only if an order on the merits had been passed under Rr. 60, 61 and 62. Even assuming that a dismissal may be interpreted as an implied adjudication against a claim, it will be unreasonable to regard an order like that passed on the first occasion in the present case merely recording the petition as an implied adjudication on the merits against the claim, so as to preclude the executing Court on a later occasion from investigating the claim on the merits.

Now, can it be said that the order of 25th January 1933 passed in this case is an order dismissing respondent 3's petition or an order prejudicial to him? It obviously cannot be construed as an order of dismissal and I am emphatically of the opinion that it is not an order against him. Respondent 3 did not ask for the attchment to be removed. All that he wanted to make sure of was that his position as mortgagee was not going to be prejudiced by the sale. Whether the property was sold expressly subject to his mortgage or whether it was sold without reference to it would not be detrimental to him. All that the Court could confer upon the auction-purchaser was the right, title and interest of the judgment-debtor and all that the judgment-debtor possessed at the time of the sale was the equity of redemption in the property put up for auction. The District Munsif satisfied respondent 3 by directing that the existence of the mortgage should be brought to the notice of the bidders at the auction. As I am of the opinion that the order does not fall within the purview of O. 21, R. 63, it follows that I do not regard it as being within Art. 11, Limitation Act. To hold otherwise would be to do immense injustice to respondent 1 who is the assignee of the mortgage. Each case must be decided

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1. ('19) 6 AIR 1919 Mad 738 : 48 I C 270 : 41 Mad 985 : 35 M L J 335 (FB), Venkataratnam v. Ranganayakamma.
2. ('23) 10 AIR 1923 Mad 76 : 70 I C 648 : 45 Mad 827 : 43 M L J 467, Abdul Kadir v. Somasundaram Chettiar.
3. ('24) 11 AIR 1924 Mad 111 : 77 I C 264 : 47 Mad 160 : 45 M L J 690, Arsamma v. Moidin.
4. ('35) 22 AIR 1935 Mad 328 : 156 I C 906 : 41 M L W 500, Kandasami Mudaliar v. Sivagurunatha Mudaliar.
5. ('35) 22 AIR 1935 Mad 1015 : 158 I C 863 : 42 M L W 710, Manicka Mudali v. Abdul Karim Sahib.
6. ('35) 22 AIR 1935 Mad 547 : 157 I C 173 : 58 Mad 936 : 68 M L J 518, Seetaramayya v. Subramaniam.

according to its own facts. If the order is of the nature of that considered in 41 Mad 985,[1] the Full Bench decision will be binding, but not otherwise. I would dismiss the appeal with costs of respondent 1.

Krishnaswami Ayyangar J.—I agree.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 79

PANDRANG ROW AND ABDUR RAHMAN JJ.

Balavenkatarama Chettiar—Appellant

v.

Hindu Religious Endowments Board and others — Respondents.

Appeal No. 63 and Civil Revn. Petn. No. 759 of 1938, Decided on 7th August 1940, against decree of Dist. Court, Coimbatore, in O. S. No. 2 of 1937.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 55—Word "dittam" means scale of expenditure in temple and not scheme for management of temple.

The word "dittam" in S. 55 only means the scale of expenditure which is fixed for the conduct of necessary services etc., in the temple and certainly does not mean a scheme for management of the temple affairs involving the appointment or election of trustees and so on. [P 80 C 1]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 63 — Board cannot appoint new trustees in place of existing trustees.

Section 63 does not empower the Board to appoint new trustees in the place of existing trustees and in effect to remove the existing trustees and replace them by others. [P 80 C 2]

(c) Madras Hindu Religious Endowments Act (2 of 1927), S. 63—Scheme for management of temple by Board — Consent of trustees does not empower Board to frame scheme beyond its jurisdiction — Consent by trustees must be deemed to be given in their personal capacity — It cannot operate as estoppel against temple or even against trustees as trustees.

Any consent given by the trustees to the framing of a scheme would not cover a scheme which it would be beyond the jurisdiction of the Board to frame. Even where consent is given to the framing of the scheme and the scheme is not beyond the jurisdiction of the Board, the consent must be deemed to have been given by the trustees in their personal capacity and cannot operate as an estoppel against the institution of which they are the trustees or even against the trustees themselves when suing or being sued in the capacity of trustees: AIR 1920 Mad 155, *Rel. on.* [P 80 C 2; P 81 C 1]

(d) Civil P. C. (1908), O. 1, R. 8 — Application by certain persons to be joined as additional plaintiffs in suit—No order passed — Court dismissing suit on preliminary point and then dismissing application on ground that there was nothing pending to which applicants could be made parties—Procedure condemned.

The Court passed no orders on an application by certain persons under O. 1, R. 8 to be joined as additional plaintiffs to the suit in question but subsequent to the dismissal of the suit on a preliminary point, the Court dismissed the application on the ground that there was nothing pending before it to which the applicants could be made parties : [P 81 C 1]

Held that the *ex post facto* method of disposing of application of the kind must be condemned unreservedly. It was a denial of justice to refrain from passing orders on petitions like the one in question till the suit was itself dismissed and then to say that as the suit had been dismissed there was nothing pending in the Court to which the petitioners could be made parties. [P 81 C 1]

Held further that in view of the nature of the ground on which the suit was dismissed, namely, the ground of estoppel which was available only against the plaintiffs in the suit, it was an eminently fit case for the favourable consideration of the Court. [P 81 C 1]

V. C. Viraraghavachariar — for Appellant.

Y. Govindarajulu, K. V. L. Narasimham, N. Subramaniam and K. E. Rajagopalachariar — for Respondents.

Pandrang Row J.—This appeal is from the decree of the additional District Judge of Coimbatore in O. S. No. 2 of 1937 dismissing a suit instituted under S. 63, Madras Hindu Religious Endowments Act, for setting aside a scheme settled by the Board, on the preliminary ground that the plaintiffs who were the trustees of the religious endowment in question namely Sri Kannikaparameswari Amman temple at Peria Nagaman in Pollachi taluk were estopped from questioning the scheme. This defence of estoppel was raised by the Board (defendant 1) though the right of recourse to a civil Court from the order of the Board settling a scheme was intended to be nagatived in this manner. It is difficult to understand how the Board which dealt with this matter of settling a scheme in a judicial capacity after hearing the parties and taking evidence can be said to have been prejudiced so as to attract the doctrine of estoppel. Assuming however that the Board is under no disability, so to say, of putting forward a plea of this kind in respect of a matter decided by it judicially or at least quasi-judicially the question remains whether the Court below was right in deciding this plea in favour of the Board. Reliance is mainly placed on a certain statement made by one of the plaintiffs Balavenkatarama Chettiar before the Inspector of religious endowments on 24th November 1935 in the village itself in the course of an inquiry which he was holding into the petition presented by certain persons against the trustees of the temple. At the end of a long statement recorded from this plaintiff by the Inspector, an addition is made to the following effect :

I have no objection to a dittam being settled by the Board for the management of the aforesaid

temple. Nor do I have any objection to the appointment of a responsible man from our caste as interim trustee or to any other order being passed until the dittam is framed.

The word 'dittam' which is found in the above statement has been taken to be equivalent to the word 'scheme' in the lower Court's judgment, but without any sufficient justification, it would appear, for the ordinary meaning of the word 'dittam' is certainly not the same as that of the word 'scheme'. A scheme for the management of a temple is one thing, whereas a dittam for the conduct of affairs in a temple is different. Unfortunately in this note the word 'dittam' is applied to the management of the temple, but this does not mean that the word was used in the sense of a scheme. 'Dittam' is a word which is found used in the Hindu Religious Endowments Act itself, *vide* S. 55, where 'dittam' is described as the scale of expenditure in the temple, and that is the sense in which it is, so far as we are aware, used with reference to temples and indeed that must be the sense in which it must have been used by a man like the person who made this statement, namely a trustee of the temple. In other words, when a trustee of a temple speaks of dittam, he could only mean the scale of expenditure which is fixed for the conduct of necessary services etc., in the temple and certainly could not have meant a scheme for management of the temple affairs involving the appointment or election of trustees and so on. It is therefore clear to us that this statement cannot be regarded as being a consent given to the framing of a regular scheme for the administration of the temple or the religious endowment. The other evidence relied upon in support of this alleged consent is quite inconclusive. Certain notes made by two Commissioners during the inquiry have been pointed out to us as showing that the parties agreed to a scheme being settled. But if the words are to be construed strictly, as the plaintiffs were not present before the Commissioners in person, they could not have agreed, and if, as is now alleged, it was the vakil, who appeared for the plaintiffs, who gave the consent, the note should have been to this effect. If as a matter of fact, the vakil who appeared for the plaintiffs before the Board had consented to the framing of a scheme, it would have been quite possible to prove this fact either by examining the vakil or at least the vakil who appeared on the opposite side, if it was thought that it would not be consonant with the dignity of the Commissioners for one of them to give evidence in the case. The best evidence on this point has not been put before us and we are unable to regard the statements made in the notes as being sufficient to show in a matter of this importance that the plaintiffs had unreservedly given their consent to the framing of a scheme just as the Board pleased. The evidence of D. W. 1 on this point is really irrelevent being substantially nothing more than hearsay evidence. We are therefore not satisfied that in this case there was any real consent given to the Board's framing a scheme as it pleased.

Even otherwise, any consent given to the framing of a scheme would not cover a scheme which it would be beyond the jurisdiction of the Board to frame. The temple in question was decided by the Board itself to be an excepted temple, and in view of S. 84 of the Act that decision is final as no one objected to that decision. So far as the powers of the Board to frame schemes in regard to excepted temples are concerned, they are to be found in S. 63 of the Act, and as it now stands, it provides, no doubt, for the fixing of the number of non-hereditary trustees, for the appointment of new trustees, in addition to the existing trustees or for associating persons with the trustees, but not for appointing new trustees in the place of existing trustees and in effect for the removal of the existing trustees and replacing them by others. Whether this has been done in this case or not does not seem to be established as clearly as it might have been, and we do not therefore propose to decide this point, because for other reasons we have decided that the case should go back to the Court below for disposal on the merits, and it will be left to the Court below to decide this point, namely whether any portion of the scheme settled by the Board is beyond the jurisdiction of the Board.

A further attack on the judgment of the Court below is based on the contention that even if consent had been given to the framing of the scheme and the scheme were not beyond the jurisdiction of the Board, nevertheless the consent must be deemed to have been given by the trustees in their personal capacity and could not be said to operate as an estoppel against the institution of which they were the trustees or even against the trustees themselves when suing or being sued in the capacity of trustees. For this proposition several authorities have been quoted. It is enough to

refer to the decision in 37 M L J 698[1] and the cases therein quoted. The decision is clearly in point and we intend to say no more than that we agree with the decision therein. It would thus follow that the finding of the Court below that the plaintiffs are estopped from maintaining the suit is not correct.

The revision petition raises the question whether the order of the Court below dismissing the application of certain other persons claiming to be brought on record as additional plaintiffs under O. 1, R. 10, Civil P. C., is wrong. These persons who are petitioners in the revision petition, desired to come in as supplemental plaintiffs in the suit in order to avoid any possible prejudice to the institution by reason of the previous conduct of the old trustees (plaintiffs in the suit). The lower Court instead of passing an order on this petition before disposing of the suit on the preliminary ground of estoppel, chose to adopt the extraordinary course of waiting till the suit itself was dismissed on the preliminary ground of estoppel and then dismissing the petition made under O. 1, R. 10, Civil P. C., on the ground that as the scheme framed by the Board had become final by reason of the dismissal of the suit filed by the plaintiffs, the application under O. 1, R. 10, was not maintainable. This *ex post facto* method, so to say, of disposing of applications of the kind must be condemned unreservedly. It is a denial of justice to refrain from passing orders on petitions like this till the suit is itself dismissed on some ground or other and then to say that as the suit had been dismissed, there was nothing pending in the Court to which the petitioners could be made parties. Obviously having regard to the nature of the ground on which the suit was dismissed, namely the ground of estoppel which was available only against the plaintiffs in the suit, this was an eminently fit case for the favourable consideration of the Court in the interests of the institution. We have no doubt that the lower Court erred, and erred grievously in dealing with this application in the manner it did. We have no doubt that the application ought to have been allowed without further question, especially having regard to the lower Court's own view that the suit would have to be dismissed on the ground that the plaintiffs were in effect estopped from bringing it. We therefore allow the petition, set aside the order of the Court below and direct that the petitioners in the revision petition be made additional plaintiffs in the suit. The parties will however bear their own costs in this revision petition.

In view of our opinion that there is no estoppel standing in the way of the plaintiffs the decree of the Court below dismissing the suit is set aside and the lower Court is directed to restore the suit to its original number on the file and dispose of it according to law. The appellant's cost of this appeal must be paid by respondents 2 to 4; respondent 1's (Board's) costs will in accordance with law come out of the endowment. As regards costs in the suit already incurred in the Court below and to be incurred in future, they will abide the result and should be provided in the revised decree of the lower Court. The court-fee paid on the memorandum of appeal will be refunded to the appellant.

C.R.K./G.N. *Order accordingly.*

1. ('20) 7 AIR 1920 Mad 155 : 54 I C 497 : 37 M L J 698, Yasim Sahib v. Ekambara Iyer.

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* A. I. R. 1941 Madras 81

Full Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

Annasami Aiyangar and others — Appellants

v.

Nithiyapadi Adivarachari and others — Respondents.

Second Appeal No. 274 of 1935, Decided on 26th September 1940, against decree of Sub-Judge, Cuddalore, in A. S. No. 244 of 1933.

* *Limitation Act (1908), Arts. 120 and 124— Lawful holder of office enjoying its emoluments must be deemed to be in possession thereof— He can sue any time when performance of his duties is interfered with — But he is not bound to sue and can abide his time — Every interference gives rise to fresh cause of action.*

A person who is admittedly the lawful holder of an office and is enjoying its emoluments must in law be regarded as being in possession of the office itself, especially where no one else is performing the duties of the office. He has the right to bring a suit at any time when the performance of his duties is interfered with. But he is not bound to take action in case of interference if it does not suit him. He can abide his time until another occasion which would only give rise to another cause of action since at every time of interference there is a fresh wrong. Consequently Art. 120 or 124 have no application to such a case: A I R 1914 P C 72, *Rel. on*; A I R 1938 Mad 193 ; A I R 1935 Mad 967; 20 M L J 781; A I R 1915 Mad 1003; A I R 1916 Mad 465 and A I R 1935 Mad 449, *Disting.*

[P 83 C 2; P 84 C 1]

V. Ramaswami Ayyar — for Appellants.

C. Padhmanabha Iyengar and A. Srirangachariar — for Respondents.

Leach C. J. — This appeal came in the first instance before Venkataramana Rao J., but as the learned Judge was of the opinion that its decision involved the consideration of the judgments of this Court in two cases which seemingly were in conflict he adjourned the hearing in order that the appeal might be placed before a Bench. The two decisions referred to by the learned Judge were decisions of Division Benches and in consequence it was deemed advisable that the appeal should be decided by a Full Bench. The two cases referred to by the learned Judge are 59 MAD 75[1] and (1938) 2 M L J 434.[2] They will be referred to in detail presently, but as it appears to us that this appeal involves the consideration of facts which are not common to the other two cases it is necessary to set out in some detail what the facts are.

The suit out of which this appeal arises was filed by respondent 1 in the Court of the District Munsif of Chidambaram for an injunction restraining the trustee and the archakas of the Sri Bhuvarahaswami temple at Srimushnam from interfering with the performance of the duties of his office of the mantrapushpam of the temple. The suit was dismissed by the District Munsif, but his decision was set aside on appeal by the Subordinate Judge of Cuddalore and respondent 1 was held to be entitled to the relief sought by him. The appellants are the archakas of the temple. The office of mantrapushpam is a hereditary one and respondent 1 succeeded to it on the death of his father in 1906. He is also the holder of two other hereditary offices in this temple, the offices of kaisika puranam and arulappadu. The appeal is only concerned with the office of mantrapushpam. The holder of the office of mantrapushpam has the right to receive from archakas flowers and tulasi leaves for the purpose of consecration, which is performed by the recitation of mantrams by the mantrapushpakar while he is holding them. After the consecration the flowers and tulasi leaves are handed to an archaka who then proceeds to offer them to the deity. The emoluments of the office of mantrapushpam in this temple consist of a ball of cooked rice per diem and twelve annas per month. Respondent 1 is a Vadagalai and the archakas of this temple are all Thengalais; and here we have the cause of the present litigation and incidentally of other suits. Respondent 1 has never performed the duties of the mantrapushpam and the reason why he has not done so is also traceable to the animosity between these two sects. The Subordinate Judge has in fact held that the office of mantrapushpam has been in abeyance for over forty years. In 1918 respondent 1 decided to take action with the object of preventing interference with the performance of the duties of his office and in that year he filed O. S. No. 66 of 1918 in the Court of the District Munsif, Vriddhachalam. In that suit the respondent asked for an injunction restraining the trustee from interfering with the performance by him of the duties cast upon him as the holder of all the three offices. The District Munsif granted him a mandatory injunction on 30th June 1920. The trustee appealed to the Subordinate Judge, but the only result was that the injunction was changed from mandatory to prohibitory in character. In these proceedings the archakas were not made parties. In 1922 respondent 1 filed O. S. No. 178 of 1922 against the trustee and the archakas for an injunction preventing them from interfering with him in the performance of his office of kaisika puranam, but in this suit he asked for no relief in respect of obstruction in the performance of the duties devolving on him as the holder of the other two offices. The District Munsif granted him an injunction on 23rd July 1924 and this was confirmed by the Subordinate Judge on appeal on 22nd October 1927.

On 10th January 1929, respondent 1 filed the suit out of which this appeal arises and, as already indicated, here he sought an injunction prohibiting the trustee and the archakas from interfering with his performance of the duties of the office of mantrapushpam. It was denied by the defendants that this office was hereditary and that respondent 1, was entitled to it. It was also contended that the suit as framed was bad, because there was no prayer for a declaration. The further plea that the suit was barred by limitation was also advanced. The District Munsif held that the office was hereditary and that respondent 1 was entitled to it, but he upheld the other objections advanced by the defendants. He considered that the suit was bad because there was no prayer for a declaration of right to the office and that it was barred by Art. 124, Limitation Act. In his opinion the archakas

1. ('35) 22 A I R 1935 Mad 967 : 161 I C 658 : 59 Mad 75 : 69 M L J 789, Ponnu Nadar v. Kumaru Reddiar.
2. ('38) 25 A I R 1938 Mad 193 : 181 I C 688 : (1938) 2 M L J 434, Appa Rao v. Secy. of State.

had gained a right to the office by adverse possession. The Subordinate Judge agreed with the District Munsif that the office was hereditary and that respondent 1 had a title to it, but he considered that the District Munsif erred in holding that the suit as framed could not be maintained and that it was barred by limitation. With regard to the plea of the defendants that the suit was bad because no declaration was asked for the Subordinate Judge considered that the relief sought did involve a prayer for a declaration. On the question of limitation the Subordinate Judge held that Art. 124 had no application and that there was a recurring cause of action. These are the facts as stated at the Bar and the only question which this Court has been called upon to decide is the question of limitation.

It will be here convenient to refer to the decisions in 59 MAD 75[1] and (1938) 2 M L J 434.[2] In the first of these cases certain Nadars, in a suit filed in 1923 in the Court of the Additional District Munsif of Tinnevelly, claimed that they and their castemen had a right to pass in procession over a certain route composed of public streets in the village in which they lived. The defendants were other castemen of the village who denied this right. In 1918 two attempts were made by the plaintiffs to take marriage processions along this route. In 1900 the Joint Magistrate passed an order under S. 147, Criminal P. C., directing that no organized procession of Shanars or Christians should pass along these streets until a civil Court had declared their right to do so. The defendants contended that, inasmuch as the suit had been filed more than six years from the date of the order, it was barred by Art. 120, Limitation Act. The Court held that this contention must prevail and that the plaintiffs' community had for ever lost their right to file a suit to establish a right to pass along these streets in procession. The Court also considered the question whether there was here a continuing wrong and decided that there was not. While it may be that the decision to apply Art. 120 in that case is open to question—the Court is not called upon to reconsider the decision here—the facts are so very different from the facts in the present case that we are unable to regard it as having any application.

The second case, (1938) 2 M L J 434,[2] is also concerned with facts which are very different to the facts in the present case. (1938) 2 M L J 434[2] involved the right to land which had formed the beds of certain tanks. It was held that a bare repudiation of a person's title without an overt act would not make it incumbent upon him to bring a declaratory suit. A party had, it was said, the right to elect when he could bring a suit for vindicating his right after there had been successive denials of his title. In that case, an adverse order had been passed by the Collector and no action had been taken on it. The persons affected by the order were still in possession of the land and it was held that they could decide when it was necessary for them to take action to vindicate their title. The only common factor in that case and in the one now before us is the possession of the plaintiffs; in that case the plaintiffs were in possession of the land and in this case the plaintiff is in possession of the office. Certain observations in (1938) 2 M L J 434[2] could be applied to the present case, but in view of the dissimilarity of the two cases in point of fact we prefer not to base our decision upon it.

It has been argued by Mr. Ramaswami Aiyar on behalf of the appellants that the Court should hold that in law respondent 1 is not in possession of his office because he has not performed the duties thereof, but he has failed to produce any authority in support of his contention. Respondent 1 is admittedly the lawful holder of the office and it is common ground that he received the emoluments, month by month, until 1927. The archakas admittedly do not claim to be in possession and it is not claimed that they have performed the duties of the office. This has been made quite clear in the judgment of the Subordinate Judge. It seems to us that, where a person is admittedly the lawful holder of an office and he is enjoying its emoluments, he must in law be regarded as being in possession of the office itself, especially where no one else is performing the duties of the office. We do not suggest, however, that the mere performance of the duties of the office by somebody else would constitute the person performing the duties the holder of the office. In our opinion it would not. Article 124, Limitation Act, has a bearing here. The Article says that for a suit for possession of a hereditary office the period of limitation is twelve years from the time when the defendant takes possession of it adversely to the plaintiff, and the explanation which follows says that an hereditary office is possessed when the profits thereof are usually received or (if there are no profits) when the duties thereof are usually performed. Therefore, so far as the Limita-

tion Act is concerned, the plaintiff has only to show that he has been in receipt of the emoluments.

In support of his argument that the archakas must be deemed to be in possession, Mr. Ramaswami Aiyar has referred to 20 M L J 781,[3] 28 M L J 217,[4] 29 M L J 558[5] and 1935 M W N 503,[6] but the effect of these cases is that mere possession of the emoluments without the performance of the duties of the office will not give a title by adverse possession. In none of those cases was the Court concerned with the position where the lawful holder of the office is in enjoyment of the emoluments. Respondent 1 is admittedly the lawful holder of the office and he has been in enjoyment of the emoluments. In these circumstances how can it be said that he has not the right to bring a suit at any time when the performance of his duties is interfered with ? Mr. Ramaswamy Aiyar admits that Art. 124 has no application and relies entirely on Art. 120. That article could only apply if respondent 1 was bound to take action when in 1921 the archakas prevented him carrying out his duties as the mantrapushpakar. But he was not bound to take action then if he did not suit him. He could abide his time. The interference which the archakas were guilty of did not affect his position as the lawful holder of the office. If the archakas interfered on another occasion it would only give rise to another cause of action.

Many other cases have been quoted in the course of the arguments, but the only one which has any bearing is 42 CAL 244.[7] That case was decided by the Privy Council. The widow of a shebait of a temple who had succeeded her deceased husband in the office mortgaged certain immovable property together with her interest in the income of the temple. The mortgagee obtained a decree on his mortgage and in the sale held in execution proceedings brought the mortgaged property, of which he got possession in 1892. The widow died in 1900. The suit out of which the appeal arose was filed by the plaintiff for a declaration that he was entitled to receive the share of the temple income as it was inalienable. One defence set up was that the suit was barred by limitation by reason of the provisions of Art. 124. This argument was rejected by the Judicial Committee. The suit was not one for a hereditary office. This office could not be held by a non-Brahmin and the defendant who was not a Brahmin was not competent to become the shebait and had not taken possession of the office. Adversely taking and appropriating to his own use a share of the surplus daily income from the offerings gave him no title to the office and therefore no right to a share in the income. On each occasion on which he received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, he committed a fresh actionable wrong in respect of which a fresh suit could be brought against him by the shebait. In the same way everytime the archakas of the temple with which this suit is concerned interfered with respondent 1 in the performance of his duties as the mantrapushpakar they were guilty of a fresh wrong. We consider that the Subordinate Judge was quite right in holding that Art. 120 (Art. 124?) has no application and that respondent 1 was entitled to institute this suit whenever he thought fit. The appeal fails and will be dismissed with costs in favour of repondent 1.

C.R.K./G.N. *Appeal dismissed.*

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3. ('10) 20 M L J 781 : 8 I C 903 : 9 M L T 73, Kamalathammal v. Krishna Pillai.
4. ('15) 2 AIR 1915 Mad 1003 : 26 I C 841 : 28 M L J 217, Ambalavana Pandara Sannadhi v. Minakshi Sundareswara Devasthanam.
5. ('16) 3 A I R 1916 Mad 465 : 30 I C 962 : 29 M L J 558, Suppa Bhattar v. Suppu Sokkayya Bhattar.
6. ('35) 22 AIR 1935 Mad 449 : 1935 M W N 503, Rajagopala Naidu v. Rama Subramania Aiyar.
7. ('14) 1 AIR 1914 P C 72 : 24 I C 501 : 42 Cal 244 : 41 I A 267 (P C), Jalandhar Thakur v. Jharulla Das.

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WADSWORTH J.

N. Muthusami Chettiar — Petitioner

v.

Periyal Achi and another—Respondents.

Civil Revn. Petn. No. 1378 of 1938, Decided on 23rd July 1940, to revise decree of Dist. Munsif, Tiruppur, in O. S. No. 224 of 1937.

(a) Civil P. C. (1908), S. 115—Revision against decision on issue which was not decision of whole suit held could be entertained in particular circumstances of the case.

Ordinarily High Court will not entertain revision petitions against decisions on issues which are not decisions of the whole suit, but in a suit for recovery of money collected by the defendant as a result of a decree which is alleged to be the property of the plaintiff's husband a preliminary issue on the question whether the suit was maintainable when the plaintiff's husband's estate had vested in the official receiver should be decided in revision as it essentially relates to the jurisdiction of the Court to entertain the suit and to a matter which, if decided wrongly in favour of the plaintiff, may result in an elaborate trial which would otherwise be unnecessary. [P 85 C 2]

(b) Insolvency — Suit by widow of deceased insolvent to recover part of husband's estate impleading official receiver as party and in anticipation of annulment of adjudication — Adjudication subsequently annulled — Effect explained.

A widow of the deceased insolvent sued for the sale proceeds of the property acquired under the decree which she asserted formed part of her husband's estate. She impleaded in her suit the official receiver and alleged that the official receiver had taken no action to get possession of this money for the estate. At the time when she filed this suit, she was taking steps for the annulment of the adjudication of her husband but she did not in her plaint specifically pray that the money claimed in the suit should be made payable to the official receiver. She claimed it for herself, possibly anticipating that the annulment of the adjudication would intervene before the suit was decreed. The adjudication was eventually annulled. At the time of the annulment the suit was barred as regards one item but was still within time as regards the other item:

***Held* that she had no legal basis for her suit at the time when it was filed. As however the suit was within time so far as the second item was concerned when the adjudication was annulled the suit with reference to this item was maintainable. With reference to the first item the suit would be dismissed on the ground that the plaintiff had no cause of action when the suit was filed, the property being vested in the official receiver and the suit for this item being time-barred before the adjudication was annulled.** [P 87 C 1]

K. V. Ramachandra Aiyar — for Petitioner.

K. S. Desikan and C. D. Venkataraman — for Respondents.

Order. — The petitioner was defendant 1 in a suit for recovery of money collected by defendant 1 as a result of a decree which is alleged to be the property of the plaintiff's husband. The facts are rather peculiar. The decree in question was transferred from a third party to the name of defendant 1 and it is alleged that the real owner was the plaintiff's husband who is now dead. The plaintiff's husband was adjudged an insolvent in 1930. He died in June 1934 at or about the time when defendant 1 effected a sale of the properties acquired in execution of the decree in question. It would appear that at the time of his death the plaintiff's husband had failed to carry out the Court's orders in prosecution of his insolvency and had not applied for a discharge. It would also appear that the debts due to creditors in the insolvency were the subject of an extra judicial composition. In June 1937 the plaintiff, widow of the deceased insolvent, sued defendant 1 for the sale proceeds of the property acquired under the decree which she asserts forms part of her husband's estate. She impleaded in her suit the official receiver and alleged that the official receiver had taken no action to get possession of this money for the estate. At the time when she filed this suit, she was taking steps for the annulment of the adjudication of her husband but she does not in her plaint specifically pray that the money claimed in the suit should be made payable to the official receiver. She claims it for herself, possibly anticipating that the annulment of the adjudication would intervene before the suit was decreed. The adjudication was eventually annulled in an appellate order of the District Judge. At the time of the annulment the suit was barred as regards one item but was still within time as regards the other item. The learned District Judge annulled the adjudication knowing of the extra judicial composition since, having regard to the death of the insolvent and all the circumstances, he thought it unnecessary to endeavour to undo this composition.

A preliminary issue was framed in the suit on the question whether the suit was maintainable when the plaintiff's husband's estate had vested in the official receiver. Ordinarily this Court will not entertain revision petitions against decisions on issues which are not decisions of the whole suit, but in the circumstances of the present case it seems to me that the matter should be decided in revision. It essentially relates to the jurisdiction of the Court to entertain the suit and it relates to a matter which if decided wrongly in favour of the plaintiff, may result in an elaborate trial which would otherwise be unnecessary. The question is by no means free from difficulty. Ordinarily speaking the provisions of S. 43, Provincial Insolvency Act, regarding the annulment of an adjudication for the default of the debtor will scarcely apply to the estate of a dead man, and one would think that the proper order to pass would be one under S. 17, merely terminating the administration; the debtor being dead and no further administration being necessary in the interests of the estate. However, it does appear in this case that before the death of the insolvent there was a default from which annulment would normally result. I am not therefore prepared to say that the annulment order was improper. In any case we are not now concerned with its correctness. It has been made and is binding.

What is the effect of a subsequent annulment order upon a suit filed by the legal representative of a deceased insolvent impleading the official receiver, which suit should strictly have been filed by the official receiver himself? There is no clear authority on the subject. The Court below

relies on a decision in A I R 1937 Mad 717,[1] which itself is rather an unusual case. It purports to follow 20 Mad 452[2] and to decide that the effect of the dismissal of an insolvency petition is to revest the debtor's property in the debtor as from the date of the order of adjudication, so that a transfer by the insolvent made after his adjudication and before the order of dismissal would be a good transfer upon which the transferee can sue. The case in 20 Mad 452[2] was a case under the old Act which had no provision for the annulment of adjudication for the default of the insolvent. The case in A I R 1937 Mad 717[1] which the learned Chief Justice was considering was under the Act of 1920 and presumably the order terminating the insolvency must have been in effect one of annulment, though the word 'dismissal' is used in the judgment. I have examined the papers in that case and find that they contain very little information. It arose from a suit filed originally by the transferee from the insolvent, who impleaded the official receiver as a co-plaintiff apparently after the suit had become barred by limitation. The trial Court overlooking the difficulty of limitation gave a decree in favour of the official receiver. The defendant filed a revision petition raising the question of limitation. The learned Chief Justice called for a report from the District Judge and as a result of what was contained in the report, ascertained that the original adjudication was an ex parte order, subsequently reconsidered on the intervention of the insolvent with the result that the petition was dismissed. One would have thought that the order should have been one not of dismissal but of annulment under S. 35 of the Act and it must be regarded as having the same effect. The learned Chief Justice holds that the decision in 20 Mad 452[2] is authority for the position that the effect of an order setting aside an adjudication is, subject to the protection of the receiver for the acts done by him to revest the debtor's property in the debtor as from the date of the vesting order. The learned Chief Justice infers that if the property is revested in the debtor as from the date of the vesting order a transfer made by the debtor during the continuance of the insolvency acquires a validity by the subsequent cancellation of the insolvency, so that the title of the transferee is good and sufficient to support a decree in his favour. It is to be noted that this is not a case of a suit filed by an insolvent during the continuance of the insolvency but a case of a suit filed by a transferee from an insolvent on the strength of a title alleged to have been created by the insolvent during the continuance of his insolvency. There is no statutory prohibition of a suit by an insolvent during the continuance of his insolvency, but it seems to follow from the fact that all the properties of the insolvent vest in the receiver, that the insolvent will during his insolvency have no such title in any part of the estate vested in the receiver as would form a basis for a suit regarding that property, and so much has been repeatedly held: *vide* 1918 M W N 289.[3] If the insolvent cannot maintain a suit regarding the property vested in the official receiver so long as the insolvency enures, it is difficult to see how the insolvent can take advantage of the Court's delays in disposing of that suit so as to clothe a suit, which in its inception was bad with a validity due only to the subsequent annulment of the insolvency. If the insolvent or his legal representative had no right of suit when the suit was filed, that suit should have been dismissed. It is suggested that the action of the insolvent's legal representative in impleading the official receiver as a defendant and disclosing to the Court the full facts of the insolvency makes that suit substantially one on behalf of the estate. I find it difficult to accede to the proposition that the failure of the official receiver to get in a particular property makes it open to the insolvent or any one else to file a suit which should legitimately have been filed by the official receiver and give to that suit an appearance of regularity by impleading the official receiver as a defendant. The Act specifically prohibits suits against an insolvent without the leave of the Court and it has been held that when a suit is filed without leave against the insolvent during the pendency of the insolvency, a subsequent annulment of that insolvency does not give a retrospective validity to the suit: *vide* A I R 1929 Mad 480[4] and this decision has been quoted with approval in a Full Bench decision reported in A I R 1937 Mad 667.[5] If

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1. ('37) 24 AIR 1937 Mad 717 : 176 I C 600, Lingappa v. Official Receiver.
2. ('97) 20 Mad 452 : 7 M L J 229, Ramasami Kottadir v. Murugesa Mudali.
3. ('18) 5 AIR 1918 Mad 294 : 45 I C 239 : 1918 M W N 289, Subbaraya v. Papathi Ammal.
4. ('29) 16 A I R 1929 Mad 480 : 113 I C 550, Ponnuswami v. Kaliaperumal.
5. ('37) 24 A I R 1937 Mad 667 : 173 I C 285 : ILR (1937) Mad 841 : (1937) 2 MLJ 223 (FB), Davood Mohideen v. Sahabdeen.

the subsequent annulment of an insolvency does not take away the necessity for leave in respect of a suit against an insolvent filed before the annulment, it is difficult to see how a subsequent annulment can give validity to a suit filed by an insolvent or his legal representative during the pendency of the insolvency when the property vested in the official receiver.

Another argument which has been advanced is that the effect of S. 78, Provincial Insolvency Act, makes it clear that though an annulment in one sense puts the insolvent back to the position which he occupied before the adjudication, it is not the intention of the Legislature to give a retrospective sanction to unauthorized suits filed in respect of the insolvent's estate during the pendency of the abortive insolvency. Under this section the whole of the period occupied by the abortive insolvency may be ignored for the purpose of limitation in respect of any suit which might have been brought but for the order of adjudication. It is true that this section will not enure to the benefit of the insolvent himself, for a suit can be brought by the official receiver on behalf of the insolvent and the adjudication does not prevent the assertion of rights for or on behalf of the insolvent. Still there is a suspension of limitation operating on behalf of the creditors who have proved their debts and it is clearly contemplated that to this extent at any rate the Legislature does not contemplate the filing of suits during an insolvency with a view of a prospective annulment of the adjudication. This is in fact what has happened in the present case. The plaintiff hoping to get the adjudication annulled has filed this suit at a time when she had no vested interest in the estate presumably in order to save limitation. I come to the conclusion that she had no legal basis for her suit at the time when it was filed. As however the suit was within time so far as the second item is concerned when the adjudication was annulled the suit with reference to this item is maintainable. With reference to item 1 the suit will have to be dismissed on the ground that the plaintiff had no cause of action when the suit was filed, the property being vested in the official receiver and the suit for this item being time-barred before the adjudication was annulled. The petition is therefore allowed to this extent. The petitioner will be entitled to three-fourths of his costs in revision.

C.R.K./D.S. *Petition partly allowed.*

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WADSWORTH AND PATANJALI SASTRI JJ.

A. Raghupathi Ayyar — Petitioner

v.

Krishnamachariar and another — Respondents.

Civil Revn. Petn. No. 1077 of 1940, Decided on 26th August 1940, to revise order of Dist. Court, Chingleput, D/- 1st April 1940.

Madras Agriculturists Relief Act (4 of 1938), S. 8 — Mortgage in favour of sons of S *— One of items of consideration for mortgage being discharge of decree in suit on promissory note — Payee under promissory note and decree-holder in promissory note suit being* S *— Judgment-debtor in mortgage suit held could not contend that* S *was really benamidar for her sons.*

Unless the debt of which the suit debt is alleged to be a renewal is in favour of the same creditor, the explanation to S. 8 has no application. [P 88 C 1]

The suit mortgage was in favour of the two sons of *S* and one of the items of consideration for the mortgage was the discharge of a decree in a suit on a promissory note. The payee under the promissory note and the decree-holder in the promissory note suit was *S*, the mother of the two mortgagees :

Held that the decree based on the mortgage deed could not be scaled down on the basis that it was in part a renewal of this promissory note debt. It was not open to the judgment-debtor to contend that *S* the payee under the promissory note, was really a benamidar for her sons. [P 87 C 2 ; P 88 C 1]

S. V. Venugopalachari and A. C. S. Chari — for Petitioner.

Ch. Raghava Rao and V. S. Rangaswami — for Respondents.

Wadsworth J. — The petitioner was the defendant in a suit on a mortgage and he contended that he was entitled to let in evidence that the mortgage was a renewal of a previous promissory note debt which had ripened into a decree, so as to attract the operation of S. 8, Madras Act 4 of 1938. The Court below held that he was not entitled to adduce such evidence and it is against that decision the present revision petition is filed. The suit mortgage was in favour of the two sons of Srinivasammal and one of the items of consideration for the mortgage was the discharge of a decree in a suit on a promissory note. The payee under the promissory note and the decree-holder in the promissory note suit was Srinivasammal, the mother of the two mortgagees. The question therefore is whether the decree based on the mortgage deed can be scaled down on the basis that it is in part a renewal of this promissory note debt. The contention was that Srinivasammal, the payee under the promissory note, was really a benamidar for her sons.

In our opinion it is not open to the judgment-debtor to raise such a contention for the purpose of S. 8 of Act 4 of 1938. Unless the debt of which the suit debt is alleged to be a renewal is in favour of the same creditor, the explanation to S. 8 has no application. We have held in our decision in C. R. P. No. 1088 of 1939 that the creditor in respect of a promissory note debt is and can only be the payee and that the creditor in respect of a decree debt can only be the decree-holder or other persons specifically empowered to execute the decree; that is to say, whether we look at the promissory note itself or at the decree resulting therefrom, the creditor must necessarily be Srinivasammal and not her sons even though the sons may have a beneficial interest in the debt. It follows therefore that there can be no question of the mortgage debt being a renewal for the purpose of the Act of the previous promissory note debt and the decision of the lower Court is right. The revision petition is therefore dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

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BURN AND STODART JJ.

In re Balija Pullayya — Accused.

Referred Trial No. 78 and Criminal Appeal No. 384 of 1939, Decided on 20t September 1939, referred by Sessions Court, Kurnool Division, D/- 20th July 1939.

Criminal Trial—Evidence—Expert evidence — Murder case—Before regarding expert's opinion as to footprints found near corpse of deceased as conclusive evidence against accused, Judge should form his own opinion regarding identity of footprints found near corpse with footprints of accused.

The expert's opinion is valuable but it must be supported by statements of facts, the accuracy or otherwise of which can be verified by the Judge. [P 90 C 1]

In a murder case, before relying on the opinion of the expert as to the footprints found near the corpse of the deceased as conclusive evidence against the accused, the Judge should form his own opinion with regard to the identity of the footprints found near the corpse with the footprints of the accused. [P 90 C 1]

P. C. Parthasarathi — for Appellant.

K. Venkataraghavachari for Public Prosecutor — for the Crown.

Burn J. — The appellant has been convicted by the learned Sessions Judge of Kurnool of abducting a woman with intent that she might be murdered (S. 364, Penal Code) and also of murdering the same woman (S. 302). He has sentenced the appellant to death for the offence of murder and to transportation for life for abduction. The woman whom the appellant is said to have abducted and murdered was a Kapa Gouramma, a widow who lived in Rajoli in the Nizam's Dominions and also had a house in Kurnool. She had two daughters (P. Ws. 4 and 5) who were apparently living by prostitution, though P. W. 5 at the time of the murder of Gouramma was said to be in poor state of health. The appellant was on terms of illicit intimacy with the younger daughter, P. W. 4. It is alleged that he was supposed to be paying her Rs. 6, a month but that his payments were irregular and P. w. 4's mother objected to her association with the appellant on account of his meanness. It was alleged that he had once given her a pair of kammals and that on a pretext of being in want of money he had taken them back from her and pledged them. The mother therefore according to the prosecution was trying to break off the association between P. W. 4 and the appellant, and this is supposed to have been the appellant's principal motive for the murder. The learned Sessions Judge thinks that he had another motive in that he was badly in need of money and that Gouramma had some cash and also some jewels.

Gouramma's corpse was found on the front verandah of her house in Kurnool on the morning of 20th February. Her throat had been cut and her ear lobes also had been cut. There is no reasonable doubt about the fact that she was murdered by somebody who wanted to steal her jewels and whatever else she had. The doctor who made the post mortem examination of Gouramma's body on the afternoon of 20th February was not able to fix the time of death. He said that in his opinion death would have occurred between 20 and 40 hours before he made the post mortem examination which was at 5-10 P. M., on 20th February. According to his opinion Gouramma must have died some time between 1 A. M. and 9 P. M. on 19th February. The doctor's evidence does not fix the time nearer than that.

The evidence against the accused went to show that on the afternoon of 18th February he took Gouramma with him by bus from Rajoli to Kurnool. There was evidence to show that Gouramma came to her house at Kurnool on the evening of that day about evening meal time, and that the appellant came to her house about an hour later. There was also evidence that the appellant was heard talking to the deceased in her

house at about 10 P. M. on 18th February. One witness (P. W. 11) says that they were talking angrily and quarrelling. Nobody appears to have seen the appellant leave the house of the deceased and according to the prosecution he was next seen on the morning of the 19th plying his trade as a tailor in the main bazaar. The appellant was arrested on the evening of 21st February in his own house in Kurnool. The only other evidence of any importance is that on the Cuddappah slabs with which the verandah of the deceased's house is floored foot prints in blood were found near the corpse. A foot print expert (P. W. 6) took impressions of the appellant's feet in goat's blood on Cuddapah slabs of a somewhat similar degree of smoothness. He said that he was satisfied that the foot prints found on the Cuddapah slabs near the corpse were the foot prints of the appellant. This is briefly the substance of the evidence for the prosecution. All the assessors expressed the opinion that the appellant had not been proved to be guilty either of abduction or of murder. The learned Sessions Judge disagreeing with them has convicted him for both the offences.

So far as abduction is concerned, there is no evidence upon which the appellant could be convicted. A person is said to abduct another person if he "by force compels or by any deceitful means induces any person to go from any place," (S. 362, Penal Code). In the present case there is nothing to show that the appellant compelled Gouramma by force to accompany him on 18th February from Rajoli to Kurnool. There is nothing to show that by deceitful means he induced her to go. On the contrary P. W. 4 the younger daughter of the deceased said quite clearly that it was she who had asked her mother to go with the appellant to Kurnool "for redeeming the kammals and buying sari and ravikkai." The other daughter (P. W. 5) does not say anything about the accused offering any deceitful inducement to her mother to persuade her to go with him to Kurnool. The conviction for abduction is therefore without any foundation in the evidence and it must be set aside.

The conviction for murder also, we think, must be set aside. The evidence of the prosecution witnesses is gravely discrepant with regard to the date on which the appellant and the deceased left Rajoli together to go to Kurnool. In the complaint (EX.E) which was given at the police station in Kurnool by P. W. 4 after the discovery of the corpse, P. W. 4 has stated that the appellant came to Rajoli "the day before yesterday (Saturday)." That was of course the 18th February. P. W. 5 in her statement under S. 164, Criminal P. C., (EX. G) recorded on 24th February also said that the appellant had come to them "last Saturday." The evidence of Masamma, a woman of Rajoli who said that she was the discoverer of the corpse, is to the same effect. But this does not fit in with the theory of the prosecution. According to P. Ws. 4 and 5 when the appellant came to them at Rajoli he wanted to persuade Gouramma to allow him to continue his intimacy with P. W. 4. The appellant, they say, professed repentence and a purpose of mending his ways. According to P. W. 4,

> accused then told my mother not to be angry with him and said that he would redeem the kammals and buy me a new sari and would treat me well.

It was in order to redeem the jewels and to buy new sari that the appellant was going from Rajoli to Kurnool. But both P. W. 4 and P. W. 5 say that the new sari was to be bought for the festival, i. e., the festival of Sivarathri. They both say that the date on which the appellant arrived at Rajoli was two days before the Sivarathri festival. They both say that the festival was still to come off. They both say that their mother went away promising to return for the festival. Both of them, and P. W. 7 also, say that when P. W. 7 started for Kurnool a few hours after Gouramma had gone, the daughters begged her to see their mother at Kurnool and to remind her to come back for the festival. Unfortunately for this theory Sivarathri was over on 17th February. The same blunder appears in the evidence of P. Ws. 10 and 11 two young prostitutes who use one half of Gouramma's house in Kurnool as their place of business though they sleep elsewhere. Both these girls said that the accused and Gouramma came back on "Saturday preceding Sivarathri." That Saturday was of course the 11th February and not the 18th February. The whole theory upon which the prosecution case is based is therefore groundless.

The learned public prosecutor, when we heard arguments in this case conceded that unless the circumstantial evidence connected with the bloody foot-prints could be relied upon, there was really no substantial case against the appellant. We thought that the judgment of the learned Sessions Judge with regard to these foot-prints was not satisfactory because he had taken the opi-

nion of the foot-print expert as conclusive. His judgment shows that he did not form any opinion of his own with regard to the identity of the foot-prints found near the corpse with the foot-prints of the appellant. The Cuddapah slabs and the specimen foot-prints had not been sent up to this Court when the appeal first came on for hearing and we thought it necessary to send for them and to examine them ourselves. It is not proper for a Judge to be guided in such matters as this entirely by the evidence of an expert. The expert's opinion is valuable but it must be supported by statements of fact, the accuracy or otherwise of which can be verified by the Judge. The result of our examination of the foot-prints, taken with the evidence of P. W. 6, is that we are not ourselves satisfied that the foot-prints found near the corpse were made by this appellant. There were five prints altogether, one of them being a fairly complete print of a left foot and four being partial prints of a right foot. The expert took for comparison two prints each of the right and left feet of the appellant. The expert says that he had ten reasons for coming to the conclusion that the left foot impression which was found near the corpse must have been made by the appellant. He says that it corresponded to the specimens in general size and shape and in the shape and size of the heels. He says that the pad and toe impressions were similarly identical, that the distance between one toe and the others was the same in both sets, that the relative position of each toe with the others was the same on both sets of impressions and so forth.

Now this is not strictly accurate. The pad and toe impressions are not identical. In both the specimens made by the appellant after treading in the blood of a goat the marks made by the toes are very much smaller in area than the toe marks found on M. O. 5. But our principal reason for refusing to follow the opinion of the expert is concerned with the partial prints of the right foot. These are M. Os. 4, 6, 7 and 8 and the specimens are M. Os. 9 and 10. In M. Os. 9 and 10 there are clearly marked the prints of all the five toes of the appellant's right foot. But in none of the prints on the M. Os. 4, 6, 7 and 8 is there any mark of a little toe. The expert has not been properly cross-examined with regard to this. He says that the impression of the little toe in M. O. 6 is missing. That is quite true, but he does not say that the impressions of the little toe is missing also from the other three prints of the right foot nor why in spite of this difference he still calls the impressions "identical". We find ourselves unable to say with any confidence that the foot-prints found near the corpse have been made by this appellant. The learned Sessions Judge in para. 17 of his judgment has stated that "the foot impressions found on the slabs are shown to be impressions in human blood." This is not, strictly speaking, accurate. It is highly probable that they were marks of human blood, but these Chuddapah slabs were not submitted to the chemical examiner and there is no certificate either of the chemical examiner or the imperial serologist to show that the stains in M. Os. 4, 5, 6, 7 and 8 are stains of human blood.

There is nothing we think in the conduct of the appellant from which it can fairly be inferred that he was the murderer of Gouramma. The learned Judge's views on this point are derived mainly from the evidence of P. W. 7. This woman lives in Rajoli and as already noticed, she says that she went to Kurnool a few hours after Gouramma. She travelled by bandy and arrived at Kurnool on the next morning and she says that she went to the house of the deceased and found it was locked. She inquired of the shop keeper who lives opposite (P. W. 9) but he could not tell her anything about Gouramma. She says that before going to Gouramma's house she had seen the accused in the bazaar and that he had told her that Gouramma was in her house. Then she says that she went back to the accused after she found the house locked and told him and he said "Oh, she must be in the house. Go and find out." Then she says that she visited him a third time and again he told her that Gouramma would be at home. After that she went again to Gouramma's house and on the advice of P. W. 9, pushed at the door and then peeping through the chink saw Gouramma lying dead across the verandah in a pool of blood. She says that she went and told P. W. 9, the opposite shop keeper what she had seen but that P. W. 9 advised her to keep quiet as it was no business of hers and there was no need for her to get into trouble about it. But she says that she went again for the fourth time to the appellant and tried to find out what he had to say without disclosing what she had seen. The accused, she says, replied, "I shall give you one cheera, and I shall give Chinna Rosamma (P. W. 4) another cheera." Then the witness says she replied ironically to the accused "You have given one woman a

cheera. Now she is lying on her back. You may do the same for me" and with these remarks she went away to the cart stand, purchased her fruits, kept quiet all day, travelled by night in a bandy back to Rajoli and then informed the daughters of Gouramma that their mother had been murdered. This woman's evidence is entirely unreliable and it is rather astonishing that the learned Sessions Judge should have paid any attention whatever to it except to denounce it as perjury.

It is quite incredible that if the accused had murdered Gouramma the night before, he would have persistently told this woman to go to Gouramma's house because she would be found there. Moreover, when this woman made a statement under S. 164, Criminal P. C., to the Sub-Magistrate on 24th February, her description of what she said to the accused and what he said to her after the discovery of the corpse was very different. She then said (*vide* Ex. H), "I went to where Pulliah was and inquired him as to whether Gouramma had gone." He replied "Madam, she is at the house. Where could she go." I said, "You have killed her and laid her in the house and often and often you tell me that she is at the house. What do you mean by your talking in this way." He turned a deaf ear to what all I said to him. He never replied to my queries." This is a vastly different account from the one which she gave in the Sessions Court. Moreover, P. W. 9 the shop keeper has stoutly denied from the first that she ever came and told him that she had discovered, Gouramma's corpse. The learned Sessions Judge accepts this evidence of P. W. 9 as true but passes over P. W. 7's lies with the remark that she was merely "trying to attribute to herself a civic consciousness which she did not possess." We must observe that this is not at all a proper attitude for a Sessions Judge to take up in the presence of deliberate perjury. The evidence of P. W. 7 should have been rejected in toto. The evidence is quite insufficient to sustain the conviction of the appellant for murder. We therefore set aside the conviction and sentence of death and direct that the appellant be released forthwith.

C.R.K./D.S. *Conviction set aside.*

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WADSWORTH J.

Sri Rajah Nayani Venkata Ranga Rao Bahadur Zamindar Garu — Petitioner

v.

Sri Rajah Tadakamalla Sita Ramachandra Rao Bahadur Zamindar Garu — Respondent.

Civil Revn. Petn. No. 2165 of 1939, Decided on 17th July 1940, to revise order of Dist. Munsif, Bezwada, D/- 21st August 1939.

(a) Easement — Suit to establish right of, can be maintained by occupier of dominant tenement — Question as to nature of plaintiff's title does not arise.

Since a suit to establish a right of easement can be maintained by the occupier of the dominant tenement no question as to the nature of the plaintiff's title in the estate which he occupies can really arise. [P 93 C 2]

(b) Court-fees Act (1870), S. 7 (iv) (d) and (c) — Court-fee and pecuniary jurisdiction — Real substance of suit and not its form should be looked to — Right of easement — Suit falls under S. 7 (iv) (c) only if there is legal necessity for plaintiff to get declaration of his right of easement before he can get injunction even though plaintiff seeks declaration by averments in body of plaint and not by specific prayer — Legal obstacle to be removed before consequential relief can be granted — Plaintiff must pray for declaration which would remove obstacle — Plaintiff merely avering title which can be established without cancellation of document or nullification of adverse title — Relief claimed flowing naturally from establishment of title aforesaid — Plaintiff need not pray for declaration of that title — Suit for injunction for protecting easement held on frame of plaint fell within S. 7 (iv) (d) and not S. 7 (iv) (c).

In matters of court-fee and pecuniary jurisdiction, the real substance of the suit and not the form in which it has been clothed should be looked to. Where there is any legal necessity for the plaintiff to get a declaration of his right of easement before he can get an injunction to protect it, the suit would have to be filed under S. 7 (iv) (c) even though he has sought the declaration by means of averments in the body of the plaint and not by praying for a declaration specifically amongst the reliefs at the end of the plaint. The safe rule however is that when there is some legal obstacle which has to be removed before a consequential relief can be granted, it is incumbent upon the plaintiff to pray for a declaration which will have the effect of removing that obstacle. But if the plaintiff merely avers a title which can be established without the cancellation of a document or the nullification of any adverse title and only claims the relief which would naturally flow from the establishment of the title which he avers, it is not necessary for the plaintiff to pray expressly for a declaration of that title. [P 93 C 2]

The plaintiff's case was that Irrigation works in his occupation, situate within the Hyderabad State, received their customary supply of water

from the overflow of tanks belonging to the defendant and situate in British India and that he had a right to require that the defendant should do nothing to the tanks in his possession which would adversely affect the customary flow of water to the tanks of the plaintiff. Consequently, he demanded a series of injunctions restraining the defendant from carrying out projected works which, it was alleged would endanger the customary flow of water to the plaintiff's tanks : [P 93 C 1, 2]

Held that on the frame of the suit, all that the plaintiff had to prove by evidence was that he had a subsisting right of easement to the extent and of the nature claimed. If the evidence established the existence of that right, there was no legal impediment which had to be removed before the injunction protecting that right would be granted; and whether he had or had not sued for declaration, it was not necessary for him to pay court-fee on the footing that the finding which he sought as to his title was really a declaration, necessarily required as a preliminary to the grant of the injunction. Consequently, the plaint fell only under S. 7 (iv) (d) and not under S. 7 (iv) (c) and the plaintiff was entitled to place his own valuation on the injunctions which he sought : 34 Cal 329 (P C); A I R 1940 Mad 113 (F B) and A I R 1931 Rang 319, *Rel. on*; A I R 1927 Mad 348, *Disting.* [P 94 C 1]

(c) Court-fees Act (1870), S. 7 (iv) (d) — Plaintiff's valuation of injunctions prayed for palpably inadequate — Court has no power to revise valuation.

Even where the valuation placed by the plaintiff upon injunctions sought for by him is palpably inadequate, the Court has no power to revise that valuation. [P 94 C 1]

(d) Injunction — Right to, is 'equity'.

'Equity' means a claim to the interposition of the Court of Chancery and it is no less an equity because the aid of Chancery is sought to protect a legal right and as such, a right to an injunction, being a right which forms part of the old chancery jurisdiction, is an equitable right. [P 95 C 2]

(e) Easement—Right of, is immovable property —It should be decided according to lex situs.

A right of easement is itself an immovable property and all questions concerning property in immovables are decided according to the *lex situs.* The right to an easement localised in British India must be determined according to the law of British India. [P 95 C 2]

(f) Easement—Right of, operating in British India in favour of land situate in foreign State— Action to prevent injury to right of easement can be maintained in British Indian Court having jurisdiction over land upon which easement operates — Foreign State Court in such case has no jurisdiction.

An action can be maintained to prevent an injury to a right of easement operating in British India in favour of land situate in a foreign State by proceeding in the Court in British India having jurisdiction over the land upon which the right of easement operates. [P 96 C 1]

A suit against a defendant residing in British India to protect a right of easement, which, though appurtenant to property in a foreign State has a local existence only in British India seeking an injunction the operation of which is only over property in British India and which affects the person of the defendant who resides in British India must be regarded essentially as one to establish a right to immovable property in British India and to protect that right by an injunction. A right of interest is itself immovable property. That right restricts the user of other immovable property and the mere fact that it operates in favour of land situate outside the jurisdiction cannot prevent the Courts having jurisdiction over the property in respect of which an injunction is sought from deciding whether or not that injunction is to be granted. Even if such a suit is to be regarded as one to establish a forign title, the British Indian Court would have jurisdiction on the ground that it is a suit to establish the existence of an equity which the plaintiff has a right to demand as against the defendant. The Foreign State Court however cannot entertain a suit for the issue of an injunction in respect of a right of easement over property in British India or grant a decree in respect of that right against a defendant residing in British India. Not only would a decree for such an injunction be futile and unenforceable but it would in fact be a decree for the protection of immovable property situate in another state. [P 95 C 1, 2]

P. Satyanarayana Rao, V. Govindarajachari and S. Venugopala Rao —for Petitioner.

B. Jagannadha Das — for Respondent.

Order.—This revision petition arises out of an order giving findings on three preliminary issues in a suit for an injunction restraining the defendant from doing certain acts with reference to his tanks over which the plaintiff claims a right of easement. The three issues are as follows :

(1) Whether the suit claim is not cognizable and triable by the municipal Courts and whether the same is determinable only by treaty between the British Government and H. E. H. the Nizam's Government.

(2) Whether any cause of action arose within the territorial jurisdiction of this Court and whether this Court has jurisdiction.

(3) Whether the reliefs are properly valued for purposes of jurisdiction and has this Court pecuniary jurisdiction to try this suit.

In order to determine these issues, it is necessary first to have a clear idea of the true nature of the plaint. The plaint as originally framed sought an injunction restraining the defendant from diverting the water flowing out of his tanks and from increasing the full tank level of those tanks, an injunction restraining him from diverting water to a newly dug channel, an injunction restraining him from closing the surplus weirs and diverting the water through a new canal into another tank and lastly a fixation of the full tank levels and the levels of the weirs of a number of the defendant's tanks. There was a long-fought battle on the court-fee question as affecting the jurisdiction of the District Munsif's Court in which the suit was filed. After the case had come up twice to this Court in revision, it was finally decided by the order of Krishnaswami Ayyangar J. in C. R. P. No. 1318 of

1937 that the last prayer relating to the fixation of the levels had been properly deleted from the plaint and that the District Munsif would have to consider the question of jurisdiction on the footing of the plaint as thus amended.

It seems to me that this finally decides the question regarding the necessity for valuing the suit on the basis of the averments in the plaint as to the necessity for fixing the levels of the defendant's tanks. It is however contended for the first time in this Court that though the plaintiff has not prayed for a declaration of his right of easement, the suit is in substance one for a declaration and injunction and should be valued under S. 7 (iv) (c), Court-fees Act, and not under S. 7 (iv) (d) and it is desirable to decide this contention in the first instance. For, if S. 7 (iv) (c) applies and a declaration is in substance and of necessity sought, the case would undoubtedly fall outside the jurisdiction of the District Munsif's Court, for the easements claimed operate over a large number of tanks and the injunctions sought will, according to the averments in the plaint, affect the income of the defendant to the extent of thousands of rupees annually, whereas the refusal of the injunction would have a proportionately adverse effect on the income of the plaintiff. Moreover, the decision of the question regarding the necessity for a declaration of the plaintiff's right has a material bearing on issue 1 regarding the jurisdiction of the British Indian Court to try the suit.

I may observe that the anxiety of the plaintiff to pay the minimum court-fee on this suit has led to much avoidable litigation and has involved both parties in a great deal of entirely unnecessary expense. Such short sighted parsimony is very ill-advised. The position is now complicated owing to the existence of a temporary injunction which would cease to operate if the plaint were returned for presentation to a Court of higher jurisdiction, so that the question of the frame of the suit is no longer one merely of court-fees and may have an important bearing on the practical position of the parties to the suit. The plaintiff's case is that irrigation works in his occupation, situate within the Hyderabad State, receive their customary supply of water from the overflow of tanks belonging to the defendant and situate in British India and that the plaintiff has a right to require that the defendant should do nothing to the tanks in his possession which will adversely affect the customary flow of water to the tanks of the plaintiff. Consequently, he demands a series of injunctions restraining the defendant from carrying out projected works which, it is alleged, will endanger the customary flow of water to the plaintiff's tanks.

Now, it is not disputed that the plaintiff is the occupier of this estate in which the tanks which form the dominant tenement are situate. It is true that the defendant has put in issue the nature of the plaintiff's title to this estate. But seeing that a suit to establish a right of easement can be maintained by the occupier of the dominant tenement, it is difficult to see how any question as to the nature of the plaintiff's title in the estate which he occupies really arises. It is however necessary to determine whether rights of easements such as are claimed do exist in favour of the plaintiff's estate and the determination of these rights is undoubtedly a necessary preliminary to the grant or refusal of an injunction to protect those rights. The question is whether this determination of the plaintiff's rights is to be regarded merely as a finding on evidence forming the basis of the substantial relief of an injunction or whether it is to be regarded as an essential relief which is sought in this suit. Now it is well established that in matters of court-fee and pecuniary jurisdiction, one must look to the real substance of the suit and not the form in which it has been clothed. If therefore there is any legal necessity for the plaintiff to get a declaration of his right of easement before he can get an injunction to protect it, the suit would have to be filed under S. 7 (iv) (c), Court-fees Act, even though he has sought this declaration by means of averments in the body of the plaint and not by praying for a declaration specifically amongst the reliefs at the end of the plaint. On this part of the case the safe rule is that when there is some legal obstacle which has to be removed before a consequential relief can be granted, it is incumbent upon the plaintiff to pray for a declaration which will have the effect of removing that obstacle. But if the plaintiff merely avers a title which can be established without the cancellation of a document or the nullification of any adverse title and only claims the relief which would naturally flow from the establishment of the title which he avers, it is not necessary for the plaintiff to pray expressly for a declaration of that title.

So much seems to me to follow from the decisions of the Privy Council in 34 CAL

329[1] and of the Full Bench of this Court in (1940) 1 M L J 32.[2] It is true that the first of these decisions related to a question of limitation, but the principle on which the decision is based applies equally, to my mind, to a question of court-fee. The decision of the Full Bench just quoted related to a suit by a minor challenging alienations in seeking possession. The question raised was expressly one of court-fee and I find it difficult to distinguish this case merely on the ground that the substantial relief is one for possession and not one for an injunction. A similar case is reported in 9 Rang 401.[3] It is not necessary for me to decide what would be the position if the plaintiff had in fact prayed for a declaration as well as for an injunction, as is the case in 52 M L J 121,[4] where Jackson J., held that the suit fell under S. 7 (iv) (c) and that the subject-matter was not the land but the value of the easement. It seems to me that on the frame of the present suit, all that the plaintiff has to do is to prove by evidence that he has a subsisting right of easement to the extent and of the nature claimed. If the evidence establishes the existence of this right, there is no legal impediment which has to be removed before the injunction protecting that right will be granted; and whether he has or has not sued for declaration, it is not necesssary for him to pay court-fee on the footing that the finding which he seeks as to his title is really a declaration, necessarily required as a preliminary to the grant of the injunction. It follows that the plaint as now amended falls only under S. 7 (iv) (d), Court-fees Act, and that the plaintiff is entitled to place his own valuation on the injunctions which he seeks. No doubt the valuation which he has placed upon these injunctions is palpably inadequate, but the Court has no power to revise that valuation. It follows therefore that the suit is within the pecuniary jurisdiction of the District Munsif.

The more difficult question is whether having regard to the fact that the suit seeks to protect an easement alleged to exist in favour of land situate outside the limits of British India, the British Court has jurisdiction to try the suit. This is a question on which in spite of the elaborate researches of learned counsel on both sides, no British or Indian authority has been discovered. There are American decisions to which I shall refer. But so far as British Courts are concerned, one is taken back to the general principles enunciated in the text books, together with such light as may be derived from somewhat analogous decisions. Dicey in his 'Conflict of Laws,' Edn. 5, lays down as his third general principle that the Courts of any country have jurisdiction over any matter with regard to which they can give an effective judgment and have no jurisdiction over any matter with regard to which they cannot give an effective judgment. Rule 53 at p. 203 prescribes that subject to certain exceptions, the Court has no jurisdiction to entertain an action for the determination of the title to or the right to the possession of any immovable situate out of England or the recovery of damages for trespass to such immovable.

The exception states that where the Court has jurisdiction to entertain an action against a person under either R. 59 or under any of the exceptions to R. 60, the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England on the ground of either (a) a contract between the parties to the action; or (b) an equity between such parties; with reference to such immovable. Rule 59 states that when the defendant in an action in personam is, at the time for the service of the writ, in England, the Court has jurisdiction in rescept of any cause of action, in whatever country such cause of action arises. Under R. 60, when the defendant in an action in personam is, at the time for the service of the writ, not in England, the Court has no jurisdiction to entertain the action. Except for the fact that they are imported into R. 53, we are not concerned with the exceptions to R. 60 for here we are dealing with a suit against the defendant who is a resident within the jurisdiction of our Courts. But it is to be remembered that one of the exceptions to R. 60 gives the English Courts jurisdiction even over a non-resident defendant when any injunction is sought as to anything to be done in England or any nuisance in England is sought to be prevented or removed. This is a clear indication that jurisdiction in respect of injunctions resides in the Court of the country in which the injunction is to operate.

1. ('07) 34 Cal 329 : 34 I A 87 : 5 C L J 334 : 11 C W N 424 (P C), Bijoy Gopal v. Krishna Mahishi Debi.
2. ('40) 27 AIR 1940 Mad 118 : 186 I C 494 : ILR (1940) Mad 259 : (1940) 1 M L J 82 (FB), Ramasami Iyengar v. Rangachariar.
3. ('31) 18 A I R 1931 Rang 319 : 134 I C 1263 : 9 Rang 401, Maung Shein v. Ma Lon Ton.
4. ('27) 14 A I R 1927 Mad 848 : 100 I C 263 : 52 M L J 121, In re Venkatakrishna Pattar.

Now, in the present suit it is necessary to determine the title to an easement operating over land in British India, but appurtenant to land in Hyderabad State. In one aspect of the matter it may be said that the right of easement forms part of the title to the land in Hyderabad. But in reality that which has to be determined is not the existence of any right in Hyderabad but the existence of a right in British India attached to another right situate elsewhere. It seems to me quite clear that the Hyderabad Court according to the principle enunciated by Dicey could not entertain the suit for the issue of an injunction in respect of a right of easement over property in British India or grant a decree in respect of that right against a defendant residing in British India. Not only would a decree for such an injunction be futile and unenforceable but it would in fact be a decree for the protection of immovable property situate in another State.

It is however contended that even assuming that the Hyderabad Court has no jurisdiction over a suit such as the present, it does not follow that the British Court has jurisdiction and that this may well be a case of a conflict between sovereign rights such as can only be solved by inter-national arbitration or treaty. Now in form there is at present no conflict between the State of Hyderabad and the province of Madras. We have to deal with a conflict of a private owner of land in Hyderabad claiming rights in favour of his land over other land situate in British India and belonging to a British Indian resident. The Governments of the two territories have so far not intervened. It seems to me unprofitable to consider in detail the cases which were cited before me on questions such as the right of an English Court to entertain a suit for damages for trespass upon real property in a foreign State or concerning the inability of an English Court to grant an injunction against a defendant residing in England for the protection of a foreign title. Here, we are in substance concerned with a suit for an injunction brought against a defendant residing in British India to protect a right of easement which though appurtenant to property in Hederabad has a local existence only in British India; and moreover the suit seeks an injunction the operation of which is only over property in British India and which affects the person of the defendant who resides in British India. It seems to me that in such circumstances it being conceded that the plaintiff is the occupier of the Hyderabad land in favour of which the right of easement is claimed, the suit must be regarded essentially as one to establish a right to immovable property in British India and to protect that right by an injunction. A right of easement is itself immovable property. That right restricts the user of other immovable property and the mere fact that it operates in favour of land situate outside the jurisdiction should not, to my mind, on the principles enunciated by Dicey, prevent the Courts having jurisdiction over the property in respect of which an injunction is sought from deciding whether or not that injunction is to be granted.

Even if this suit is to be regarded as one to establish a foreign title, I am of opinion that it would come within the exception to R. 53 in Dicey on the ground that it is a suit to establish the existence of an equity which the plaintiff has a right to demand as against the defendant. A right to an injunction is a right which forms part of the old Chancery jurisdiction. "Equity" is defined by Ashburner as 'a claim to the interposition of the Court of Chancery' and it is no less an equity because the aid of Chancery is sought to protect a legal right. It has been suggested that the British Courts cannot exercise jurisdiction over this suit because the determination of the plaintiff's right to an easement will necessarily involve the decision of a Hyderabad title subject to Hyderabad law. This seems to me to be an erroneous contention; for a right of easement is itself an immovable and all questions concerning property in immovables are decided according to the *lex situs*. The easement in question here is localised and it is localised in British India and the right to that easement must be determined according to the law of British India. Questions relating to rights of easement operating in one State in favour of land in another State seems to be of more frequent occurrence in America than in most parts of the British Empire. Washburn on Easements, Edn. 4 at p. 738 summarises the law as follows:

> If an action be for obstructing a water course, it is local in its nature . . . . . In respect to the jurisdiction which should take cognizance of this injury, the Court held that an injury to an easement by acts done in one State may be sued for in that State, though the principal estate be in another, as for obstructing a way in *A*, which is appurtenant to an estate in *B*. In this case, therefore as the owner on the Connecticut side was injured by the act done by the other party on the

Rhode Island side, the former may bring his action in Rhode Island for the injury thereby done. If, for instance, the owner on the Connecticut side instead of this were to obtain an injunction against the owner on the other side in the Courts of that State in respect to the canal by which he diverts the water, it would be inoperative and could not be enforced in Rhode Island, it being a proceeding quasi in rem. And it seems that one who is injured by such an act may have his action, either where the act is done, or the consequential injury is suffered, at his election.

The learned author was dealing with a case in which there was a stream dividing two States and the owner of the land in one State diverted the water to the detriment of the owner of the land in another State situate lower down the stream. Thus in America, at any rate, the principle which I have endeavoured to set forth seems to have been recognised, namely that an action may be maintained to prevent an injury to a right of easement operating in one State in favour of land situate in another State by proceeding in the Court having jurisdiction over the land upon which the right of easement operates. The same result is achieved by applying R. 53 in Dicey along with the exception to R. 60 relating to suits for an injunction. In the result therefore I hold that the suit as framed is within the pecuniary jurisdiction of the District Munsif and that it is one cognizable by a British Indian Court in respect of which the Court of the District Munsif has territorial jurisdiction. I also hold that the court-fee paid is correct. The revision petition is therefore dismissed with costs. In view of the time taken by the arguments in the case and the research necessary for its proper presentation, I fix the advocate's fee at Rs. 150. I wish to add that this suit which has been pending since 1933 should now be decided with all possible expedition.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 96

PATANJALI SASTRI J.

S. P. Rm. M. Meyappa Chettiar

v.

S. P. Rm. Rm. Ramaswami Chettiar.

Civil Revn. Petn. No. 562 of 1937, Decided on 24th July 1940, to revise decree of Dist. Munsif, Sivaganga, D/- 30th November 1936.

Limitation Act (1908), Arts. 120 and 61 — Plaintiff purchasing stamps for sale certificate in respect of property jointly purchased by him and defendant — Claim for contribution is governed by Art. 120 and not by Art. 61—Cause of action arises when stamps are actually utilized and not when they are purchased.

A claim by the plaintiff for contribution in respect of a share of the amount spent by him for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by him and the defendant is governed by Art. 120. The cause of action arises when the stamps are actually utilized for the purpose in question and not when they are merely purchased. Art. 61 which presupposes the accruing of a cause of action when the payment is made does not apply to such a case : A I R 1923 Mad 64, *Rel. on.* [P 96 C 2]

V. Ramaswami Ayyar — for Petitioner.

A. C. Sampath Ayyangar — for Respondent.

Order. — The only point for determination in this revision petition relates to the applicability of Art. 61, Limitation Act, to the petitioner's claim for contribution in respect of a half share of the amount spent by him for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by the petitioner and the respondent. The stamps were purchased on 13th February 1933. The sale certificate, Ex. A was issued by the Court on 20th February 1933. The suit was brought on 18th February 1936. The Court below applied Art. 61, Limitation Act, and reckoning three years from 13th February 1933 when the petitioner actually paid the money for the purchase of the stamps held the suit barred by limitation. I cannot agree with this view. Even assuming that Art. 61 is applicable to certain classes of suits for contribution, I am clearly of opinion that it cannot apply to a suit of this description. For it is obvious that the petitioner could not have a cause of action against the defendant as soon as he purchased the stamps though he might have intended such purchase to enure to the benefit of the defendant also by the stamps being utilized for the purpose of engrossing the sale certificate to be issued jointly in the name of both the parties. Until the stamps were actually utilized for the purpose the petitioner could not as it seems to me, claim to recover any part of the purchase money from the respondent. To a case of this kind Art. 61 which presupposes the accruing of a cause of action when the payment is made cannot be applicable : *cf.* 43 M L J 271[1]. It is not disputed that if Art. 61 does not apply, the proper Article applicable is 120, and the suit was filed in time. The civil revision petition succeeds and the petitioner's suit will be decreed with costs here and in the Court below.

O.R.K./G.N. *Petition allowed.*

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1. ('23) 10 AIR 1923 Mad 64 : 70 I C 405 : 43 M L J 271, Sundara Iyer v. Ananthapadmanabha Iyer.

A. I. R. 1941 Madras 97

VENKATARAMANA RAO J.

Boddana Ramudu and others —
Defendants — Appellants

v.

Sasapu Sanyasi Naidu and another —
Plaintiffs — Respondents.

Second Appeal No. 384 of 1937, Decided on 24th July 1940, against decree of Sub-Judge, Chicacole, in A. S. No. 44 of 1936.

(a) Tenure — Nature of—Recitals in mortgage deeds are prima facie evidence—Fact that recitals were made by minor mortgagor's guardian does not affect presumption of recitals.

The recitals in a mortgage deed are prima facie evidence against the mortgagor as regards the nature of the tenure of the land mortgaged. The fact that the recitals were made by the guardian of the minor mortgagor is not a reason for not taking them as prima facie evidence unless it can be shown that those recitals were made under a mistake or misapprehension of the nature of the tenure in regard to which the burden would certainly be on the mortgagor. [P 98 C 1]

(b) Landlord and tenant — Dharmilla inam land—Tenant has occupancy right.

The tenants of a dharmilla inam land have occupancy rights in the land : A I R 1922 Mad 373 and A I R 1939 P C 244, *Foll.* [P 98 C 1]

(c) Madras Estates Land Act (1 of 1908), Ss. 187, 151 and 143—Occupancy tenant cannot deprive himself of his rights except under S. 151 or S. 143—Mortgage of dharmilla land to tenant by landlord—Tenant in ignorance of his rights agreeing to deliver possession after expiry of term of mortgage—Tenant held not estopped from denying landlord's right to possession of land.

The policy of the Legislature as enacted in S. 187 is to protect the tenant against himself and prevent him from entering into any contract by which he can deprive himself of the protection afforded by the statute. Except by voluntary surrender under S. 143 of the Estates Land Act, or by adopting the procedure prescribed in S. 151 a tenant cannot be deprived of possession of land wherein he has occupancy right. Consequently, where in a mortgage of dharmilla land in favour of the tenant by the landlord the tenant in ignorance of his rights agrees to deliver possession after the expiry of the term of mortgage the tenant is not estopped from denying the landlords right to claim possession of the land : (1898) 1 Ch 144, *Rel. on.* [P 98 C 2 ; P 99 C 1]

V. Govindarajachari — for Appellants.

B. Jagannadha Das and S. Suryaprakasam — for Respondents.

Judgment.—This second appeal arises out of a suit instituted by the plaintiffs as purchasers of the equity of redemption of two mortgages dated 22nd June 1914 and 12th November 1918. The mortgage of 22nd June 1914 is usufructuary and that of 12th November 1918 is simple. The plaintiffs sued for redemption of the mortgages and for recovery of possession of the lands mortgaged thereunder. The right to redeem is not denied. The amount due and payable under the mortgages is not disputed. But the point in controversy between the parties is whether the plaintiffs are entitled to recover vacant possession of the lands or are only entitled to the melvaram interest therein. The contention of the defendants is that on the date of the mortgage in 1914 they were cultivating tenants in possession of the lands and had occupancy rights therein and that what was mortgaged was only the melvaram interest. The plaintiffs said in answer that under the terms of the mortgage what was mortgaged was the entire land and not merely the melvaram interest and that the tenants had no occupancy rights but were only tenants at will and that even assuming they had occupancy rights they were precluded from asserting such rights. So the substantial questions which fell to be decided were, (1) whether the defendants had occupancy rights on the date of the usufructuary mortgage in 1914 and (2) assuming they had occupancy rights whether they are estopped from contending that they had such rights. The learned District Munsif of Parvatipur who tried the case was of the opinion that as the lands were dharmilla inam lands and the defendants' father was a cultivating tenant on the date of the mortgage, the defendants were entitled to occupancy rights and they were not estopped from resisting the plaintiffs' right to claim possession. On appeal the learned Subordnate Judge held against the defendants on both the points and gave a decree in favour of the plaintiffs as prayed for. It is against this decision that this second appeal has been preferred by the defendants. It seems to me that on both the points the view of the learned Judge is wrong.

Exhibit 4 (a) which is the deed of mortgage dated 22nd June 1914, Ex. 4, which is dated 12th November 1918, and two other deeds of mortgage which were filed by the plaintiffs themselves (Exs. B and C) relating to the suit land describe the nature of the land as dharmilla inam. Ex. 4 (a) clearly states that the land was under the cultivation of the defendants' father on that date; and as the learned Subordinate Judge observes it was conceded before him that the defendants were in possession as tenants on the date of the mortgage. The recitals are prima facie evidence as regards the nature of the tenure of the land and the learned District Munsif who came to the conclusion on those recitals that it was dharmilla inam land was perfectly warranted in doing so.

What Mr. Jagannadha Das contends is that those recitals ought not to be taken as evidence against his clients because on the date of the document the executant (the plaintiffs' predecessor-in-title) was a minor and those recitals were made by the guardian and that an opportunity should be given to his clients for placing more evidence on record in regard to the nature of the tenure. The question whether the defendants had occupancy rights was specifically put in issue in issue 4. The plaintiffs themselves filed Ex. C, which contains recitals as to the land being dharmilla inam and Exs. 4 and 4 (a) under which the mortgages were created describe the land as dharmilla inam. As I have already observed, the recitals in the deeds would be prima facie evidence against the plaintiffs. The fact that the recitals were made by the guardian is not a reason for not taking them as prima facie evidence unless it can be shown that those recitals were made under a mistake or misapprehension of the nature of the tenure in regard to which the burden would certainly be on the plaintiffs. In the face of these recitals, it was obviously the duty of the plaintiffs to have put before the Court other evidence to show that these recitals ought not to be acted upon. The absence of any such evidence coupled with the fact of long possession by the defendants certainly warrants the finding of the District Munsif. Once it is found that the land was dharmilla inam there can be no question of the defendants having occupancy rights as settled by a Full Bench of this Court in 45 Mad 716[1] and affirmed by the Privy Council in I L R (1940) Mad 1.[2] This is not disputed by Mr. Jagannadha Das. I am therefore of the opinion that the learned Subordinate Judge ought not to have brushed aside the recitals in the documents and should have given effect to them. I set aside the finding of the learned Subordinate Judge and hold that the lands are dharmilla inam lands and that the defendants' father was entitled to occupancy rights on the dates of the mortgages in question.

The next question is whether the defendants are estopped from denying the right of the landlord to claim possession of the land. Mr. Jagannadha Das contends that under the deed of mortgage, Ex. 4 (a) the defendants father undertook to deliver possession of the land at the end of the period stipulated for in the deed, that the mortgage proceeds on the footing that he had no occupancy right therein and that the plaintiffs' predecessor-in-title was entitled to get possession of the land at the end of the term. There can be no doubt that on the date of the mortgage, Ex. 4 (a) neither the plaintiffs' predecessor-in-title nor the defendants' father was aware of their respective rights. The plaintiffs' predecessor-in-title thought that he was entitled to possession and the defendants' father thought that he had no occupancy right or at any rate was not conscious of it and he believed he was bound to deliver possession at the end of the term. The question is not what the plaintiffs' predecessor-in-title thought or what the defendants' father thought but if in law the tenant had occupancy right and he was under a statutory incapacity to enter into any contract to give up his occupancy right and if the landlord wants to claim possession of the land free of that right, would the tenant be estopped from denying the right of landlord to claim possession? The policy of the Legislature as enacted in S. 187 of the Act is to protect the tenant against himself and prevent him from entering into any contract by which he can deprive himself of the protection afforded by the statute. Except by voluntary surrender under S. 143, Estates Land Act or by adopting the procedure prescribed in S. 151 of the Act a tenant cannot be deprived of possession of land wherein he has occupancy right. The contention of Mr. Jagannadha Das is that S. 187 (g) would not be applicable to the case of a mortgage but must be strictly applied only to cases where the landlord seeks to eject the tenant from possession of the land. It seems to me that so to construe the section would make the provision illusory. The landlord and the tenant have only to resort to the device of having a mortgage executed by which at the end of a particular period the tenant undertakes to give up possession to render the statute futile. In this connexion I would like to refer to the observations of Lindley, M. R. in (1898) 1 Ch 144,[3] where the question was whether it was competent for a married woman who was entitled to property for her separate use without power of anticipation to get rid of the restraint even by telling an untruth. The observations are to this effect:

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1. ('22) 9 AIR 1922 Mad 878 : 70 I C 615 : 45 Mad 716 : 48 M L J 229 (FB), Brahmayya v. Achiraju.
2. ('39) 26 AIR 1939 P C 244 : 184 I C 1 : 66 I A 278 : I L R (1940) Mad 1 : I L R (1939) Kar 401 (P C), Narayanaraju v. Suryanarayudu.
3. (1898) 1 Ch 144: 67 L J Ch 130: 77 L T 576: 46 WR 215: 14 TLR 81, Bateman Lady v. Faber.

A married woman cannot by hook or by crook—by any device, even by her own fraud (the cases go to that length)—deprive herself of the protection which the restraint on anticipation throws around her. About the policy of the law I will say nothing, but it has been sanctioned by the Married Women's Property Act.

I would apply the above principle to this case where the tenant acts in ignorance of his rights and hold that the defendants in this case are not estopped from denying the right of the plaintiffs to claim possession of the land. I would therefore set aside the decree of the learned Subordinate Judge and restore that of the District Munsif with costs throughout. Leave to appeal refused.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1941 Madras 99 (1)

WADSWORTH J.

Mayandi Venkatesa Mudali and another — Petitioners

v.

Konne Desappa Mudali — Respondent.

Civil Revn. Petn. No. 550 of 1937, Decided on 22nd July 1940, to revise order of Dist. Court, Chittoor, D/- 4th December 1936.

Provincial Insolvency Act (1920), S. 6 (e) — Sale of debtor's property in execution of decree for rent under Madras Estates Land Act is act of insolvency.

The sale of the debtor's property which is vested in him and is in his physical possession for arrears of rent under the Madras Estates Land Act operates as an act of insolvency under S. 6 (e), Provincial Insolvency Act : A I R 1928 Cal 644, *Disting*. [P 99 C 1]

S. Ramanujachariar — for Petitioners.

D. Ramaswami Iyengar — for Respondent.

Order. — The question is whether the sale of the appellant's property for arrears of rent under the Madras Estates Land Act operates as an act of insolvency under S. 6 (e), Provincial Insolvency Act. It seems to me clear that the decree for rent is a decree for the payment of money notwithstanding the fact that the rent is charged on the holding. The decree in question was passed before the appointment of the ad interim receiver in the previous insolvency. At the time of the sale the receiver was apparently not in possession though he had been appointed. The property therefore not only vested in the debtor but was in his physical possession and there was nothing except his poverty to prevent him from paying the rent. The property was certainly "his property" within the terms of S. 6 (e), Provincial Insolvency Act. The case reported in A I R 1928 Cal 644[1] has no application for in that case there had been an adjudication and the property no longer vested in the debtor. The view taken by the Courts below is correct and the petition is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

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1. ('28) 15 A I R 1928 Cal 644 : 115 I C 356 : 32 C W N 716, Lachmi Chand v. Bipin Behari.

A. I. R. 1941 Madras 99 (2)

LAKSHMANA RAO J.

In re Arunachala Mudali and others— Petitioners.

Criminal Revn. Case No. 85 and Petn. No. 82 of 1940, Decided on 4th September 1940, to revise judgment of Joint Magistrate, Tirupattur, D/- 6th January 1940.

Police Act (1861), S. 32 — Person violating condition of license is guilty under S. 32 even if he is not licensee.

The person violating the condition of any license need not be the licensee and is therefore guilty under S. 32. [P 99 C 2]

K. S. Jayarama Aiyar and G. Gopalaswami — for Petitioners.

Public Prosecutor — for the Crown.

Order. — Petitioner 1 obtained a license from the District Superintendent of Police under S. 30 cl. (2) of the Police Act, for taking a procession, and one of the conditions of the license was that music of all description should be stopped within a distance of 50 yards on either side of any mosque. This condition was violated by petitioners 2 to 11 and petitioner 1, the licensee, would unquestionably be guilty under S. 32, Police Act. The real question is whether the other petitioners would also be guilty under that section and as urged by the Public Prosecutor S. 32 provides that every person violating the condition of any license granted by the District Superintendent of Police for the use of music shall be liable to a fine. The person violating the condition need not be the licensee, and the finding is that petitioners 2 to 11 were aware of the conditions of the license. They too would therefore be guilty under S. 32, Police Act, and there is no ground for interference with the conviction. But the fines are excessive and they are reduced to Rs. 100 in the case of petitioner 1 and Rs. 25 each in the case of the others. Otherwise this petition is dismissed.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1941 Madras 100 (1)

HORWILL J.

Alagu Sundarammal — Petitioner

v.

Ko. So. Thiruvengadathu Iyengar — Respondent.

Civil Revn. Petn. No. 508 of 1937, Decided on 3rd May 1940, to revise decree of Sub-Judge, Devakottah, in S. C. S. No. 366 of 1936.

Provincial Insolvency Act (1920), S. 44 (1) (c) — Debtor filing insolvency application but deliberately omitting to mention debt due by him and thus preventing creditor from obtaining share of assets — S. 44 (1) (c) applies.

Where a debtor who filed an insolvency application has deliberately concealed the existence of a debt due by him and has thus prevented the creditor from appearing in the insolvency Court and obtaining a share of the assets if any S. 44 (1) (c) applies to such a case. [P 100 C 2]

A. V. Narayanaswami Ayyar — for Petitioner.

S. Panchapagesa Sastri and K. R. Krishnaswamy Aiyar — for Respondent.

Order.—The petitioner was a close relative and a creditor of the respondent. The suit debt was incurred in 1928 in Devakottah, where both the petitioner and the respondent were living. The respondent has a son-in-law in the South Arcot District and while on a visit to him, filed an insolvency application under the summary procedure and omitted to mention the petitioner as his creditor. During the course of the insolvency proceedings, he made an endorsement on the pro-note of the petitioner which saved limitation ; but he failed to draw the attention of the insolvency Court to the existence of this debt. The lower Court has found that he played a fraud upon the petitioner and deliberately concealed the existence of this debt in order that the insolvency proceedings might be decided to his advantage. The procedure being on the summary side, many formalities were dispensed with, and very little publication was given to the insolvency. Nothing was of course, known about the insolvent's life at Devakottah and neighbourhood and whether he had any property there. It is the petitioner's case that the respondent has property and that if she had been a party to the insolvency proceedings, she would have been able to prove so. Although no dividend was presumably declared, yet the insolvency Court (that of the Subordinate Judge of Cuddalore) granted an absolute discharge without any hesitation, in spite of the prohibition contained in S. 42 (1) (a), Provincial Insolvency Act.

The position on the findings given by the learned Subordinate Judge — with which I agree—is therefore that the insolvent by his fraud prevented the petitioner from appearing in the insolvency Court and obtaining a share of the assets, if there were any, and now, when a suit is filed, he pleads the bar of these very insolvency proceedings in which he would not allow the petitioner to participate. Section 44 (1) (c), Provincial Insolvency Act, would I think apply to a case like this. This was a debt in respect of which the respondent obtained forbearance by a fraud; for it was on account of his fraud that the petitioner was unable to appear in the insolvency proceedings and proceed against his assets. The petition is therefore allowed and the suit decreed in favour of the plaintiff. The petitioner is entitled to her costs in this Court as well as in the lower Court.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1941 Madras 100 (2)

WADSWORTH J.

Sundara Reddiar — Petitioner

v.

Alagappa Chettiar by agent Veeraraghava Ayyangar — Respondent.

Civil Revn. Petn. No. 15 of 1939, Decided on 23rd July 1940, to revise order of Sub-Judge, Cuddallore, in M. P. No. 534 of 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 20 — Father not following up his stay application with application under S. 19 but dying before expiry of sixty days— His son impleaded as legal representative cannot file fresh application under section 20.

Where a father did not follow up his stay application with an application under S. 19, but died before the expiry of the sixty days time allowed under S. 20, his son impleaded as legal representative cannot file a fresh application under S. 20. [P 100 C 2 ; P 101 C 1]

T. E. Ramabhadracharlar — for Petitioner.

S. Panchanadha Mudaliar — for Respondent.

Order. — Petitioner is the son and legal representative of defendant 19 against whom the decree was being executed when he got a stay by means of an application dated 9th April 1938 under S. 20, Act 4 of 1938. Defendant 19 did not follow up his stay application with an application under S. 19, but he died on 4th June 1938, just before the expiry of the sixty days time allowed under S. 20. Petitioner was impleaded as legal representative on 19th October 1938 and on that day asked for time to oppose the execution. On 14th December 1938 he filed a

fresh application under S. 20. I am of opinion that the application does not lie. The petitioner succeeds to the rights and liabilities in the litigation of his father. His father had already exhausted his remedy under S. 20 and by the express terms of that section the decree must be executed against him as it stands. The legal representative is subject to the same liability. The petition is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1941 Madras 101

BURN AND MOCKETT JJ.

In re Baggam Appalanarasayya

Accused.

Referred Trial No. 89 and Criminal Appeal No. 353 of 1940, Decided on 30th July 1940, referred by Court of Session, Vizagapatam Division, D/- 15th April 1940.

(a) Evidence Act (1872), S. 32 (1) — Murder case—Judge deriving motive of crime from statements made by deceased that he suspected accused of having betrayed his relative in civil case — Statements held inadmissible under S. 32 (1).

In a murder case the Judge relied on certain evidence as proving motive on the part of the accused to murder the deceased. That motive was derived from statements made by the deceased to his wife and to his wife's sister to the effect that in relation to a law suit in which the deceased's wife's sister was concerned the accused had accepted a bribe from the plaintiff in the suit against his wife's sister :

Held that these statements were wholly inadmissible as they were not statements made by the deceased as to the cause of his death or to circumstances of the transaction which resulted in his death : A I R 1939 P C 47, *Rel. on.* [P 101 C 2]

(b) Criminal P. C. (1898), Ss. 162 and 164— Evidence of what accused person said when arrested is denied to the defence under Indian procedure.

Under the provisions of S. 162, it is not possible for an arrested person to make a statement to the police which can be used in evidence at the trial. Evidence of what an accused person said when arrested often so valuable to innocent accused according to English experience is denied to the defence under the Indian procedure. But an accused person can, if he knows it, make a statement under S. 164 of his version of the case before a Magistrate. [P 102 C 2]

S. Suryaprakasam and R. Guruswami — for Appellant.

K. Venkataraghavachari for Public Prosecutor — for the Crown.

Mockett J. — The appellant who is the karnam of the village of Gangachollapenta was charged before the learned Sessions Judge of Vizagapatam together with three other persons for murdering one Thalada Ramaswami on the night of 2nd August last. The murder must have taken place on the main road between Gajapatinagaram and Mentada very near to Mentada. There is ample evidence on the record to show that the appellant and the deceased were on terms of friendship. That has been proved by the village Munsif and there are circumstances in this case which strongly bear that out. But the learned Sessions Judge has relied on certain evidence in this case as proving motive on the part of the appellant to murder the deceased. That motive is derived from statements made by the deceased to his wife and to his wife's sister to the effect that in relation to a law suit in which the deceased's wife's sister, one Pydithalli was concerned the appellant had accepted a bribe from the plaintiff one Narayanamma in the suit against Pydithalli. The motive is thus entirely derived from statements made by the deceased. These statements are wholly inadmissible. There is nothing in S. 32, Evidence Act, which makes them admissible. They are not statements made by the deceased as to the cause of his death or to circumstances of the transaction which resulted in his death. The Judicial Committee in (1939) 1 M L J 756[1] has considered the provisions of S. 32 (1), Evidence Act, in relation to statements of deceased persons who have been murdered. Lord Atkin (at p. 763) points out that

> the circumstances must be circumstances of the transaction, general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible.

In this appeal the deceased's statements provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed his wife's sister in a civil case. They in no way are to be associated with the actual murder. Evidence of these statements should have been excluded. There was thus no admissible evidence of motive on the record. On the other hand, as we have indicated, there was evidence showing the contrary and friendship between two persons is not consistent with a desire on the part of one to murder the other in the absence of evidence to the contrary. On the day in question, it is in our view beyond dispute that the deceased and the appellant set out together to go to Mentada village. We think they were going out together on a drinking bout. This is probabilized by the evidence of the deceased's

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1. ('39) 26 AIR 1939 P C 47 : 180 I C 1 : 40 Cr L J 364 : 18 Pat 234 : I L R (1939) Kar 123 : (1939) 1 M L J 756 : 66 I A 66 (PC), Pakala Narayanasami v. Emperor.

wife and in fact there is the evidence of P. Ws. 5 and 6 that at about dusk on the evening in question the appellant and the deceased were drinking together in Mentada. P. W. 4 also proves that the deceased and the appellant went together because he lent a stick to the deceased and pieces of that stick were found at the place of the murder. It is convenient to pause here and say that at about 3 P. M. on 3rd August that is the next day after these two went to Mentada together, P. W. 21 found in his field which is marked on the plan the body of a man. He at once sent a report (EX. H) to the village Munsif. The body was identified as that of Thalada Ramaswami and it is beyond doubt that he had been murdered. The medical officer P. W. 1 in his certificate (EX. A) describes the injuries. The skull was fractured in no less than four places. In all there were ten injuries, cuts and bruises; and all the injuries, says the doctor, could have been caused by blows with a stick and in fact portions of a broken stick were found upon the scene.

So the position is that the appellant and the deceased were together in Mentada on that evening at about dusk. The next evidence of their movements is given by P. Ws. 14, 15 and 16 and their evidence can be summarised very shortly. They were proceeding in a jutka from Gajapatinagaram railway station to Mentada. There were three people by the side of the road near the place where the body was found. A little beyond, that is to say, on the Mentada side P. W. 14 saw the appellant and the deceased. P. Ws. 15 and 16 saw the deceased and another man the difference being that P. W. 14 identifies the appellant, the other two are unable to do so. P. W. 15 says that they were reeling along the road as if they were drunk which is entirely consistent with the information which P. Ws. 5 and 6 have given about what they were doing in Mentada. So P. Ws. 14 to 16 prove that at the spot they passed three unknown men whom they later identified as accused 2, 3 and 4 waiting by the side of the road and beyond them were coming towards the village the deceased and the appellant and we have no doubt that they were both under the influence of drink. The only other evidence of what happened on the road is given by P. W. 18. With regard to P. W. 18, evidence has been led by the defence and his cross-examination casts some doubt on whether he was there at all. However the probabilities are that he was there. But his evidence amounts to no more than this. He says that on the road between Chittivalasa and Mentada he saw the accused 1, 2 and 3, he does not mention accused 4 and Ramasami fighting and abusing each other. He goes on "I did not see who beat whom. They were all fighting together. I ran away as I was afraid." Ten days later only he says did he hear of Ramasami's death and four days later he was examined by the Sub-Inspector. He was able to identify accused 2 and 3. And that is the evidence led by the Crown.

The appellant followed a course which might well be followed more often. It must be remembered that in view of the provisions of S. 162, Criminal P. C., it is not possible for an arrested person to make a statement to the police which can be used in evidence at the trial. Evidence of what an accused person said when arrested often so valuable to innocent accused according to English experience—is denied to the defence under the Indian procedure. But an accused person can, if he knows it, make a statement of his version of the case before a Magistrate and this is what the appellant at once did. He made a statement under S. 164, Criminal P. C., giving his version of what happened and his story is consistent with the case for the prosecution. He says that on the day in question he proceeded to Mentada with the deceased and that on their way home he saw Muppadi Krishnamurthi who is P. W. 14 thereby bearing out what that witness said and P. W. 14 was in his jutka as he had stated.

According to the appellant the deceased said that he did not wish to be seen in the state in which they were, that is under the influence of drink and they stepped aside from the path. A little further the three other accused Bugatha Sanyasi, Kalla Ramasami and Divakalla Ramudu were waiting and according to him they set upon Ramasami, put a rope round his neck and beat him with sticks and a pen-knife with a folding blade. He says that the pala stick to which reference has been made and which had been lent by P. W. 4 was broken. According to the appellant these three men threatened him not to say "anywhere" which presumably means anything to anyone. Taking this evidence at its highest, we only have a statement by P. W. 18 that a melee took place on that road that night. There is nothing to show that the appellant was doing anything hostile to the deceased. Indeed the probabilities are from the fact that they had been out for the evening

together under circumstances that made for friendship that he would have been on the deceased's side rather than against him. It is not impossible that having seen this man attacked in this manner and living as he did in the village with the three persons concerned he might have been afraid that he might meet a similar fate and quite wrongly kept silence. We are not however dealing with what was the procedure for a village officer under the circumstances but with the question whether he has been proved to be guilty of murder. The learned Sessions Judge has arrived at the conclusion that he is guilty for the following reasons. Holding rightly that Ex. c was admissible (*vide* the observations of Lord Atkin at P. 767 of the report to which we have referred) the learned Sessions Judge referring to Ex. c, says :

It does prove beyond doubt that not only was accused 1 with the deceased when the deceased was last seen near the place where he was murdered, but that he continued to be with him until he had been beaten to death. Accused 1 is a karnam and a man in position of authority. It cannot be believed that he was taken by surprise, stood by horrified and then kept quiet because he was afraid of the threats of his assailants. With regard to this it must be remembered there was evidence that he was very much under the influence of drink. The only conclusion that can be drawn is that he either took part in the beating himself or was a party to it. I am of opinion, therefore, that the prosecution has proved its case against accused 1.

At the sessions, it is right to observe, the appellant resiled from Ex. c, which contained at least a possible story and substituted for it a wholly incredible alibi. Whether he did this on his own initiative or on legal advice we do not know. He may have been influenced by the fact that Ex. c was treated throughout as being a strong circumstance against him. What should have been a shield was turned into a hostile spear. Ex. c was labelled at once by the Magistrate as a "confession statement", in spite of the fact that it was self-exculpatory, a circumstance which must have seemed ominous to the appellant. In our opinion, Ex. c and the evidence of P. W. 18 proved no more than that there was an attack probably by accused 2 to 3 of which P. W., 18 could see very little as he was quite unable to say who was striking whom. We have already indicated that the evidence of P. W. 18 taken with the relationship between these two—the deceased and the appellant—is quite as consistent with the view that the appellant might have been taking the side of the deceased, as with the supposition that he was hostile to him. Accused 2, 3 and 4 were acquitted and it must therefore be presumed that the trial Judge did not believe that accused 2 made a confessional statement as stated by P. W. 3. But it appears to us that although he arrived at the conclusion that they were innocent or at least not proved to be guilty, the learned Judge has convicted the appellant not on the ground that he wholly committed the murder himself but that he took part in it or was a party to it. In our view there was no evidence at all on which a conviction could be based. It is reasonable to suppose that this evidence with regard to motive rested as it was on statements by the deceased was not objected to by the defence but we consider it right to observe that the trial Judge should have excluded these statements and that in any case the Public Prosecutor of the District should himself have seen that such wholly inadmissible evidence was not placed before the Court. The learned Judge is entitled to the assistance of the Bar with regard to these matters. It does not appear in this case the learned Sessions Judge received the assistance to which he was entitled. As a result of these conclusions the conviction and sentence of the appellant must be set aside, his appeal allowed and he will be set at liberty.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 103

PATANJALI SASTRI J.

Kamalathammal — Petitioner

v.

Harihara Ayyar — Respondent.

Civil Revn. Petn. No. 784 of 1939, Decided on 30th August 1940, to revise decree of Dist. Court, East Tanjore at Negapatam, in C. M. A. No. 4 of 1939.

(a) Provincial Small Cause Courts Act (1887), S. 35—Ex parte decree passed in Small Cause suit in Court of Subordinate Judge — Application by defendant to set aside ex parte decree — Before its disposal Court of Subordinate Judge abolished and application transferred to District Munsif's Court — Suit beyond Small Cause jurisdiction of District Munsif—Application to set aside ex parte decree dismissed by District Munsif—Order held must be regarded as one passed in exercise of original civil jurisdiction and hence appealable.

Section 35 does not say that the Court which is empowered thereunder to entertain proceedings owing to a small cause Court ceasing to have jurisdiction with reference to the case, should have jurisdiction to try the suit as a Court of small causes. It is sufficient if it has jurisdiction to try the suit. [P 105 C 1]

In a small cause suit, *A* obtained an ex parte decree in Subordinate Judge's Court. The defen-

dant in the case applied to the Court to set aside the ex parte decree which was set aside on certain terms. A revision petition was filed against that order and High Court set it aside and remitted the proceeding for disposal according to law. Before however it could be disposed of, the Court of the Subordinate Judge was abolished and by the District Court's proceedings, the application to set aside the ex parte decree was ordered to be transferred from the Subordinate Judge's Court to the District Munsif's Court. The Small Cause jurisdiction of the District Munsif's Court was so limited that it could not have entertained on the Small Cause side the suit out of which these proceedings arose if such suit were then about to be instituted. The District Munsif dismissed application to set aside ex parte decree:

Held that the order of the District Munsif's Court refusing to set aside the ex parte decree must be regarded as an order passed by the Court in the exercise of its original civil jurisdiction. When the proceeding was taken up by the District Munsif on the original side of his jurisdiction, it must be deemed thereafter to be a case open to appeal, as if the District Munsif had set aside the ex parte decree and passed a fresh decree after retrial, such decree would have been appealable. An appeal against the order of District Munsif was therefore competent: *Case law discussed.* [P 105 C 2; P 107 C 1]

(b) Civil P. C. (1908), S. 24(4)—District Court may transfer proceeding from Court of Small Causes to Court not having adequate small cause powers to deal with it as Court of Small Causes — Transferee Court shall be deemed as Court of Small Causes.

A District Court may transfer any proceeding from a Court of Small Causes to a Court not having adequate Small Cause powers to deal with it as a Court of small causes. But, nevertheless, the latter Court shall be deemed to be a Court of small causes for the purposes of the suit transferred: A I R 1932 Mad 683, *Rel. on.* [P 105 C 1]

S. Thyagaraja Iyer and T. N. Sundaresa Iyer — for Petitioner.

T. L. Venkatarama Iyer — for Respondent.

Order. — This revision petition raises a question of jurisdiction on which there has been considerable divergence of judicial opinion. The facts may be briefly stated. The petitioner obtained an ex parte decree in S. C. S. No. 73 of 1937 on the file of the Subordinate Judge's Court of Tiruvarur. The respondent who was defendant 1 in the case applied to the Court to set aside the ex parte decree which was set aside on 31st August 1937, on certain terms which are not material for the purpose of this petition. A revision petition was filed against that order and this Court set it aside and remitted the proceeding for disposal according to law. Before, however, it could be disposed of, the Court of the Subordinate Judge of Tiruvarur was abolished with effect from 1st November 1938, and by the District Court's proceedings dated 29th October 1938, the application to set aside the ex parte decree was ordered to be transferred from the Subordinate Judge's Court to the District Munsif's Court, Tiruvarur and the transfer was accordingly made by the Subordinate Judge on 31st October 1938. The District Munsif dealing with the application in due course, held that there was sufficient service of the summons in the suit on the respondent and there was no sufficient cause for his non-appearance on the date of the hearing of the suit and dismissed the application. It may be mentioned here that the small cause jurisdiction of the District Munsif's Court, Tiruvarur, was so limited that it could not have entertained on the small cause side the suit out of which these proceedings arose if such suit were then about to be instituted. On appeal to the District Court, that Court reversed the decision of the District Munsif and set aside the ex parte decree holding that there was no proper service of summons in the suit. This civil revision petition has been preferred against that order.

The main contention for the petitioner before me was that the appeal to the lower Court was incompetent and its order purporting to set aside the ex parte decree was made without jurisdiction. This contention was based on two grounds: firstly, the order of the District Court transferring the respondent's application to set aside the ex parte decree from the Subordinate Judge's Court of Tiruvarur where it had been pending after remand by this Court to the Court of the District Munsif of the same place must be taken to have been made under S. 24, Civil P. C., and by virtue of sub-s. (4) of that section, the District Munsif's Court must be deemed to have dealt with the application as a Court of small causes. Therefore, it was said, the order dismissing the application was final under S. 27, Provincial Small Cause Courts Act, and no appeal lay against such order. Secondly and alternatively, even assuming that the District Munsif's Court dealt with the application and made the order on the original side of its jurisdiction, O. 43, R. 1 (d), Civil P. C., provided an appeal against an order rejecting an application to set aside an ex parte decree only "in a case open to appeal" and the decree in this case having admittedly been made by the Subordinate Judge's Court, Tiruvarur, as a Court of small causes, it was not a case open to appeal within the meaning of O. 43, R. 1 (d), and no appeal was admissible. Several decisions were cited in the course of arguments on either side but before considering them, I will briefly refer to the relevant statutory provisions bearing

on this question. Section 16, Provincial Small Cause Courts Act, provides that a suit cognizable by a Court of small causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of small causes by which the suit is triable. Section 35 (1) provides that:

> Where a Court of Small Causes or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit.

It will be observed that this section does not say that the Court which is empowered thereunder to entertain proceedings owing to a small cause Court ceasing to have jurisdiction with reference to the case, should have jurisdiction to try the suit as a Court of small causes. It is sufficient if it has jurisdiction to try the suit. It is not disputed that the District Munsif's Court, Tiruvarur would be the Court having jurisdiction to try the suit out of which these proceedings have arisen, if that suit were to be instituted at the time when the application to set aside the ex parte decree was transferred to it, as no other Court had jurisdiction to try it as a Court of small causes within the same local limits. The District Munsif's Court however was competent to entertain the suit only on its original side, owing to the limitation placed on its small cause powers. Section 24, Civil P. C., empowers the High Court or the District Court to transfer any suit, appeal or other proceeding pending in any Court subordinate to it to any other Court subordinate to it and competent to try or dispose of the same and it is provided in sub-s. (4) that:

> The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

The section makes it clear and it has also been decided (*vide* 55 Mad 960[1]) that a District Court may transfer any proceeding from a Court of small causes to a Court not having adequate small cause powers to deal with it as a Court of small causes. But, nevertheless, the latter Court shall be deemed to be a Court of small causes for the purposes of the suit transferred. While, therefore, both under S. 24, Civil P. C., and S. 35, Provincial Small Cause Courts Act, a Court not invested with adequate small cause powers may properly try a suit which was originally instituted as a small cause suit in a different Court, there is a marked distinction in the character in which it is empowered to deal with such suit. Under S. 24, Civil P. C., such Court tries the suit as a Court of small causes while under the latter provision, it tries the suit in whatsoever character it has jurisdiction to try it. Now, the question arises; when a District Court purports to transfer a suit or a proceeding from a small cause Court which is about to be abolished to a Court which is empowered under S. 35, Provincial Small Cause Courts Act, even without such transfer, to deal with it, is the decree or order passed by the latter Court to be regarded as one passed by a Court of small causes or by a Court exercising original civil jurisdiction? The answer to this question is of considerable practical importance to the parties concerned as on such answer depends their right of appeal.

On a consideration of the provisions referred to above, it appears to me that the order of the District Munsif's Court, Tiruvarur, refusing to set aside the ex parte decree must be regarded as an order passed by the Court in the exercise of its original civil jurisdiction. Under S. 35, Provincial Small Cause Courts Act, the respondent was entitled to have his application for setting aside the ex parte decree which was pending in that Subordinate Judge's Court, taken up and disposed of by the District Munsif's Court aforesaid, and that Court dealt with it, and could only deal with it, on the original side of its jurisdiction. As already observed, this section does not require that the Court dealing with a proceeding thereunder should be competent to deal with it as a Small Cause Court; nor does it provide that such Court shall be deemed to be a Court of small causes. It is therefore difficult to see how the position could be altered by the District Court purporting to transfer the respondent's application to the same District Munsif's Court. As already indicated, no order of transfer was necessary to enable the latter Court to deal with the respondent's application and the order passed by the District Court must, in the circumstances, be regarded as in the nature of an administrative direction issued to facilitate the transmission of the records of the proceeding, and not as an order under S. 24 bringing sub-s. (4) of that section into operation.

The petitioner argued broadly that the

1. ('32) 19 A I R 1932 Mad 683 : 139 I C 477 : 55 Mad 960 : 63 M L J 689, Chockalinga Chettiar v. Palaniappa.

suit having been originally instituted as a small cause suit in a Court having jurisdiction to try it as such the character of the suit could not be changed though it was subsequently dealt with under S. 35 by another Court as an original suit owing to want of adequate small cause powers. This contention is supported by the observations of Stone J., in 69 M L J 443.[2] These observations were however largely obiter, as in that case the Court which finally disposed of the suit was competent to try it as a small cause suit and must be deemed to have dealt with it as such, as it could not have dealt with it otherwise having regard to S. 16 of the Act. No doubt the view adumbrated by the learned Judge, namely the suit remains what it was when it began has the merit of simplicity but I am unable to find any warrant for it in the relevant statutory provisions. The learned Judge observes:

> Now it was urged that S. 35, Provincial Small Cause Courts Act, operates to change in some way a small cause suit into an original suit. In my opinion, it does nothing of the sort. What S. 35 does is to invest a Court which otherwise would be incompetent to hear any, or certain small cause suits, with power to hear certain of such suits viz., those pending in that Court at the time that Court's jurisdiction is changed.

This is not entirely correct, as S. 35 provides not only for the continuance of pending proceedings in the same Court when that Court's jurisdiction is changed, but also for their continuance in a different Court on the abolition of the original Court. Apart from this, if as the learned Judge thinks, there is nothing in S. 35 to turn a small cause suit into an original suit it is difficult to see anything in it to turn a civil Court into a Court of small causes, so as to attract the application of S. 27 barring appeals in respect of a decree or order made by a Court of Small Causes. It is significant that S. 35 contains no provision similar to S. 24 (4), Civil P. C. It seems to me that the rule laid down by the learned Judge would be an unwarranted extension of the latter provision to cases falling under S. 35, and is not supported by the authorities referred to by him. In the Full Bench case in 33 Mad 323[3] it appears that the District Munsif who tried the suit on the original side had jurisdiction to try it as a small cause suit and it was held that the Court must be regarded as having tried it as a Court of small causes. The case was not one under S. 35 and it does not support the wide proposition laid down by the learned Judge. The decision of Cornish J. in 44 M L W 874[4] is also distinguishable on the same ground, namely, that the Court which ultimately tried the suit had jurisdiction to try it as a small cause suit. Though the learned Judge referred to the decision of Stone J., in 69 M L J 443[2] it is evident that he did not rely upon the wide general observations contained in that case as he referred to the Full Bench decision in 54 ALL 171[5] as not being inconsistent with 69 M L J 443.[2] This Full Bench held that a suit instituted as a small cause suit, if tried as an original suit in the circumstances mentioned in S. 35 when there was no other Judge in the local areas with adequate small cause powers to try it as a small cause suit, should be regarded as an original suit, and the decree passed in it would be appealable. I respectfully agree with this view and hold that S. 27, Provincial Small Cause Courts Act, does not operate in the circumstances of the case to bar any appeal from the order of the District Munsif's Court, Tiruvarur, refusing to set aside the ex parte decree in question.

The question next arises whether an appeal lies from the said order under O. 43, R. (1) (d). The petitioner contends that the qualifying words "in a case open to appeal" should be understood as referring to the appealability of the decree which is sought to be set aside and as in this case, the decree which was originally passed by a Court of small causes, was not appealable, the order refusing to set it aside was also not appealable under this clause. This contention is supported by the decision of a single Judge reported in 20 ALL L J 208[6] but a Bench of this Court in 55 M L J 262[7] was not inclined to accept that restricted interpretation of those words. The question was whether an appeal lay against an order refusing to set aside an ex parte decree passed on an application filed under para. 20 of Sch. 2, Civil P. C., and registered as a suit. It was argued that no appeal lay as it was not a "case open to appeal" as the decree

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2. ('35) 22 AIR 1935 Mad 919 : 159 I C 958 : 69 M L J 443, Ramaswami Muthirian v. Arunachalam Chettiar.

3. ('10) 33 Mad 323 : 1 I C 543 : 20 M L J 718 : 6 M L T 121 (F B), Seethapathy v. Subbaya.

4. ('37) 24 A I R 1937 Mad 227 : 168 I C 691 : (1937) 1 M L J 14 : 44 M L W 874, Gopalakrishna Naicken v. Madhavanayaki Ammal.

5. ('31) 18 A I R 1931 All 574 : 136 I C 357 : 54 All 171 : 1931 A L J 953 (F B), Bhagvati Pande v. Badri Pande.

6. ('22) 9 A I R 1922 All 50 : 65 I C 967 : 20 A L J 208, Hira Lal v. Jhunni Lal.

7. ('28) 15 A I R 1928 Mad 969 : 112 I C 691 : 55 M L J 262, Selvarayan v. Amalorpavanadham.

passed was not in excess of the award and therefore not appealable. The learned Judges observed :

> It cannot be said that the words 'a case open to appeal' should be necessarily construed only with reference to the decree and to no other order.

They held that an appeal lay because there was an order filing the award and an appeal could have been filed against it. This view was approved and followed in I L R (1937) 1 Cal 135.[8] It seems to me that when the proceeding was taken up by the District Munsif of Tiruvarur on the original side of his jurisdiction, it must be deemed thereafter to be a case open to appeal, as, if the District Munsif had set aside the ex parte decree and passed a fresh decree after retrial, such decree would have been appealable, in the view I have taken on the first point. If the restricted interpretation contended for by the petitioner must be rejected as untenable, there seems to be no reason why the general words should not be held to include a case of the kind now before me. For these reasons, I hold that the appeal to the Court below was competent and dismiss this civil revision petition with costs.

C.R.K./D.S. *Petition dismissed.*

8. ('36) 23 A I R 1936 Cal 485 : 166 I C 103 : 63 C L J 277 : 40 C W N 992 : I L R (1937) 1 Cal 135, Mohendra Chandra v. Basir Uddin.

A. I. R. 1941 Madras 107

WADSWORTH AND PATANJALI SASTRI JJ.

Rayam Duraiswamy Iyengar and others — Petitioners

v.

M. Raghavachariar — Respondent.

Civil Revn. Petn. No. 1607 of 1938, Decided on 19th August 1940, to revise decree of Sub-Judge, Chingleput, in S. C. S. No. 92 of 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 8 and 9 (1) — Ordinary rule that unappropriated payments should be applied towards interest is for guidance of Court and not presumption of law with regard to what has actually been done— Notional appropriation cannot be substituted for actual appropriation — Pro-note executed in 1926 renewed in 1935—Open payment in August 1937 appropriated neither towards interest nor towards principal — It cannot be said that there is no interest outstanding so as to bring S. 8 (1) into effect—Under S. 9 (1) pro-note of 1935 must be deemed to be debt contracted in 1926 and must be dealt with under S. 8.

The ordinary rule that unappropriated payments are first to be applied towards interest is more a rule for the guidance of the Court than a presumption of law regarding what has in fact been done. In the case of an open payment towards a debt, a mere notional appropriation, such as is contemplated in the rule referred to, cannot take the place of an actual appropriation for the purpose of saving limitation. A creditor is not entitled, after the debtor has sought relief under Act 4 of 1938, to treat an open payment as having been theoretically appropriated towards interest when in fact it was not appropriated at all and thereby nullify the effect of S. 8 (1). Therefore where a payment has not been appropriated either to principal or interest, it cannot be said that there is no interest outstanding so as to bring into effect S. 8 (1). Therefore where a promissory note executed in 1926 is renewed in 1935 and an open payment is made in August 1937, the pro-note of 1935 under S. 9 (1) must be deemed to be a debt contracted in 1926 and must be dealt with under the provisions of S. 8 : A I R 1940 P C 63, *Rel. on ;* A I R 1940 Mad 419, *Not approved.* [P 108 C 1, 2]

R. Krishna Aiyar — for Petitioners.

M. S. Venkatarama Aiyar — for Respondent.

Wadsworth J. — This petition raises a question regarding the working of S. 8 of Madras Act 4 of 1938. The petitioners were some of the defendants in the suit on a promissory note for Rs. 1900. This note was dated 20th April 1935 and it renewed an earlier note which was admittedly executed on 19th April 1926 for a sum of Rs. 1000, though this earlier note has not been exhibited. On 2nd August 1937 a payment of Rs. 1000 was endorsed "towards this promissory note in the matter of the sale of a house." The lower Court has held that this payment was made towards the promissory note generally, i. e., towards the entire amount due including principal and interest and he has rejected the plea of actual appropriation. The petitioners are admittedly agriculturists and the lower Court has scaled down the debt by the simple process of treating the debt as one borrowed on the earlier date 19th April 1926, doubling the original principal, subtracting the admitted payments amounting to Rs. 1005 and giving a decree for the balance of Rs. 995 as on 1st October 1937 with interest as from that date at $6\frac{1}{4}$ per cent. under S. 12 of the Act. That is to say the learned District Munsif has ignored cl. (1) of S. 8 and has scaled down the debt on the basis that cl. (3) of that section provides a minimum rather than a maximum which the creditor may claim. It seems to us that the method adopted by the lower Court of scaling down this debt cannot be justified. It is, however, by no means easy to lay down what is the correct way of applying this difficult section.

It is contended for the respondent that the payment on 2nd August 1937 must be deemed to have been appropriated in the manner most favourable to the creditor and that the scaling down process must be

applied only after making such an appropriation. We do not think that this contention can be upheld. Granting that when the Court is adjusting accounts between debtor and creditor, the ordinary rule is that unappropriated payments are first to be applied towards interest; this is more a rule for the guidance of the Court than a presumption of law regarding what has in fact been done. In dealing with the subject of appropriation as affecting S. 20, Limitation Act, the Privy Council in a recent case (1940) 1 M L J 895[1] had occasion to consider whether, when there is an open payment towards a debt, a mere notional appropriation, such as is contemplated in the rule just referred to, can take the place of an actual appropriation for the purpose of saving limitation and their Lordships held that it could not. It seems to us that the same principle applies in dealing with the present facts. Here we have an open payment of Rs. 1000 made towards the debt generally, but not appropriated by the debtor or creditor towards principal or interest. We do not consider that the creditor should be entitled, after the debtor has sought relief under Act 4 of 1938, to treat this payment as having been theoretically appropriated towards interest when in fact it was not appropriated at all. We must therefore regard the debt as one in which there has been a payment, but that payment has not been appropriated either to principal or interest. Our attention has been drawn to a decision of Horwill J., reported in (1940) 1 M L J 225=51 M L W 237,[2] where the learned Judge drew a presumption that a similar payment not expressly appropriated was at once applied in the reduction of the debt for interest. We doubt whether such theoretical appropriation can properly be postulated in order to nullify the effect of S. 8 (1) of the Act. Although there must have been an intention in due course to adjust the lump sum payment against the outstanding dues for interest and principal until such adjustment has in fact been made, it cannot in our opinion be said that there is no interest outstanding so as to bring into effect, S. 8, cl. (1).

Now on this basis we have to see what is the actual result. With reference to the proviso to S. 9 (1), the promissory note of 1935 must be deemed to be a debt contracted in 1926 and must be dealt with under the provisions of S. 8, that is to say all interest outstanding on 1st October 1937 must be cancelled. If the interest is so cancelled, the unappropriated payment of Rs. 1000 made on 2nd August 1937 is sufficient to discharge the debt in full. The revision petition is therefore allowed with costs and the debt will be scaled down in the manner indicated with the result that the plaintiff's suit will be dismissed with costs.

C.R.K./G.N. *Petition allowed.*

1. ('40) 27 AIR 1940 P C 63 : 187 I C 233 : (1940) 1 M L J 895 : I L R (1940) Kar 134 : 67 I A 160 (PC), Rama Shah v. Lal Chand.
2. ('40) 27 AIR 1940 Mad 419 : (1940) 1 M L J 225 : 51 M L W 237, Narayanaswami Naidu v. Rajamanickam Pillai.

A. I. R. 1941 Madras 108

VENKATARAMANA RAO J.

Sanam Narayanamurthi and another — Appellants

v.

Manapalli Nageswara Rao representing firm of Manepalli Nageswara Rao and Brothers — Respondents.

Second Appeal No. 55 of 1935, Decided on 29th September 1939, against decree of Sub-Judge, Ellore, in A. S. No. 20 of 1932.

(a) Contract — Contract for sale of goods — Vendee paying earnest money and committing default — Vendee cannot recover earnest money.

In respect of contract for sale of goods it has been customary in India to receive sums of money by way of deposit or earnest. Such sums are forfeited when default is committed by the vendee : 33 All 166, *Rel. on;* 9 Mysore L J 35, *Not approved.* [P 109 C 2]

(b) Contract — Contract for sale of goods falling through vendee's default — Vendee is entitled to recover purchase money paid by him — Vendor can set off against claim for purchase money damages suffered by reason of vendee's default — But vendor must prove his readiness and willingness to perform his part on date fixed for performance of contract.

A vendee through whose default a contract for the sale of goods falls through is entitled to recover the amount of purchase money paid by him and the vendee can only resist the claim by seeking to set off against the said sum any damages which he might have incurred by reason of the vendor's non-performance of the contract. But before he can substantiate his claim he must prove his readiness and willingness to perform his part of the contract and that he was in a position to perform the contract on the date fixed for its performance. [P 109 C 2]

Ch. Raghava Rao and Ramamurthi — for Appellants.

P. Somasundaram — for Respondents.

Judgment. — This appeal arises out of a suit for the return of the purchase money paid by the plaintiff in respect of a contract for sale and delivery of 600 bags of paddy by the defendants to the plaintiff. The contract was entered into on 28th October 1929 and is evidenced by Ex. D. The price per bag was fixed at Rs. 8-1-6. An advance of

Rs. 200 was paid on the said day and later a sum of Rs. 1110 was advanced. In all, the plaintiff paid Rs. 1310 towards the purchase money. The date of performance was 8th November 1929. No delivery took place on that day. The case for the plaintiff is that the defendants committed default in the delivery of the bags and therefore he was entitled to sue for the return of the purchase money. The case for the defendants is that though the contract Ex. D does not mention what bags they were to deliver it was stipulated between them that those bags were the bags which the defendants had pledged with the Imperial Bank of India, that the plaintiff was to pay in advance the amount which he had to pay towards the purchase money in order to enable them to redeem the pledge and deliver the bags to the plaintiff but the plaintiff committed default in paying the said money to them. They further stated that this attitude on the part of the plaintiff was due to the fact that there was a falling market. In answer to this the plaintiff stated that he did go with the money to Avatapalli where the bags were under pledge and offered the money but the defendants would not take it. Both the lower Courts have found that the plaintiff did not go to Avatapalli and offer the money as alleged by him and taking advantage of the falling market he was not prepared to abide by the contract. Therefore there is no doubt that the plaintiff committed default in performing his part of the contract, but the question is, is the plaintiff entitled to get a return of the purchase money. Out of this sum of Rs. 1310, Rs. 200 was the sum paid on the date of the contract as and by way of earnest money.

Mr. Somasundaram on behalf of the plaintiff attempted to argue that that sum was not paid as earnest but as purchase money. I do not think it is open to him to so contend in the face of the distinct admission made by his client in his deposition wherein he states thus, "Defendant asked for Rs. 200 towards earnest money. I paid the amount." As the plaintiff has committed default, the defendants are entitled to forfeit the said sum of Rs. 200 and it is not open to the plaintiff to seek to recover it. Mr. Somasundaram argued that in mercantile contracts it is not usual to forfeit the said sum and the amount paid as advance or by way of earnest was never treated as security and in support thereof he relied on certain observations of Coutts-Trotter J. Whatever may be the practice with regard to mercantile contracts in England, so far as I am aware even in respect of sale of goods it has been customary in this country to receive sums of money by way of deposit or earnest and such sums were forfeited when default is committed by the vendee, and Courts have given effect to such forfeiture. As an instance in point I may mention the case reported in 33 ALL 166.[1] It was a case relating to a contract for the purchase of 500 bales of cotton. Sir John Stanley C. J., and Banerji J., non-suited the plaintiff who sued to recover the earnest money paid by him on the ground that he committed default in the performance of his part of the contract. Mr. Somasundaram argued that even assuming that the plaintiff was not entitled to recover the earnest money paid by him when he committed default, at any rate the Court could not non-suit him in a case where the defendants were equally at fault in performing their part of the contract, but he was not able to cite any authority in support of this contention except relying, for the purpose of argument, on the case reported in 9 Mysore L J 35. No doubt there are observations therein in support of his contention but the learned Judges who decided that case did not give any authority in support of the view they have taken. The question is not whether the defendants committed default or not but whether the plaintiff is entitled to recover the purchase money.

The next question is as regards the balance of the money claimed (excluding the said earnest) which is a sum of Rs. 1110. As the contract fell through the plaintiff is entitled to recover the said sum of money and the defendants can only resist the claim by seeking to set off against the said sum any damages which they might have incurred by reason of the plaintiff's non-performance of the contract. The defendants did make this claim in the written statement but before they could substantiate their claim they should prove their readiness and willingness to perform their part of the contract and were in a position to perform the contract on the date fixed for its performance. As the learned Subordinate Judge did not give any finding in regard thereto I called for a finding on the said question. The learned Subordinate Judge has now submitted a finding to the effect that the defendants must be held to have been ready and

1. ('11) 33 All 166 : 7 I C 794 : 7 A L J 1019, Roshan Lal v. Delhi Cloth and General Mills Co. Ltd., Delhi.

willing to deliver the paddy on the date fixed for the performance of the contract. This finding was canvassed by Mr. Somasundaram on the ground that the learned Judge made out a new case for the defendants in arriving at his conclusion. It is this. According to EX. D, there was nothing to indicate that the goods the defendants contracted to deliver were the goods pledged to the Imperial Bank of India and therefore it must be taken that the defendants might have delivered the goods having regard to the falling market. The learned Judge, in my opinion, in arriving at the said conclusion failed to give due weight to the admissions made by the defendants in the written statement and further it was throughout their case that what was contracted to be delivered was the goods pledged to the Imperial Bank of India. So far as these goods are concerned, it is clear that the defendants were not in a position to redeem the pledge and deliver them. At any rate they have not shown that they were in a position to do so. Their case throughout was that with the money to be paid by the plaintiff they should redeem the pledge and deliver the goods. I must therefore set aside this finding and hold that the defendants were not ready and willing to deliver the goods on the date of performance and therefore they are not entitled to claim any damages or set off any damages against the sum claimed by the plaintiff.

In the result the plaintiff will be entitled to a decree for the sum of Rs. 1110 with interest at 6 per cent. from the date of plaint. The decrees therefore of both the lower Courts will have to be modified accordingly. The appellants and the respondents will receive and pay proportionate costs in this appeal. Leave to appeal refused.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 110

HORWILL J.

C. K. Kunjandi — Petitioner

v.

Kuduvayoor Nagarathil Melharath Kadir Moideen Rowthen's son Chinnavava Rowther and others — Respondents.

Civil Revn. Petn. No. 352 of 1937, Decided on 23rd April 1940, to revise the decree of Sub-Judge, South Malabar at Palghat, in S. C. S. No. 243 of 1936.

(a) Limitation Act (1908), S. 20 — Payment by one heir saves limitation against others.

A payment by an heir saves limitation against the other heirs : A I R 1929 Mad 419; A I R 1930 Mad 738 and A I R 1938 Mad 774, *Ref.* [P 111 C 1]

(b) Limitation Act (1908), Ss. 20 and 21 — One of joint contractors dying—Subsequent payment by other within limitation—Payment does not save limitation against heirs of deceased joint contractor.

Where after the death of one of joint contractors a payment is made by the other within the period of limitation, the payment does not save limitation against the heirs of the deceased joint contractor. [P 111 C 1]

K. Kuttikrishna Menon—for Petitioner.

S. Venkatachala Sastri—for Respondents.

Order. — Defendant 2 is the mother of defendants 3 to 5. The husband of defendant 2, the father of defendants 3 to 5 and defendant 1 executed a promissory note in favour of the plaintiff petitioner. Within the period of limitation, after the death of defendant 2's husband, defendant 1 made a payment. This suit was brought within three years of that payment but more than three years from the execution of the note. Defendant 1 was clearly liable; but the more difficult question was whether defendants 2 to 5 were liable also or whether the suit was barred as against them. That point was decided in favour of defendants 2 to 5 by the Subordinate Judge of Palghat. There can be no doubt that it is well established in this High Court that any acknowledgment made under S. 19 by one person does not save limitation against any other persons liable under the note, whereas a payment made under S. 20 saves limitation as against all those liable under the note. I am unable to see any great difference in the wording of Ss. 19 and 20 which would account for this difference in the law applying to acknowledgments and payments. The earlier Indian decisions on the subject seem to have been based largely on the English law; and the decisions to which I have been referred assume the difference between Ss. 19 and 20 and follow earlier cases. Section 21 (2), Limitation Act, says :

> Nothing in the said sections (Ss. 19 and 20) renders one of several joint contractors . . . . . chargeable by reason only of a written . . . . . payment made by . . . . any other or others of them.

Reading Ss. 20 and 21 together, it would follow that a payment saves limitation against all the debtors unless the debtors are co-contractors. It has been laid down in a number of cases (A I R 1929 Mad 419,[1]

1. ('29) 16 A I R 1929 Mad 419 : 118 I C 802 : 56 M L J 630, Narasimha Rama Iyer v. Ibrahim.

127 IC 641[2] and 48 MLW 251[3]) that a payment by an heir saves limitation against other heirs. The position in this case is rather peculiar. There is no payment by one heir; but there was a payment by a joint contractor. At the time when this payment was made, the other joint contractor was dead and, strictly speaking, there was no other joint contractor to whom S. 21 (2) could directly apply; but defendants 2 to 5 are sought to be made liable because they are the heirs of the other joint contractor. Their liability depends upon the liability of the person whose heirs they are. That other person was a joint contractor and defendants 2 to 5 represent his estate. I am therefore of opinion that this payment made by defendant 1 does not save limitation against defendants 2 to 5. The petition is accordingly dismissed with costs of the contesting respondents.

C.R.K./G.N. *Petition dismissed.*

2. ('30) 17 A I R 1930 Mad 738 : 127 I C 641, Lokandha Naiko v. Lokhono Naiko.

3. ('38) 25 AIR 1938 Mad 774 : 178 I C 243 : ILR (1938) Mad 968 : (1938) 2 M L J 33 : 48 M L W 251, Pangudaya Pillai v. Uthandiya Pillai.

A. I. R. 1941 Madras 111

VENKATARAMANA RAO J.

Maragadhammal — Appellant

v.

Yasodhammal — Respondent.

S. R. No. 30252 of 1939, Decided on 12th April 1940.

Madras High Court, Original Side Fees Rules, R. No. 35—Appeal from judgment directing issue of probate — Subject-matter must be deemed to be incapable of valuation — Appellant is entitled to put his valuation upon it.

In a probate proceeding no question of title to property is adjudicated as it is not within the province of a probate Court to go into it. The only question before it is whether a person died testate or intestate and who is entitled to the administration of the estate, and if he died testate whether the executor is entitled to the grant of probate.

[P 111 C 2]

Hence in an appeal from a judgment directing issue of probate the subject-matter must be deemed to be incapable of valuation and the person who is preferring the appeal is entitled to put his own valuation upon it. He need not pay ad valorem court fee: 21 M L J 481, *Rel. on.* [P 112 C]

K. Narasimha Aiyer — for Appellant.

Government Pleader — for the Crown.

Order. — The question for decision is, what is the court-fee payable on the memorandum of appeal which was presented against the judgment of my learned brother Somayya J. in T. O. S. No. 11 of 1938 by which he directed the issue of a probate after declaring the will propounded by the respondent to be genuine. The appellant paid a court-fee of Rs. 225. The learned Master is of the opinion that an ad valorem stamp duty is payable under No. 35 of the High Court Fees Rules. The office is of the opinion that under No. 35 the appellant has to pay a stamp duty on rupees 7615-12-5 at which the testamentary suit has been valued and the same must be deemed to be the valuation in the appeal. The appellant contends that the subject-matter is incapable of valuation, but he however values it at Rs. 2000 and states that the stamp duty paid by him is correct. The question is, is the contention of the appellant sound? The rule governing this matter is No. 35 of the Original Side Fees Rules which runs thus:

Memorandum of Appeal from a final judgment:	
When the value of the subject-matter of the appeal does not exceed Rs. 2500	... Rs. 225/-
And for every Rs. 1000, or part thereof in excess of Rs. 2500 ...	... Rs. 5/-.

There can be no question that the appeal is from a final judgment: *vide* 46 Mad 592.[1] But the question that has to be decided is, what is the subject-matter of the appeal? In deciding this question, the nature of the probate proceedings has to be considered. In a probate proceeding no question of title to property is adjudicated as it is not within the province of a probate Court to go into it. The only question before it is whether a person died testate or intestate and who is entitled to the administration of the estate, and if he died testate whether the executor is entitled to the grant of probate. In 54 Cal 126,[2] Sanderson, C. J. described the nature of a probate proceeding thus:

I propose to consider what is the nature of the proceedings in connexion with an application for a grant of probate. There is no doubt that in such proceedings the question of title to property does not arise The question is whether one or other of the parties to the proceedings is entitled to represent the estate. But, when the proceedings are contested, as in this case, the Court has to try an issue between the parties and which involves the question whether the plaintiff is entitled to have a grant of probate or whether the person, who has entered a caveat and who has become a defendant, has substantiated and proved the defence which he has set up.

The learned Chief Justice then referred to the case in (1846) Montriou Rep 167[3] at

1. ('23) 10 AIR 1923 Mad 362: 72 I C 925: 46 Mad 592 : 44 M L J 146, Perumal Chetty v. Kandaswamy Chetty.

2. ('27) 14 AIR 1927 Cal 281 : 100 I C 797 : 54 Cal 126: 31 C W N 254, Prankumar Pal v. Darpahari Pai.

3. (1846) Montriou Rep 167, In the Goods of Colonel John Shelton.

p. 173: Sanjeeva Rao's Indian Decisions, Old Series, vol. 1 p. 590, where the nature of the proceedings is described thus:

A contest for probate is a suit to try the question of testacy or intestacy, and that administration is a matter of civil right.

This is the view which has also been taken by a Bench of this Court in 21 M L J 481.[4] In that case the question was what is the stamp duty payable in the High Court on a memorandum of appeal presented against an order granting probate by a District Court? In dealing with that question Sankaran Nair and Munro JJ. observed thus:

We also think that on principle an ad valorem stamp should not be levied in such cases. The only title which the order appealed against gives to the petitioner is the right to administer the estate and if he has to sue to recover the estate he will have to pay stamp duty on its value. We do not think stamp duty on the value of the estate should be twice exacted.

Having regard to the nature of the right that is agitated in a probate proceeding, the subject-matter of the appeal in my opinion must be deemed to be incapable of valuation or the person who is preferring the appeal is entitled to put his own valuation upon it. In 35 ALL 448,[5] the view taken was that the subject-matter in dispute in an appeal against an order issuing probate was impossible to be estimated at a money value. There is no provision in the original side rules as to payment of any fixed fee in regard to matters which are incapable of valuation as provided in the Court-fees Act. The only indication that can be gathered from the fees rules is a note to Rule No. 1 in regard to a plaint which is that the plaint shall contain a statement of the value of the subject-matter of the suit for purposes of calculating the court-fees payable thereon under this item. The plaintiff shall, in preparing the statement, follow as far as possible the provisions of S. 7, Court-fees Act, 1870, as amended by Madras Act 5 of 1922. Section 7, Court-fees Act, does not provide for all cases. It seems to me that if the subject-matter of an appeal is viewed to be incapable of valuation which in my view is the correct basis, the minimum fee for the memorandum of appeal provided according to the High Court Fees Rules, namely, Rs. 225, is the proper fee leviable. But if the appellant is entitled to put his own valuation—and he has put his valuation here at Rs. 2000—the fee that has been paid is the proper fee. I therefore decide that the appellant need not pay any further court-fee. The Government solicitor will get his costs Rs. 35 from the Government.

C.R.K./D.S. *Order accordingly.*

4. ('11) 21 M L J 481: 9 I C 538: (1911) 1 M W N 237: 9 M L T 314, Rodrigues v. Mathias.
5. ('13) 35 All 448 : 22 I C 98, Miss. Eva Mountstephens v. Mr. Hunter Garnett.

A. I. R. 1941 Madras 112

WADSWORTH AND PATANJALI SASTRI JJ.

Periasami Pillai — Petitioner

v.

Sivathia Pillai — Respondent.

Civil Revn. Petn. No. 1482 of 1939, Decided on 20th August 1940.

Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) — Burden of proof.

Where a person applies under the Act claiming himself to be an agriculturist he has first to establish a prima facie case that he falls under one of the categories enumerated in Ss. 3 (ii) (a) to (d). Then the burden shifts to the opposite party to show prima facie that the applicant is excluded by one or other of the provisos. When this has been done the burden again shifts to the applicant to adduce materials which are specially within his knowledge and have a bearing on the applicability of the provisos. [P 112 C 2]

A. Sundaram Ayyar — for Petitioner.

Order.—With reference to the question of the burden of proof under S. 3 (ii), Madras Act 4 of 1938 and its provisos, it seems to us clear that the applicant has first to establish a prima facie case that he falls under one of the categories enumerated in Ss. 3 (ii) (a) to (d). Then the burden shifts to the respondents to show prima facie that the applicant is excluded by one or other of the provisos. When this has been done the burden again shifts to the applicant to adduce materials which are specially within his knowledge and have a bearing on the applicability of the provisos. The lower Court does not appear to have grasped the principles on which the onus should lie and a fresh finding is necessary on the question whether the applicant is an agriculturist. If he is an agriculturist the position is clear with reference to our decision in C. R. P. No. 1607 of 1938.[1] All interest outstanding on 1st October 1937 has to be wiped out. Thereafter interest will have to be calculated as under S. 12 of the Act, and the various payments credited as and when made. There can be no question of appropriating payments made after 1st October 1937 to interest which was outstanding on that date. The petition is allowed with costs and the application is remitted to the lower Court for disposal in the light of this judgment.

C.R.K./D.S. *Petition allowed.*

1. *Reported in* ('41) 28 AIR 1941 Mad 107: (1940) 2 MLJ 648, Duraiswamy Iyengar v. Raghavachariar.

A. I. R. 1941 Madras 113

WADSWORTH AND PATANJALI SASTRI JJ.

Periaswami Chettiar and another — *Plaintiffs* — Petitioners

v.

S. A. Ramaswami Goundan — *Defendant* — Respondent.

Civil Revn. Petn. No. 653 of 1939, Decided on 19th August 1940, to revise order of Court, Sub-Judge, Coimbatore, D/- 14th February 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii)—Simple mortgagee of agricultural land is entitled to benefits of Act.

A simple mortgagee of agricultural land has a saleable interest in agricultural land which would qualify him for the benefits of the Act having regard to the definition in S. 3 (ii): A I R 1940 Mad 941, *Foll.* [P 113 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 19—Trial Court can scale down decree of appellate Court.

The trial Court has power under S. 19 to scale down a decree passed by the appellate Court: AIR 1939 Mad 483, *Foll.* [P 113 C 2]

(c) Madras Agriculturists Relief Act (4 of 1938) — Puisne mortgagee impleaded in suit by earlier mortgagee can be deemed to be debtor entitled to benefits of Act.

A puisne mortgagee impleaded in a suit by the earlier mortgagee can be deemed to be a "debtor" entitled to the benefits of the Act, he being a person who is liable to pay the amount of the debt due to the first mortgagee: A I R 1939 Mad 186, *Rel. on.* [P 114 C 1]

K. S. Sankara Aiyar — for Petitioners.

K. Bhashyam Ayyangar and T. R. Srinivasan — for Respondent.

Wadsworth J.—This petition arises out of an application under S. 19 of Madras Act, 4 of 1938, to scale down a mortgage decree. The applicant (respondent here) was an assignee from defendant 4 who was a third mortgagee. The petitioners before us represent the plaintiffs who were the first mortgagees. The mortgagor was defendant 1. The plaintiffs got a decree in 1935 which they executed and realized the full amount by the sale of the hypotheca. Plaintiffs also filed an appeal claiming an additional sum by way of interest and on 17th March 1938 the appellate Court gave a decree for this additional sum. The plaintiffs then applied for payment of the amount of this decree out of the balance in Court deposit, and it was this application which gave rise to the application by the representative of defendant 4 who had been brought on record in execution to scale down the decree. In revision a number of points have been taken. The first was whether the applicant by virtue of his mortgage can be said to have a saleable interest in agricultural land which would qualify him for the benefits of the Act having regard to the definition in S. 3 (ii). This point is covered by our decision in C. R. P. No. 513 of 1939[1] in which we have held that a simple mortgagee has such a saleable interest as to qualify him for the benefits of the Act. The second point taken relates to the power of the trial Court under S. 19 to scale down a decree passed by the appellate Court. This question is covered by the decision of a Bench of this Court in (1939) 1 M L J 329,[2] with which we are in respectful agreement.

A more substantial question is whether a puisne mortgagee impleaded in a suit by the earlier mortgagee can be deemed to be a "debtor" entitled to the benefits of the Act; that is to say, is he a person who is liable to pay the amount of the debt due to the first mortgagee. There is a decision of Newsam J., in (1939) 2 M L J 225[3] to the effect that a puisne mortgagee is not a debtor of the first mortgagee decree-holder, the reason being that he is a person in whose favour the privilege of redeeming the first mortgage debt has been recognized but not one who is under an obligation to pay. This judgment, which is very short, makes no reference to the earlier case, I L R (1939) Mad 218,[4] in which the Bench had to consider the position of the purchaser of the equity of redemption impleaded in a mortgage suit and they held that the purchaser had such a liability as would fall within the definition of "debt" under S. 3 (iii) of the Act and that certainly it was not the intention of the Legislature to limit the relief under the Act to cases where a judgment-debtor was personally liable.

An attempt has been made to distinguish this decision on the ground that it emphasized the possessory interest which the purchaser had to protect by discharging the mortgage debt, whereas in the case of the puisne mortgagee, it is possible for the latter to await the result of the sale and collect his dues from the proceeds thereof, if sufficient balance remains. We are unable to accept this distinction as valid. Under the

1. *Reported in* ('40) 27 A I R 1940 Mad 941 : (1940) 2 M L J 516, Subburamier v. Venkatachalapathi.
2. ('39) 26 AIR 1939 Mad 483 : 183 I C 596 : ILR (1939) Mad 520 : (1939) 1 M L J 329, Ganga Raju v. Bulli Ramayya.
3. ('40) 27 A I R 1940 Mad 61 : (1939) 2 M L J 225, Narayanachari v. Annamalai Chettiar.
4. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : ILR (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.

mortgage decree, the debt is made payable by the judgment-debtor who is a puisne mortgagee. It is true that he need not pay it, if he is prepared to risk the loss of his interest in the hypotheca or if he is confident that the sale will produce sufficient to satisfy his mortgage as well as that of the first mortgagee. Surely, the purchaser of the equity of redemption impleaded in a mortgage suit is in a very similar position. He need not pay the debt if he is prepared to risk the loss of his property, or if he is confident that the sale will realize sufficient to pay him a fair compensation for the money he has spent in acquiring the equity of redemption. In each case, there is in fact a liability to pay the debt of the first mortgagee. It is not a personal liability, but it is none the less a liability. The fact that a puisne mortgagee is a person under a liability to pay the debt of the first mortgagee has been recognized in other decisions apart from those under this Act: *vide* 44 Mad 544[5] and 51 M L W 453[6] at p. 460. We have no doubt that the principle governing the decision in I L R (1939) Mad 218[4] must also govern the decision of the present case and we must hold that the puisne mortgagee against whom a decree has been passed in a suit by the first mortgagee is a person liable to pay the debt of the plaintiff. In the result therefore the petition is dismissed with costs of the contesting respondent.

C.R.K./D.S. *Petition dismissed.*

5. ('21) 8 AIR 1921 Mad 102 : 62 I C 393 : 44 Mad 544 : 40 M L J 218, Askaram Sowcar v. Venkataswami Naidu.

6. ('41) 28 A I R 1941 Mad 6 : 51 M L W 453 : (1940) 2 M L J 726, Thinnappa Chettiar v. Krishna Rao.

A. I. R. 1941 Madras 114

WADSWORTH J.

Aravapalli Viresam — Petitioner

v.

Gurram Adinarayana and others — Respondents.

Civil Revn. Petn. No. 90 of 1939, Decided on 22nd April 1940, to revise order of the Dist. Munsif, Narasaraopet, D/- 6th December 1938.

Civil P. C. (1908), O. 9, R. 13 — Sufficient cause — Recording of finding as to presence of, is not mandatory though most desirable—Absence of such finding is however no ground for interference in revision.

Although the recording of a finding regarding the presence of sufficient cause for interference under O. 9, R. 13 is not a mandatory requirement for an order setting aside an ex parte decree, still it is most desirable that a finding on the facts should be given explicitly but the absence of such a finding is not a ground for interference in revision : A I R 1936 Mad 524, *Rel. on;* 1931 M W N 239, *Not approved;* 21 Cal 67 (P C), *Disting.* [P 115 C 1]

V. Govindarajachari — for Petitioner.

K. Katayya — for Respondents.

Order. — The petitioner seeks to revise an order setting aside an ex parte decree against the respondents on terms that the respondents should deposit suit costs which deposit was made. The only contention which might call for interference in revision is that by inference from the terms of O. 9, R. 13, Civil P. C., it is obligatory upon the Court to record a finding that the defendant who seeks to set aside an ex parte decree was prevented by sufficient cause from appearing. In the present case, the respondents filed an affidavit alleging sufficient cause for their non-appearance. There was a counter affidavit filed by some lawyer acting for the lawyer of the plaintiff denying these allegations. The learned District Munsif does not discuss the truth of the allegations on one side or the other but simply lays down the terms upon which the ex parte decree should be set aside. Now, O. 9, R. 13 merely requires the applicant to satisfy the Court that summons was not duly served or that he was prevented by any sufficient cause from appearing. It does not in terms require the Court to record a finding that it is so satisfied. There are two decisions of single Judges of this Court taking opposite views on this question whether it is obligatory upon the Court to record a finding. Ananthakrishna Iyer J., in 1931 M W N 239,[1] holds that it is mandatory to record such a finding. The only authority quoted is the decision of the Privy Council in 21 Cal 66[2] a decision which is not in any way concerned with setting aside ex parte decrees, but has to do with setting aside sales in execution for material irregularities. Moreover, I have been unable to find in the report of that decision the observation upon which the learned Judge relies. I must take it then that the decision of Ananthakrishna Ayyer J. is not based on authority.

There is a more recent decision of Stodart J., in A I R 1936 Mad 524[3] in which the learned Judge observes that while it is

1. ('31) 1931 M W N 239, Vaithi Chetti v. Govindam Pillai.

2. ('94) 21 Cal 66 : 20 I A 176 : 6 Sar 324 (P C), Tasadduk Rasul Khan v. Ahmad Husain.

3. ('36) 23 A I R 1936 Mad 524 : 163 I C 732, Venkatarama Iyer v. Ramaswami Iyer.

most desirable that the Court should state why it thinks the ex parte decree should be set aside, O. 9, R. 13, Civil P. C., does not make it obligatory for the Court to state its reasons and he holds that the failure to record findings on the merits of the case is not a ground for interference in revision. With great respect to the learned Judge who held the contrary view, it seems to me that the view of Stodart J. is correct. Interference in revision under S. 115, Civil P. C., depends on some error pertaining to jurisdiction. If the recording of a finding regarding the presence of sufficient cause for interference is not a mandatory requirement for an order setting aside an ex parte decree, it cannot be said that such an order is passed without jurisdiction merely because the learned Judge does not set forth the reasons for passing the order. It is of course most desirable that a finding on the facts should be given explicitly but I am of opinion that the absence of such a finding is not a ground for interference in revision. The revision petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 115

ABDUR RAHMAN J.

Radhakrishna Chetty and another — Petitioners

v.

Miss Teckla Schomberg — Respondent.

Civil Revn. Petn. No. 856 of 1940, Decided on 1st May 1940, to revise order of Dist. Munsif, Chingleput, D/- 3rd November 1939.

Court Fees Act (1870), Ss. 7 (ix) and 17 — Mortgage—Redemption suit—Reliefs for redemption and mesne profits based on right to redeem and arising out of same cause of action — Suit falls under S. 7 (ix) and not S. 17 — Fact that plaintiff asks separately for mesne profits and states his estimate of amount which would be due by mortgagee is immaterial.

A suit for redemption of a mortgage in which the reliefs claimed by the plaintiff, both for redemption and for recovery of mesne profits, are based on his right to redeem and arise out of the same cause of action falls under S. 7 (ix) and not under S. 17. In such a case, since the main relief claimed is one for redemption the prayers for surplus profits or for accounts are only subservient to the main relief and as the ascertainment of the amount payable by one party to the other is a condition of redemption and is incidental thereto, the valuation put by the plaintiff on relief for redemption covers the relief in regard to surplus profits as well. The fact that the plaintiff asks for surplus profits separately and states the amount which would be according to him due by the mortgagee is immaterial : A I R 1931 Mad 479 and A I R 1923 All 261, *Rel. on;* 30 Mad 61, *Expl. and Disting.* [P 116 C 1]

M. Shama Das — for Petitioners.

S. Narayana Ayyangar — for Respondent.

Order.—The only question to be decided in this revision relates to the jurisdictional value placed by the plaintiff in her suit for redemption in which she asked for certain surplus profits to be decreed in her favour in addition. The lower Court relying on 39 Mad 447[1] and 60 M L J 698,[2] held that the value which the plaintiff had placed on her relief for redemption would cover the relief in regard to surplus profits as well and that the latter need not be valued separately. The defendants have filed the present revision to test the correctness of this order.

Since the value, determinable for the computation of court-fees and for purposes of jurisdiction is, under the provisions of S. 8, Suits Valuation Act, to be the same, the determination of the latter would depend on the decision as to the requisite court-fee required on the present plaint. Learned counsel for the petitioners contends that the plaintiff is asking for two 'distinct subjects' within the meaning of S. 17, Court-fees Act, and the plaint is therefore chargeable with the aggregate amount of the fees to which the plaint would be liable, when embracing either of such subjects separately. The court-fees are, unless otherwise provided, to be paid ad valorem, and if the plaintiff is asking for two distinct subjects, it would follow that the fee would be chargeable for each subject separately. But the question is whether the relief claimed by the plaintiff for surplus profits is a distinct subject. Reliance was placed by learned counsel for the petitioners in this connexion on 30 Mad 61,[3] but that case does not bear out his contention as two distinct alternative reliefs forming different matters were being claimed in that case and the court-fee was required to be paid in respect of each relief separately. The claim for redemption in that suit was based upon the alleged right of the plaintiff as a mortgagor while the alternative relief was based on a contract for a further mortgage which was distinct from the earlier mortgage right. As the alternative claims were held to comprise distinct matters which

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1. ('16) 3 A I R 1916 Mad 631 : 28 I C 624 : 39 Mad 447 : 29 M L J 142, Jalladeen Marakayar v. Vijiayasami.
2. ('31) 18 A I R 1931 Mad 479 : 132 I C 317 : 60 M L J 698, Pothanna v. Satyananda Charyulu.
3. ('07) 30 Mad 61 : 16 M L J 462 : 1 M L T 426, Neelakandham Nambudripad v. Tirunilai Ananthakrishna Iyer.

could have been made the grounds for separate suits, they were held to form "distinct subjects" within the meaning of S. 17, Court-fees Act. It was however stated in that judgment that

> where reliefs are claimed in the alternative with reference to the same cause of action, S. 17 would not govern the case.

This observation is fatal to the petitioners' contention and when this was pointed out by me to their learned counsel, he had to concede it. It is true that the plaintiff has, in her plaint, asked for surplus profits separately, and this was the main ground on which the correctness of the lower Court's order was impugned. But having read the plaint carefully, I am of opinion that the reliefs claimed by the plaintiff, both for redemption and for recovery of mesne profits, are based on her right to redeem and arise out of the same cause of action. Section 7, sub-cl. (ix), Court-fees Act, provides that in suits against a mortgagee for recovery of the property mortgaged, the fee would be "according to the principal money expressed to be secured by the instrument of mortgage." In so far as a suit for redemption is a suit against a mortgagee for the recovery of the property mortgaged, the fee would have to be paid on the principal money expressed to be secured by the mortgage deed although the major portion of the principal amount may have been paid or may be alleged to have been paid before the suit is instituted. Similarly, the amount of interest which may have accumulated on the mortgage and which the mortgagor will be required to pay in addition to the principal due under the deed, will have to be disregarded in computing the fee to be paid for the redemption suit.

Since the main relief claimed by the plaintiff is one for redemption, and her prayers for surplus profits or for accounts are only subservient to the main relief claimed by her and as the ascertainment of the amount payable by one party to the other is a condition of redemption and is incidental thereto, the valuation put by the plaintiff in her plaint is correct. The fact that the plaintiff has stated the amount which would be according to her, due by the defendant mortgagee is, to my mind, immaterial. The taking of an account has to be ordered by a Court under the terms of a preliminary decree passed in a redemption suit (O. 37, R. 7, Civil P. C.) and if it appears that the defendant mortgagee has been overpaid, he would be directed under R. 9 not only to retransfer the property, but to pay to the plaintiff mortgagor the amount which has been found due to him. In such a case, the plaintiff could not have been, under the provisions of S. 7, sub-cl. (ix), Court-fees Act, asked to pay any additional court-fee. Why should she be compelled to pay additional court-fee when she has added a prayer in respect of a matter which the Court is bound to inquire into and which must, for that reason, be regarded as more or less superfluous? I would therefore respectfully agree with the reasons given by Sundaram Chetty J., in 60 M L J 698[2] and with what was decided in 45 ALL 154.[4] The revision fails for the above reasons and is dismissed with costs.

C.R.K./G.N. *Revision dismissed.*

4. ('23) 10 A I R 1923 All 261 : 80 I C 1021 : 45 All 154, Chhiddu Singh v. Jhangjan Rai.

A. I. R. 1941 Madras 116

WADSWORTH AND PATANJALI SASTRI JJ.

Ramadoss Reddiar — Defendant — Petitioner

v.

Munuswami Reddiar — Plaintiff — Respondent.

Civil Revn. Petn. No. 1454 of 1939, Decided on 13th September 1940, to revise order of Dist. Munsif, Chingleput, D/- 5th April 1939.

*Madras Agriculturists Relief Act (4 of 1938), Ss. 15 and 19 — Procedure under S. 19 can be invoked under S. 15 to discharge decree for rent —Decree on pronote executed for arrears of rent is not decree for rent (*Per Wadsworth J. — Patanjali Sastri J., *Dissenting.)*

Section 19 no doubt in terms applies only to decrees for the repayment of debts, but a similar procedure can certainly be invoked under S. 15 for the discharge of a decree for rent, having regard to the terms of S. 15 (1). [P 117 C 1]

Per *Wadsworth J.* — A decree, on a promissory note executed for arrears of rent is however not a decree for rent and consequently S. 15 cannot be applied to discharge that decree which being a decree for a debt falls under Ss. 9 and 19 of the Act. The question of the discharge of "rent due as such" does not arise : A I R 1932 Mad 436 (S B), *Rel. on.* [P 117 C 1, 2]

Per *Patanjali Sastri J.* — A promissory note taken for arrears of rent merely provides a new remedy with certain legal incidents and does not change the character of the liability and therefore a decree on the pronote is a decree for arrears of rent *(Obiter).* [P 117 C 2]

V. V. Ramadurai — for Petitioner.

T. R. Srinivasan — for Respondent.

Wadsworth J.—This petition raises the question whether the provisions of S. 15 of

Act 4 of 1938 can be applied so as to discharge a decree obtained by the endorsee of a promissory note executed for arrears of rent. On 11th February 1936 the petitioner executed a promissory note for the arrears of rent due for Fasli 1345 and previous faslis. The promisee under the note was one of the two zamindars of the village. He endorses the note in favour of his co-zamindar, who filed a suit on the note and got a decree on 28th September 1937. On 5th November 1938 the petitioner applied under S. 19 of the Act to amend the decree after declaring that the plaintiff was entitled to nothing thereunder except the amount of costs, inasmuch as the entire subject-matter of the suit comprising arrears had been discharged by paying in the Collector's office the arrears for Faslis 1346 and 1347. The application was rejected and it is this order of which revision is sought.

Section 19, under which the application was made, in terms applies only to decrees for the repayment of debts. But there can be no doubt that a similar procedure can be invoked under S. 15 for the discharge of a decree for rent, having regard to the terms of cl. 1 of that section. By that clause it is provided that (subject to the payments contemplated in the proviso) all rent for Fasli 1345 and prior years which is outstanding on the date of the commencement of the Act shall be deemed to be discharged, "whether the rent be due as such or whether a decree has been obtained therefor." Now the Court which passed the decree on the promissory note is not concerned with the arrears of rent on the petitioner's holding, unless this decree can be deemed to be a decree for rent, a fact which the applicant seems to recognise by making his deposit with the Collector and filing his application for amending the decree as one under S. 19. We are not therefore concerned with the discharge of rent 'due as such', but with the discharge of rent where "a decree has been obtained therefor" and even though the arrears of rent covered by the promissory note might be deemed to be still outstanding—or in suspense, as some decisions have put it—the petitioner can claim no relief under this application unless the decree on the promissory note is a decree for arrears of rent.

On the question whether the decree on the promissory note can be regarded as a decree for rent, it seems to us that we are bound by the decision of the Special Bench in 55 Mad 830.[1] The question in that case was whether interest due to a zamindar under promissory notes taken from his ryots for arrears of rent was agricultural income, and it was held that it was not, the reasoning being that by the fresh contract between the zamindar and the ryots, the actual character of the liability had been changed into a loan and had ceased to be rent. It follows from this decision that the decree on the promissory note is not a decree for rent. We are not really concerned in this case with the question whether in circumstances such as these, a suit on the original liability for rent would lie. Assuming that it would, and that there is therefore rent still outstanding, the petitioner cannot, by the process provided under S. 15 of the Act, get rid of the decree on the promissory note unless that decree be a decree for rent, which it is not in form and which, on the authority of the decision just cited, it must be held not to be in substance. The decree being, as it purports to be, a decree for a debt, it will fall not under S. 15, but under Ss. 9 and 19 of the Act, as has been held by the lower Court. In the view we take it is unnecessary to go into the further question of the effect of the endorsement of the note to the plaintiff a co-zamindar, by the original payee. The petition is dismissed with costs.

Patanjali Sastri J.—I agree and would only add that, if the matter was not covered by authority, I would be inclined to the view that a promissory note taken for arrears of rent merely provided a new remedy with certain legal incidents, and I should have found some difficulty in subscribing to the proposition that, in such circumstances, the character of the liability is so changed that what remains payable is no longer 'rent' but only a 'debt'. But, as pointed out in the judgment of my learned brother, a Special Bench of three Judges has made that proposition the basis of their decision, and I feel bound to follow it.

C.R.K./G.N. *Petition dismissed.*

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1. ('32) 19 A I R 1932 Mad 436 : 138 I C 289 : 55 Mad 830 : 63 M L J 20 (S B), Commissioner of Income-tax Madras v. Rajagopala Venkata Narasimha Bahadur.

A. I. R. 1941 Madras 118

WADSWORTH AND PATANJALI SASTRI JJ.

M. Varadaraja Perumal Pillai and another — Defendants — Petitioners

v.

Palanimuthu Goundan — Plaintiff — Respondent.

Civil Revn. Petn. No. 1679 and A. A. A. O. No. 239 of 1938, Decided on 4th September 1940, to revise the order of Dist. Munsif, Salem, D/- 12th August 1938.

(a) Pronote—Pronote representing unpaid purchase money—Mere endorsement whether carries vendor's lien with it (Quære).

It is doubtful whether in the absence of a registered conveyance a mere endorsement of a promissory note which represents unpaid purchase money carries with it the security in the shape of the vendor's lien : A I R 1922 Mad 344, *Ref.* [P 118 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 10 (2) (ii) — Construction — Section 10 (2) (ii) protects liability in respect of which charge is provided under S. 55 (iv) (b), T. P. Act — Exclusion of liability does not depend on actual subsistence of charge but on question whether charge was provided in beginning — Assignment of liability does not affect category into which it falls.

Section 10 (2) (ii) protects any liability of the category of liabilities in respect of which a charge is provided under S. 55 (iv) (b), T. P. Act. The intention of the Legislature was to specify those classes of liabilities in respect of which the scaling down provisions of the Act were not to operate and the exclusion of liabilities of these categories was not to depend on the actual subsistence of the charge but on the question whether in the beginning the liability was one belonging to that category in respect of which the Transfer of Property Act provided a charge. The essential category into which the liability falls is not affected by the assignment of this liability to a third party. [P 118 C 2]

(c) Madras Agriculturists Relief Act (4 of 1938) — Construction — Act is expropriatory measure — Doubt should be resolved in favour of person expropriated and not of person claiming to expropriate.

The Act is an expropriatory measure and if there is any doubt as to the meaning of its terms that doubt should be resolved in favour of the person expropriated and not of the person who claims the right to expropriate. [P 119 C 1]

V. Ganapathi Ayyah — for Petitioners.

S. S. Ramchandra Iyer — for Respondent.

Wadsworth J. — This revision petition arises out of an application by a judgment-debtor under S. 19, Madras Act, 4 of 1938, and raises a question regarding the meaning of S. 10 (2) (ii) of that Act. The essential facts are that the judgment-debtor purchased lands under a sale deed of February 1923 whereby the purchase price was to be paid by the discharge of two debts and the execution of a promissory note for the balance. This promissory note was twice renewed and the renewed note of 1932 was assigned in 1936 to the plaintiff by endorsement. The plaintiff got a decree on the promissory note and when the judgment-debtor applied to scale down the decree, the plaintiff pleaded that the liability was one in respect of which a charge was provided under S. 55 (iv) (b), T. P. Act, and that therefore the provisions of S. 8, Madras Act, 4 of 1938, could not be applied.

For the purpose of deciding this case, we assume that the decision in 44 Mad 965[1] is correct, though there is some conflict of authority on the question whether a mere endorsement of a promissory note which represents unpaid purchase money carries with it the security in the shape of the vendor's lien. Assuming that there was in fact no charge which the plaintiff-assignee could work out against his debtor, is the plaintiff entitled to rely on the provisions of S. 10 (2) (ii)? This provision may be read in two ways. It may be read as safeguarding any liability for which a charge under S. 55 (iv) (b), T. P. Act, subsists; or, it may be read as protecting any liability of the category of liabilities in respect of which a charge is provided under S. 55 (iv) (b), T. P. Act. We are of opinion that the latter interpretation is the correct interpretation and that the intention of the Legislature was to specify those classes of liabilities in respect of which the scaling down provisions of the Act were not to operate and that the exclusion of liabilities of these categories was not to depend on the actual subsistence of the charge but on the question whether in the beginning the liability was one belonging to that category in respect of which the Transfer of Property Act provided a charge.

Now, applying this criterion to the present case, undoubtedly the liability of the judgment-debtor to his vendor was one in respect of which a charge was created by the operation of S. 55 (iv) (b), T. P. Act. It is, as we have suggested, doubtful whether that charge could be enforced by an endorsee of the promissory note in the absence of a registered conveyance. But the essential category into which the liability falls is not, in our opinion, affected by the assignment of this liability to a third party and we consider it is one which falls into the category referred to in S. 10 (2) (ii) of the Act. As we have more than once point-

1. ('22) 9 A I R 1922 Mad 344 : 66 I C 168 : 44 Mad 965 : 41 M L J 297, Elumalai Chetty v. Balakrishna Mudaliar.

ed out, this Act 4 of 1938 is an expropriatory measure and if there is any doubt as to the meaning of its terms, that doubt should be resolved in favour of the person expropriated and not of the person who claims the right to expropriate. In this view, we agree with the decision of the trial Court and dismiss the petition and the connected appeal with costs in the civil revision petition.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 119

WADSWORTH AND PATANJALI SASTRI JJ.

K. G. Lakshmana Iyer and another — Petitioners

v.

Ramaswami Naicker and others — Respondents.

Civil Revn. Petn. No. 1194 of 1939, Decided on 10th September 1940, to revise order of Sub-Judge, Coimbatore, D/- 8th December 1938.

- *Madras Agriculturists Relief Act (4 of 1938), S. 10 (2) (ii)*—A *selling certain property to* B—B *executing mortgage in* A's *favour for full sale price and giving as security not only property sold but also other property — Mortgage held was one in respect of which charge was provided under S. 55 (4) (b), T. P. Act.*

The liability covered by the mortgage originated as part of a transaction whereby property was sold by A to B who executed a mortgage for the full amount of the sale price and gave as security not only the property sold but also some other property. The mortgage deed provided that the principal amount should be payable after five years but should carry interest from the date of the bond :

Held that the sale was for a price and the mortgage merely provided the way in which that price was to be paid and secured. The provision, that the amount should bear interest from the date of the deed and not from the date fixed for payment, was itself an indication that the principal amount was regarded as the purchase price due on the sale, the payment of which was, by agreement, deferred and therefore the liability under the mortgage was one in respect of which a charge was provided under S. 55 (4) (b), T. P. Act, and the terms providing additional security and giving five years for payment were not necessarily inconsistent with the continuance of the charge : A I R 1918 Mad 82, *Expl.* ; 31 Cal 57 (P C), *Rel. on.*

[P 119 C 2 ; P 120 C 1]

A. C. Sampath Iyengar — for Petitioners.

N. Somasundaram — for Respondents.

Wadsworth J.—The petitioners obtained a decree in a mortgage suit and they seek to revise the order of the Subordinate Judge scaling down that decree under Ss. 8 and 19, Madras Agriculturists Relief Act, at the instance of defendants 1 and 3 to 5. The main ground on which the lower Court's order is attacked, is that the liability under the mortgage is one for which a charge is provided under S. 55 (4) (b), T. P. Act, so that by the provisions of S. 10 (2) (ii) of Act 4 of 1938 the liability cannot be scaled down. Now we have held in C. R. P. No. 1679 of 1938[1] that S. 10 (2) (ii) must be interpreted as excluding all liabilities falling within the category therein described, whether or not the charge actually subsists at the time of suit. We have therefore to consider whether at its inception the liability covered by this mortgage was one of the class in respect of which S. 55 (4) (b) of the T. P. Act, provides a charge. It is common ground that the liability covered by the mortgage originated on 22nd January 1920, as part of a transaction whereby property was sold to defendant 2 and the father of the other defendants, the vendees executing a mortgage for the full amount of the sale price and giving as security not only the property sold but also some other property. The mortgage deed provided that the principal amount should be payable after five years but should carry interest from the date of the bond. On these facts, the lower Court, quoting the case in 35 M L J 304,[2] held that there was a substitution of a better security and that the vendor's statutory lien was displaced. Now, the decision on which the lower Court relies does not purport to lay down any principle other than those set forth in the leading case in 31 Cal 57,[3] where their Lordships of the Privy Council consider the nature of the vendor's lien under S. 55, T. P. Act, and the circumstances in which it does or does not operate. In considering the question of the existence of a "contract to the contrary," their Lordships observe :

> There is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge.

Applying this rule, we find it difficult to hold that the terms of the suit mortgage constitute a "contract to the contrary" so as to exclude the statutory charge. It is true that the mortgage provides additional security and gives five years for payment. But we are not prepared to hold that these terms

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1. *Reported in* ('41) 28 A I R 1941 Mad 118: (1940) 2 M L J 838, Varadaraja Perumal v. Palanimuthu Goundan.
2. ('18) 5 AIR 1918 Mad 82 : 44 I C 523 : 35 M L J 304, Krishnaswami v. Subramania.
3. ('04) 31 Cal 57 : 30 I A 238 : 8 C W N 41 : 8 Sar 554 (P C), Webb v. Macpherson.

are necessarily inconsistent with the continuance of the charge. Their Lordships in the same decision go on to deal with the distinction between a sale in consideration for money which the purchaser covenants to pay and a sale in consideration for a mere covenant to pay, in which there would be no purchase price and therefore no statutory charge. We have given careful consideration to the form of the sale deed and the recitals of the contemporaneous mortgage deed in the present case and have come to the conclusion that the sale was for a price and that the mortgage merely provided the way in which that price was to be paid and secured. The form of the sale deed, which recites the amount of the purchase price and the receipt of that price by the execution of the mortgage deed, is the ordinary form commonly used in a conveyance for a price which is not paid in cash. There is nothing to show clearly that the sale was regarded as a sale for a mortgage and not as a sale for a price in respect of which a mortgage was executed. Moreover, the provision in the mortgage deed that the amount should bear interest from the date of the deed and not from the date fixed for payment, is itself an indication that the principal amount was regarded as the purchase price due on the sale, the payment of which was, by agreement, deferred.

We are therefore of opinion that this liability was one in respect of which a charge is provided under S. 55 (4) (b), T. P. Act, and that by reason of S. 10 (2) (ii) of Act 4 of 1938 the lower Court had no jurisdiction to scale down that liability. On this finding there is no necessity to go into the further question raised regarding the status of defendants 3 to 5 as agriculturists. The civil revision petition is therefore allowed and the application under S. 19 is dismissed with costs here and in the Court below.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1941 Madras 120

BURN AND MOCKETT JJ.

In re Nannapaneni Seshayya

Appellant.

Criminal Appeal No. 476, Criminal Revn. No. 479 and Taken up No. 3 of 1940, Decided on 11th October 1940, against order of Court of Session, Guntur Division, in Session Case No. 22 of 1940.

(a) Penal Code (1860), S. 302—Little girl and her mother residing with accused — Quarrel between girl's mother and accused's wife—Accused on false pretext taking girl with him and returning without her and admitting to have killed girl and thrown body in pond — Girl in fact dying as stated by accused — Accused held guilty of murder — Motive of crime being slight is immaterial.

A little girl aged six years along with her mother resided at the accused's (her uncle's) house. There was some quarrel between the girl's mother and the accused's wife as a result of which the mother had been cooking separately. Thereafter the accused on the morning of the fateful day took the girl from the house on a false pretext and returned without her. He first explained that the girl had been killed by a car but later stated in the presence of the mother and other relatives that he had killed the girl himself and thrown the body in a pond. Subsequently, the dead body of the girl was found in the pond with a stone tied round the waist:

Held that if the evidence were only that the girl was last in the presence of the accused and in his presence under suspicious circumstances and that her body was found with a stone tied to it in the pond, that alone would raise a hostile presumption against the accused which he would necessarily have to explain, but on the facts of the case the guilt of the accused had been proved beyond any shadow of doubt and the fact that the motive for the crime was slight was not material. [P 122 C 1, 2]

(b) Penal Code (1860), S. 302 — Murder — Guilt established beyond all reasonable doubt — Conviction being based on circumstantial evidence is no reason for not awarding capital punishment.

It matters not how an accused's guilt is established, whether by the testimony of eye-witnesses or by the testimony of combined circumstances provided that it is established beyond all reasonable doubt. The measure of proof however must be the same in either case. Consequently the fact that the conviction is based on circumstantial evidence is no reason for not awarding capital punishment.

[P 122 C 2]

(c) Penal Code (1860), S. 302 — Trial Court failing in its duty to impose sentence of death— High Court can pass the same.

Where the trial Court fails in its duty to impose a sentence of death by passing the lesser sentence the High Court has power to pass a sentence of death : A I R 1930 Mad 446 and A I R 1929 Mad 667, *Rel. on.* [P 122 C 2]

S. Vepa and J. Krishnamurthy—for Appellant.

Public Prosecutor — for the Crown.

Mockett J.—The appellant has been convicted by the learned Sessions Judge of Guntur of the murder of a little girl one Seetharamamma. The trial Court imposed a sentence of transportation for life and the learned Judge who perused the judgment of the trial Court ordered the issue of a notice to the prisoner to show cause why the sentence should not be enhanced to a sentence of death. The deceased was the daughter of P. W. 1 and the accused was her uncle. Her father died three years before this occurrence and he and his brother were then undivided. P. W. 1 continued to live in the family. The inmates of the house in which they lived—the house of Nagamma (P.W. 2)

—were P. W. 1, the accused, the deceased girl aged six and the accused's wife. At the time of the death of Seetharamamma there had been a quarrel between P. W. 1 and the accused's wife with the result that P. W. 1 had been cooking separately. The little girl was last seen alive on Friday the 15th September and on that date P. W. 1 left home for her field at about 9 A. M. after giving her daughter food. She left in the house the accused, Nagamma and Seetharamamma. When she returned in the evening the accused and the deceased were absent. P. W. 2 tells us something of the movements of these two. She is the accused's aunt and she says that after P. W. 1 had left the house the accused took the deceased with him saying that he was going to the seedbeds but later saying that he was going to take her to Tekkellapad which will be seen on the south of the plan and is nine miles from the deceased's village. At Tekkellapad lived P. W. 7 the father of P. W. 1 and therefore the grandfather of the little girl. That evening the accused returned home at about meal time and enquiries were made of him as to where the little girl was. He told P. W. 1 that he had left her in P. W. 7's house, an answer which did not satisfy P. W. 1 who on September 16th sent P. W. 5 to P. W. 6, a relative asking the latter to make enquiries. On Sunday the 17th, P. W. 1's father and others came from Tekkellapad and said that the deceased was not there. The accused was questioned and P. W. 2 and P. W. 1 state—and their evidence is corroborated by P. Ws. 5, 6 and 7—that at first the accused said that Seetharamamma had been run over by a car at Mangalagiri. Later he stated that he had killed her and put her in a pond "being possessed of an evil idea". P. W. 5's description of what happened is as follows: The accused was interrogated and he said that the girl was runover by a car at Mangalagiri. Pressed further he said:

> I was taking her to Tekkellapad. When we reached a field pond near Katikkalla, Butchi Reddi's field, some evil idea got into my head. I killed the girl and put her body in the pond and came home.

It was extracted in cross-examination from P. W. 2 that the father and brother-in-law of P. W. 1 beat the accused before he confessed. Exhibit A was made by P. W. 1 the next day. It was given to the village Munsif who had come from Niddamaru to her house at Neerukonda. It is dated the 18th at noon and in that statement P. W. 1 set out in effect what she stated in evidence at the sessions and which has been stated above. There is no doubt about the date of Ex. A and the time. The Munsif is definite that it was at noon and it is dated the 18th September. Comment has been made on the fact that if the family had been told that the child was in the pond on the night of the 17th, it does not appear that immediately they went to the pond to investigate. It must be remembered that these are villagers and it is impossible to say with any degree of certainty what any of them will do under any given circumstances. They chose to go to the Munsif and the Munsif came to the house the next day. What is certain is that after that the pond was examined, the body of Seetharamamma was found there. It had a cord round the waist and a heavy stone (M. O. 4) which we have seen, was attached to it. It was not possible, says the doctor, to state with certainty how this child had died. There was no water in the lungs; the body was highly decomposed and there was a legature mark round the abdomen of the deceased and that was all the doctor could say. A number of witnesses P. Ws. 3, 4, 9, 10 and 11 speak to seeing the accused and this little girl on that morning together and in various places in the vicinity and not far from the pond in which the body was found. Ordinarily, the girl being in the company of the accused would be of little importance because she very often was with him in the fields. On that the evidence is clear but it is important in this case because the accused has totally denied that he ever took the girl on that day. Both at the committing Magistrate's Court and in the Sessions Court he told the same story. He states, "I did not take the girl. I did not kill her," and he denies he confessed to the relatives. If therefore the evidence of P. Ws. 3, 4, 9, 10 and 11 is to be accepted, it is curious and indeed significant that the appellant should totally say that he was ever in the company of the girl on that morning.

The story of the prosecution may be summarised as follows: On some pretext proved to be false the appellant took from her house Seetharamamma on the morning of the 15th September. He returned without her and according to the evidence first gave the explanation that she had been killed by a car and later stated that he had killed her himself being under the influence of the evil one. Enquiries showed that in fact the girl had died in the manner in which it is stated. She was in a pond. She had a stone tied round her waist and under those circumstances there is an irresistible inference

that she was murdered. If the evidence were only that she was last in the presence of the accused and in his presence under suspicious circumstances and that her body was found with a stone tied to it in the pond that alone would raise a hostile presumption against the accused which he would necessarily have to explain. But in this case there is in addition evidence of a confession to the relatives which we accept and which is entirely consistent with the rest of the case. It is true that the motive for this crime may be slight. It appears to be a fact that he quarrelled with the girl's mother but equally there are no grounds for supposing not only that anybody else had committed this crime but that this family should desire to fabricate false evidence with the purpose of obtaining a conviction for murder against the accused.

We have listened to a long and careful argument by Mr. S. Vepa and he invites us to say that the evidence of these witnesses for the prosecution is not satisfactory, that there is a doubt in the case and that the appellant should necessarily receive the benefit of that doubt. We are unable to accept that argument. The evidence is consistent in all material particulars. The most that can be said is that had these villagers acted in a manner which one would expect of people of a much higher grade of education a very strong case might have been somewhat stronger. In our view, the guilt of the accused has been proved beyond any shadow of doubt and we have no reason to suppose that the evidence for the prosecution is other than true. This appeal will therefore be dismissed.

In considering the question whether the sentence should be enhanced, it is well to remember that the appellant has been convicted of the murder of a little girl whom he was proved to have taken from her house for reasons which have been shown to be false. He was never intending to take her to her grandfather. The moment the girl's mother heard of his supposed intentions she was surprised. She states she wondered why after the quarrel between herself and the wife of the accused, the accused should take her daughter away without her permission because be it remembered that when P. W. 1 left the house that day there was no question. The accused never asked her permission to take her daughter so far away as Tekkallapad nine miles distance. We cannot doubt therefore that this murder was premeditated and deliberate. Why exactly it was perpetrated is known only to the appellant. The learned Judge dealt with the question of sentence as follows :

> As to the punishment since the guilt of the accused has been proved by strong circumstantial evidence this is not a case calling for capital punishment. I therefore sentence him to transportation for life.

That reason, namely that the conviction was based on circumstantial evidence, has been in innumerable cases condemned by this High Court. It was condemned in 1914 by Ayling and Kumaraswami Sastri JJ., in 1915 M W N 34;[1] in 1921 by Ayling and Krishnan JJ., in 44 Mad 443[2] and again in 1929 condemned by Waller and Krishnan Pandalai JJ., in 2 M Cr C 158.[3] There is thus ample authority for so self-evident a proposition. It must surely be obvious that it matters not how an accused's guilt is established whether by the testimony of eye-witnesses or by the testimony of combined circumstances provided that it is established beyond all reasonable doubt and the measure of proof must be the same in either case. Our attention has been drawn to some decisions the effect of which is as stated in the headnote in 53 Mad 585[4] :

> Where on a conviction for murder the Sessions Court awarded a sentence lesser than death, the High Court will not enhance the sentence, unless it is satisfied that on the evidence in the case the sentence of death is the only possible sentence which could have been passed by the Sessions Court.

As on a conviction for murder the law provides for an alternative sentence we have no doubt that when using the phrase "the only possible sentence" the Court intended to express the view that it was only in cases in which the lower Court had manifestly failed in its duty that the High Court would impose the sentence of death. As stated by Waller J., in 2 M Cr C 158,[3] because the lower Court had failed in its duty there was no reason why the High Court should do the same. In this case we consider that the trial Court's duty was to impose the sentence of death. There must be cases in which that is manifestly so and perhaps as good an example as can be given is the case of the deliberate murder of a small child for purposes of robbery or any other purpose such as this

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1. ('15) 2 A I R 1915 Mad 542 : 26 I C 332 : 16 Cr L J 28 : 1915 M W N 34, Muniandi v. Emperor.
2. ('21) 8 A I R 1921 Mad 423 : 61 I C 524 : 22 Cr L J 396 : 44 Mad 443 : 40 M L J 464, Public Prosecutor v. Paramandi.
3. ('29) 16 A I R 1929 Mad 667 : 118 I C 817 : 30 Cr L J 971 : 2 M Cr C 158, Indrammal v. Emperor.
4. ('30) 17 A I R 1930 Mad 446 : 127 I C 290 : 31 Cr L J 1193 : 53 Mad 585 : 58 M L J 490, Gunduthalayan v. Emperor.

case. No doubt examples can be multiplied but such an example may be mentioned. For reasons which are wholly unsupportable and which Mr. Vepa did not attempt to support the learned Judge has passed the lesser sentence. There are no other reasons justifying such a course. It is our duty to pass a sentence of death. We therefore enhance the sentence of transportation for life to a sentence of death and direct that the accused be hanged by the neck until he be dead.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 123

WADSWORTH J.

Minni Zuleka Bi and another —

Petitioners

v.

Kulsum Bi and another — Respondents.

Civil Revn. Petn. No. 1034 of 1939, Decided on 23rd April 1940, to revise order of Dist. Munsif, Vellore, D/- 10th January 1939.

Civil P. C. (1908), S. 152 — Amendment of decree — Appeal abating against deceased respondent but decided on merits against other respondents — Legal representatives of deceased respondent should apply to appellate Court for amendment of decree.

When an appeal has abated so far as the deceased respondent is concerned, but has been decided on the merits so far as the other respondents are concerned, a subsequent application for an amendment of the decree under S. 152, at the instance of the legal representatives of the deceased respondent should be made not in the trial Court but in the appellate Court. The legal representatives of the deceased respondent have locus standi to apply for amendment of the decree : A I R 1928 All 679; A I R 1918 Mad 295; 16 I C 933 and A I R 1925 All 556, *Ref.* [P 123 C 1; P 125 C 1, 2]

T. L. Venkatarama Iyer — for Petitioners.

R. Thirumalai Thathachariar —

for Respondents.

Order.—This revision petition raises the question whether when an appeal has abated so far as one of the respondents is concerned but has been decided on the merits so far as the other respondents are concerned, a subsequent application for an amendment of the decree under S. 152, Civil P. C., at the instance of the legal representatives of the deceased respondent should be made in the trial Court or in the appellate Court. The question is apparently not covered by authority and is not without difficulty. Unfortunately, very few of the relevant documents are before the Court and there is a certain obscurity regarding the facts. So far as I have been able to gather them, the admitted facts are as follows : The suit was originally filed by one plaintiff alone for partition of his share in properties owned in common by members of a Mahomedan family. This plaintiff was entitled to a 7/24th share. By a clerical error the plaint was so drafted as to make it appear that instead of claiming 7/24 of the whole of the properties, he was claiming only 7/24 of 7/24 of the family properties. This error was not noticed till after the preliminary decree had been passed and an appeal had been filed by certain of the defendants. There was a large array of respondents but the principal respondent was the original plaintiff. He died during the pendency of the appeal and no legal representative having been brought on record within the time allowed, the appellate Court ordered that the appeal so far as he was concerned, abated. Apparently, the appellant made out no case against the other respondents and the appeal as against them was dismissed with costs. There was no order as to costs in respect of the deceased respondent. After this decision, the present petitioners, legal representatives of the deceased first plaintiff were impleaded in the final decree proceedings as plaintiffs 2 and 3 and it was at this stage that the error in the plaint which had been incorporated in the preliminary decree was discovered and an application was filed before the District Munsif to rectify this error both in the plaint and in the preliminary decree. It was rejected by the District Munsif on the ground that he had no jurisdiction to modify the decree of the appellate Court. This is the order against which the present revision petition has been filed, but the judgment contains no reference to the fact that the appeal, so far as it related to plaintiff 1 under whom the petitioners claim, had abated before the dismissal of the appeal as against the other respondents. A review application was filed calling the attention of the District Munsif to this abatement. The District Munsif declined to modify the previous order and there is no petition to revise the review order.

The contention of the petitioners is that when an appeal abates, the position of the deceased respondent is just the same as it would have been had no appeal been filed and his legal representatives are entitled to treat, as the only decree affecting them, the decree of the trial Court. Therefore it is contended, if a clerical error is discovered in this decree, they must look to the trial Court to amend that decree and they have

no locus standi to approach the appellate Court for the same relief. This being a matter of first impression and one which is not free from difficulty, it is, in my opinion, necessary to dispose of it with reference to the special facts of the case and it is not desirable to attempt to adjudicate on the hypothetical case in which an amendment is sought of a decree in a case when the appeal has abated as against the sole respondent. In many respects, the abatement of an appeal has the same effect as the dismissal of an appeal. Under O. 22, R. 9, Civil P. C., the abatement of a suit or appeal prevents the filing of a fresh suit or appeal raising the same contentions and it is established that when an appeal has abated, limitation runs from the date of the order of abatement and not from the date of the preliminary decree. It is obviously necessary that one Court or other should have the power to rectify clerical errors affecting the process of execution in which the legal representatives of the deceased respondent are interested. There is a decision of a Bench of the Allahabad High Court reported in 50 ALL 608[1] to the effect that when the appellate Court merely allows an appeal to be withdrawn, this order has not the effect of a decree superseding the trial Court's decree and any amendment is to be carried out by the trial Court. It is of course arguable that when an appellant allows the appeal against the deceased respondent to abate, the effect is very much the same as if the appeal had been withdrawn as against that deceased respondent. But even assuming this to be so, if the appeal is withdrawn as against one respondent but prosecuted as against other respondents until it results in a decree on the merits in the appellate Court, in such circumstances should the respondent in respect of whom the appeal has been withdrawn be required to go to the trial Court for his amendment or to the appellate Court.

My attention has been drawn to two decisions of the Madras High Court which have some slight bearing on the question before me. One is the decision of a single Judge reported in 7 M L W 8.[2] The actual decision was to the effect that when there is a second appeal pending, it is the lower appellate Court which has jurisdiction to amend the decree. The correctness of that proposition is not disputed, but it is contended that a consequential order of the learned Judge on a civil miscellaneous petition filed contemporaneously with the civil revision petition against the District Judge's refusal to amend, by implication recognizes the power of the High Court to carry out an amendment in the case of an appeal which has been withdrawn. It does appear that the second appeal in that case was eventually withdrawn; but it does not appear that the second appeal had been withdrawn at the time when this civil miscellaneous petition was filed. If as seems likely, the second appeal was still pending, the order on the civil miscellaneous petition, consequential upon the order in the civil revision petition, that the amendment was to be carried out by the District Judge, would have no more effect than to implement the decision that the pendency of an appeal did not affect the power of the lower Court to amend.

The other case is one reported in 16 I C 933.[3] That was a revision against an order of amendment carried out by the lower appellate Court when there had been a second appeal which had been dismissed. One of the learned Judges held that the lower appellate Court had the power of amendment because the second appeal had been dismissed merely on the ground that no appeal lay, and therefore there was no decree of the second appellate Court confirming the decree of the lower appellate Court. The other learned Judge does not appear to have adopted this view, for he agrees with the decision on another ground and refrains from commenting on the theory that the dismissal of a second appeal on the ground that no appeal lies is not tantamount to a decree. There is also a decision of a Bench of the Allahabad High Court reported in A I R 1925 ALL 556,[4] in which it was held that when an appeal was dismissed for default, there is, properly speaking, no superseding decree of the appellate Court and an amendment application lies to the lower Court. This decision, like that in 50 ALL 608,[1] already referred to, does not deal with the difficult question which arises when the appellate Court actually gives a decision on the merits so far as some of the parties are concerned though the appeal fails for want of prosecution or some similar cause as regards another party.

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1. ('28) 15 AIR 1928 All 679 : 108 I C 564 : 50 All 608 : 26 A L J 407, Deoki v. Jwala Prasad.
2. ('18) 5 AIR 1918 Mad 295 : 44 I C 248 : 7 M L W 8, Muthu Bhattar v. Mrithunjaya Bhattar.
3. ('12) 16 I C 933, Pankajaammal v. Seshadri.
4. ('25) 12 AIR 1925 All 556: 88 I C 396: 23 A L J 518, Pitam Lal v. Balwant Singh.

Whatever the position may be when an appeal abates in its entirety and there is no possibility, in consequence of conflicting decrees, it seems to me that there are obvious grounds for limiting the power of amendment to the appellate Court when an appeal has abated only in part and a decree on merits has been given as against the other respondents. In such circumstances, there is clearly a decree capable of execution passed by the appellate Court. The legal representatives of the deceased respondent would presumably be required, when filing an application to execute the trial Court's decree, to produce a copy of the appellate Court's decree in order to prove that the appellate Court had not modified the decree so far as the deceased decree-holder was concerned. When the decree in question, like that which is now under consideration, is a preliminary decree for partition and possession of a fractional share the result of allowing an amendment in the trial Court altering the fraction of the deceased respondent's share would necessarily be that there would be two conflicting decrees. The preliminary decree of the trial Court gave to the plaintiff 7/24 of 7/24 of the entire properties. The amendment suggested would give him 7/24th of the whole properties—a very different share. The appellate Court's decree which binds all the parties, except perhaps the legal representatives of the deceased respondent, confirms the former decree for the lesser share. It seems to me to follow that if there is to be an amendment which has the effect of enlarging the plaintiff's share, that amendment must necessarily be carried out in the appellate Court's decree if a conflict between the two decrees is to be avoided.

It is objected that this would put the legal representatives of the deceased respondent in the position having no locus standi to pray for the amendment of a decree affecting them, such decree being clearly vitiated by a clerical error. I do not think that this objection is insuperable. Granted that for the purpose of coming on record in a pending appeal, there is a special period of limitation provided, when we are at the execution of the final decree stage, the legal representatives of the deceased decree-holder can be brought on record at any time when the decree is alive, so far as is necessary for the purpose of prosecuting their rights. If once it is conceded that the decree which is to be executed is in substance the appellate Court's decree, there being no statutory prohibition against the amendment of this decree at the instance of the legal representatives of a deceased decree-holder, it seems to me to follow *ex debito justitiæ* that the appellate Court must have the power to carry out the necessary amendments at the instance of the legal representatives of the deceased party. And in this view I dismiss the revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 125

HORWILL J.

Moidin Rowthan — Petitioner

v.

Dakshayani Amma and another — Respondents.

Civil Revn. Petn. No. 435 of 1937, Decided on 24th April 1940, to revise order of Sub-Judge, South Malabar at Palghat, D/- 29th October 1936.

Civil P. C. (1908), Ss. 73, 63 and 64 — S. 73 can be availed of only by decree-holder making application for execution of decree — Attachment before judgment does not become attachment in execution without application for execution — Ss. 63 and 64 do not indicate that Court should suo motu ascertain claimants to particular sum and divide it among persons entitled to share.

Section 73 can be availed of only by persons making applications to the Court for the execution of decrees. In the absence of such an application an attachment before judgment does not become an attachment in execution. Sections 63 and 64 do not indicate that the Court should suo motu ascertain the various claimants to a particular sum of money and divide it among persons entitled to a share of it though S. 63 indicates that the Court should adjudicate upon questions of this nature : A I R 1924 Mad 494 (F B), *Disting.* [P 126 C 1]

K. P. Ramakrishna Iyer and P. Sridhara Rao — for Petitioner.

P. Govinda Menon — for Respondents.

Order.—The petitioner filed S. C. No. 460 of 1935 against a debtor and attached before judgment some money that was in the hands of a garnishee. Some time later, the petitioner obtained a decree — we do not know its exact date, but it is said that it was some time before 7th March 1936. He did not take out execution of this decree. The respondents obtained a decree in S. C. No. 440 of 1935 against the same debtor, and in execution they also attached on 26th November 1935 this same sum of money in the hands of the garnishee. That money was paid into Court on 3rd March 1936, and upon an application by the respondents, the money was paid to them on 7th March 1936. The petitioner thereupon filed M. P. No. 590 of 1936, praying that the Court should recall the sum

of money paid over to the respondents and distribute it rateably between them. That petition was dismissed by the Subordinate Judge of Palghat, and hence this revision petition. The petitioner's contention is that he was entitled to a share in the money that had been paid into Court by the garnishee and that the lower Court acted illegally in paying that money over to the respondents. He contends that the Court was bound to see that the money was properly distributed among those who had a claim to it. As proof that such a duty is cast upon the Court, he refers to Ss. 63 and 64, Civil P. C. Section 63 only indicates that the Court should adjudicate upon questions of this nature, and S. 64 explains the effect of an attachment. Neither of these sections indicates that the Court should suo motu ascertain who are the various claimants to a particular sum of money and then to divide that money among the persons who are entitled to a share of it. Section 73 runs:

> Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor . . . . the assets . . . . . shall be rateably distributed among all such persons.

So that it is clear that the Court can only divide the assets among such persons as may have made application to the Court for the execution of decrees. The present petitioner made no such application. He contends that his attachment before judgment becomes by some legal fiction an attachment in execution. He states as authority for this unusual proposition a decision of a Full Bench of this Court in 47 Mad 483.[1] What the Court there held was that "property attached in execution" in O. 21, R. 57, Civil P. C., includes property attached before judgment, when there has been a decree followed by an execution petition for the purpose of bringing the property attached to sale. This judgment does not say that proceedings taken before execution can be deemed to be proceedings taken after execution; but it only says that property attached before judgment may be considered to be property attached in execution when it is followed by an execution application for the purpose of bringing the attached property to sale. As the petitioner has put in no such application, the above decision has no application to this case. This revision application could have been dismissed on the simple ground that the petitioner had a remedy by way of a suit afforded to him by S. 73 (2); but a decision on the point raised in the Court below has been given in order to avoid further litigation. The revision petition is accordingly dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

1. ('24) 11 AIR 1924 Mad 494 : 79 I C 144 : 47 Mad 488 : 46 M L J 415 (F B), Meyyappa Chettiar v. Chidambaram Chettiar.

A. I. R. 1941 Madras 126

KING J.

Chinna Goundan and another — Appellants

v.

Kalyanasundaram Iyer and others — Respondents.

Appeal No. 86 of 1939, Decided on 23rd August 1940, against appellate order of Dist. Munsif, Salem, D/- 13th December 1938.

(a) Madras Estates Land Act (8 of 1934), Ss. 6, Expl. 2 and 127 — S. 127 does not control S. 6, Expl. 2.

Section 127 relates only to such repeal or amendment as Act 8 of 1934 itself brings about. Section 6, Expl. 2 was enacted, not by Act 8 of 1934 but by Act 18 of 1936. It is impossible therefore that S. 127 of Act 8 of 1934 could control or in any way apply to S. 6, Expl. 2 of the Act as it now stands. [P 127 C 1]

(b) Execution — Decree valid in itself — Plea that passing of new Act renders decree inexecutable can be raised.

A judgment-debtor is not debarred from raising a plea in execution proceedings that the passing of a new Act renders the decree which is perfectly valid in itself inexecutable in practice: A I R 1917 Cal 728, *Rel. on.* [P 126 C 2 ; P 127 C 1, 2]

M. Krishna Bharathi — for Appellants.

A. Srirangachariar — for Respondents.

Judgment. — The appellants in this appeal are the judgment-debtors and the respondent is the holder of a decree which was obtained in 1922 and finally confirmed by the High Court in Letters Patent appeal on 26th January 1934. The decree is for the eviction of the appellants. The appellants contended in the Courts below that the execution application could not be permitted, as owing to the recent amendment of the Estates Land Act they had acquired occupancy rights. This contention was upheld by the learned District Munsif, but on appeal, the learned District Judge of Salem has allowed execution to proceed. There appears to have been some dispute in the Court of the District Munsif as to whether the land which is the subject-matter of this appeal was or was not part of an estate, as now defined by the Act. However the respondent, who was the appellant before the

learned District Judge, and against whom the District Munsif decided this point, did not raise it in his grounds of appeal and I need not therefore consider it either.

It is clear that at the present time and at the time when this execution application was presented, the appellants here were in occupation of land which was part of an estate. They now rely upon S. 6, Explanation (2), Estates Land Act, which enacts that any person who was in possession on 30th June 1934 of any land which is now an estate by virtue of the Act of 1936 shall have occupancy rights. It is contended, on the other hand, by the respondent, that he is protected by S. 127 of Act 8 of 1934. Sub-section (1) of that section runs as follows :

Subject to the provisions of sub-s. (2), nothing in this Act or in any repeal or amendment effected thereby shall affect any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act under a decree or order of a competent Court.

It is pointed out for the respondent that his decree is dated 26th January 1934, before the Act 8 of 1934 came into force and it is argued that under the provisions of this section, the rights which he has acquired cannot be attacked. I am unable to see how this section can apply to the facts of the present case. It is clear from the language of the section that it relates only to such repeal or amendment as Act 8 of 1934 itself brings about. Explanation 2 to S. 6 was enacted, not by Act 8 of 1934 but by Act 18 of 1936. It is impossible therefore that S. 127 of Act 8 of 1934 could control or in any way apply to explanation 2 to S. 6 of the Act as we now have it. This contention on the part of the respondent must therefore be overruled.

It is next contended on behalf of the respondent that if he is not permitted to execute his decree, it will infringe the well-known principle of law that the executing Court cannot go behind the terms of the decree. This argument also I am unable to accept. The plea which the judgment-debtors are now putting forward in no way affects the validity of the decree. If their contention is accepted, it does not in the slightest amount to an assertion that the decree in 1934 ought not to have been passed. No new facts are alleged which would in any way involve the re-opening of the decision then arrived at by the Court. All that they are pleading is that certain events have happened, namely, a new Act has been passed, the effect of which renders the decree which is perfectly valid in itself inexecutable in practice. I see no reason or principles of law upon which the appellants should be debarred from raising this plea. On the other hand, in 44 Cal 954[1] at p. 963, I find it stated that a particular objection which is there being dealt with is one that could properly be taken in proceedings in execution of the decree :

The judgment-debtor, when he takes such objection, does not attack the decree; he merely urges that the decree, though properly made, has, by reason of events subsequent, become incapable of execution.

I hold therefore that by reason of explanation 2 to S. 6 of the Act, the appellants cannot be evicted from the land and that they are entitled to raise this plea against the decree-holder when he attempts to execute his decree. In the result, this appeal must be allowed and the order of the learned District Munsif must be restored with costs throughout. Leave granted.

C.R.K./G.N. *Appeal allowed.*

1. ('17) 4 A I R 1917 Cal 728 : 38 I C 493 : 44 Cal 954 : 24 C L J 523 : 21 C W N 776, Syam Mandal v. Satinath Banerjee.

A. I. R. 1941 Madras 127

WADSWORTH AND PATANJALI SASTRI JJ.

V. S. Singaracharíar — Petitioner

v.

Pappathi Ammal — Respondent.

Civil Revn. Petn. No. 656 of 1939, Decided on 19th August 1940, to revise order of District Munsif, Trichinopoly, D/- 14th December 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii)—Holder of vendor's lien in agricultural land can be agriculturist.

The holder of a vendor's lien in agricultural land is qualified to be an agriculturist : A I R 1940 Mad 941, *Ref.* [P 127 C 2]

K. S. Desikan and K. Raman—for Petitioner.

C. S. Rama Rao Sahib and A. Sundaram Aiyar — for Respondent.

Order. — In view of our decision in C. R. P. No. 513 of 1939[1] that a simple mortgagee of agricultural land has a saleable interest therein sufficient to satisfy S. 3 (ii) (a) Madras Act 4 of 1938, it would seem to follow that the holder of a vendor's lien in agricultural land is equally qualified to be an agriculturist. But the trial Court has not gone fully into the question whether in fact the lien subsists. The transferee did not admit his liability to pay to his transferor, as the learned Judge seems to think, but to the plaintiff — the holder of the incumbrance over the right transferred.

1. *Reported in* ('40) 27 AIR 1940 Mad 941 : (1940) 2 M L J 516, Subburamiar v. Venkatachalapathi.

Whether or not the vendor's lien subsists will, in our opinion, depend largely on the circumstances of the transfer—for instance, if the transferee has the right to hold the unpaid money for the protection of his own interest against the incumbrances, there can hardly be a debt due to the transferor in respect of which the lien may be said to subsist. But this question can best be investigated by the trial Court in disposing of the pending application under S. 19. With these observations, the petition is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1941 Madras 128

WADSWORTH AND PATANJALI SASTRI JJ.

Puranam Egna Narayanayya —
Petitioner

v.

Desaboyina Venkatayya and others —
Respondents.

Civil Revn. Petn. No. 346 of 1939, Decided on 29th August 1940, to revise order of Dist. Munsif, Markapur, D/- 10th September 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 10 (2) (ii) — A *entering into agreement with* B *to purchase land, paying price and getting sale deed executed—Before registration of sale deed* A *agreeing with* C *to get land conveyed to him by* B—C *executing pronote in* A's *favour and paying certain sum in cash—At* A's *instance* B *executing registered sale deed in* C's *favour* — C *mortgaging land in question to* A *to cover amount due under pronote — Liability covered by mortgage held not one in respect of which charge was provided under S. 55 (4) (b), T. P. Act.*

A entered into an agreement with *B* to purchase land, paid the price and got a sale deed executed. Before the sale deed was registered there was an agreement between *A* and *C* whereby *A* undertook to get the land conveyed by *B* to *C* who executed in favour of *A* a promissory note and paid a certain sum in cash. On the same day at the instance of *A*, *B* executed a registered sale deed in favour of *C* and on the following day *C* executed a mortgage to *A* to cover the amount embodied in the promissory note :

Held that *A* had no interest which he could convey inasmuch as the title remained with *B* at the time of the transfer to *C* and though *B* was under an obligation to *A*, that obligation did not have the effect of vesting any title in *A*, who could not therefore be regarded as a seller and the amount due from *C* to him could not carry any charge such as was provided in S. 55 (4) (b), T. P. Act : A I R 1936 P C 204 and A I R 1927 P C 42, *Disting.*

[P 129 C 1]

V. S. Narasimhachar — for Petitioner.

P. Satyanarayana Rao—for Respondents.

Wadsworth J. — The petitioner in this revision petition entered into an agreement with one Seshayya to purchase land, paid the price and got a sale deed executed. When he was about to get the sale deed registered he was approached by respondent 1 who himself wanted a conveyance of the same land. There was an agreement whereby the petitioner undertook to get the land conveyed by Seshayya to respondent 1 and on that date respondent 1 executed in favour of the petitioner a promissory note and paid a certain sum in cash. On the same day at the instance of the petitioner Seshayya executed a registered sale deed in favour of respondent 1 and on the following day, 11th August 1921 respondent 1 executed a mortgage to the petitioner to cover the amount embodied in the promissory note of the previous day. In 1937 the petitioner sued on his mortgage and on 6th November 1937 he got a preliminary decree which was followed on 11th March 1938 by a final decree for Rs. 2575 and odd. When Madras Act 4 of 1938 came into force respondent 1 applied under S. 19 of that Act to scale down the decree debt. The application was resisted on the ground that the debt in question was a liability for which a charge is provided under S. 55 (4) (b), T. P. Act, and therefore by the operation of S. 10 (2) (ii) of Act 4 of 1938 was excluded from the scaling down provisions. This plea was rejected by the lower Court and the petitioner seeks to revise that order.

The only question therefore is whether the liability covered by the mortgage is one in respect of which a charge is provided under S. 55 (4) (b), T. P. Act. Section 55 (4) (b) provides that the seller is entitled to a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid. Is the petitioner in this case a seller and is the money in respect of which this mortgage was executed, unpaid purchase money in the hands of the buyer? It seems to us quite clear that the answer to both these questions must be in the negative. The petitioner was not the seller of the property for he had no interest which he could convey. The title remained with Seshayya at the time of the transfer to respondent 1 and though Seshayya was under an obligation to the petitioner, that obligation did not have the effect of vesting any title in the petitioner. So much follows from S. 54, T. P. Act, which lays down that a contract for the sale of immovable property does not of itself create any interest in or charge on such property.

The petitioner relies on two decisions of the Privy Council. 59 Mad 910,[1] was a case in which property had been purchased at court auction by the decree-holder and thirty days had elapsed from the sale without objection, at which juncture there was a compromise whereby the sale was confirmed except with reference to one item which was to be left in the hands of the judgment-debtor subject to a payment representing the value thereof. The payment was not made. The mortgage by which it was secured was found to be unenforceable and their Lordships of the Privy Council held that there was a charge in favour of the decree-holder purchaser for the amount due under the agreement of compromise as unpaid purchase price. Their Lordships held that the title of the decree-holder purchaser was complete although there had been no formal order of confirmation and that the recording of the compromise was a sufficient conveyance of that title to the judgment-debtor without the formalities of confirmation of the sale and a separate conveyance by the court-auction purchaser. That decision proceeded on the special facts of the case which have little or no similarity to the facts before us. It cannot be authority for the view that whenever a person who has no title but merely a right to a conveyance of title, arranges with his prospective vendor for a conveyance in favour of the third party, the rights of a seller subsist in favour of the person who has arranged for the conveyance but has not actually conveyed anything. The other decision is in 50 Mad 193,[2] which is merely to the effect that when there is a gift deed registered after an interval of time, title passes as on the date of the execution deed and not as on the date of its registration. This again is no authority for the view that when there is a deed not made effective by registration it conveys title. Clearly there was no title in the petitioner which he could convey to respondent 1. He cannot therefore be regarded as a seller and the amount due from respondent 1 to him will not carry any charge such as is provided in S. 55 (4) (b), T. P. Act. The decision of the lower Court is correct and the petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

1. ('36) 23 A I R 1936 P C 204: 163 I C 4: 59 Mad 910: 63 I A 304 (P C), Zamindar of Polavaram v. Maharajah of Pittapur.
2. ('27) 14 A I R 1927 P C 42: 100 I C 105: 50 Mad 193: 54 I A 89 (P C), Kalyanasundaram Pillai v. Karuppa Mooppanar.

* A. I. R. 1941 Madras 129

MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Madipalli Venkatachellam — Appellant

v.

Madipalli Suryanarayanamurty and others — Respondents.

Appeal No. 52 and Civil Revn. Petn. No. 921 of 1936, Decided on 16th August 1939, against decree of Dist. Court, East Godavari at Rajahmundry in O. S. No. 34 of 1926.

(a) Civil P. C. (1908), Sch. 2, Paras. 11 and 20 — Paras. 11 and 20 are different and cannot be usefully compared.

There is little relation between Paras. 11 and 20 which deal with very different topics and therefore cannot be usefully compared : A I R 1932 Mad 462, *Dissent.* [P 133 C 1]

(b) Civil P. C. (1908), S. 21 and O. 41, R. 2 — Objection not set forth in grounds of appeal — Appellate Court under O 41, R. 2 has discretion to allow objection and ordinarily would not object to its being raised and argued if respondent is not likely to suffer thereby — Objection to territorial jurisdiction neither raised in trial Court nor mentioned in grounds of appeal — Objection held on facts of case could not be allowed to be raised — But in view of large stakes involved and possibility of case proceeding further it was proper that objection be dealt with on merits.

Order 41, Rule 2 leaves a discretion in the Court as to whether an appellant may be allowed to urge in support of his appeal a ground of objection not set forth in the memorandum of appeal. Ordinarily, the appellate Court would not object to a new ground of appeal being raised and argued if the respondent is not likely to suffer any prejudice thereby. [P 135 C 1]

The application for filing an award was made in the trial Court in September 1926 and was heard and disposed of in October 1935. The appeal to the High Court was filed about three and half years before it came up for hearing in 1939. The objection to the territorial jurisdiction was raised neither in the trial Court nor mentioned in the grounds of appeal :

Held that after all the long lapse of time and after all the expense which must have been incurred the High Court would naturally feel reluctant to allow the objection to be raised when it had never been taken before. But, in view of the large stakes involved and the possibility of the case proceeding further, it was proper that the objection should be dealt with on merits. [P 135 C 1]

(c) Civil P. C. (1908), Sch. 2, Para. 20 and Ss. 15 to 20 and S. 89—Para 20 should be construed liberally — Sch 2 is not self contained — Ss. 15 to 20 apply to it—Court having territorial jurisdiction by reason of S. 17 over part of subject-matter of award has jurisdiction over its entire subject matter — Applications under Para. 20 must be treated as suits — S. 89 does not prohibit such course—Court's jurisdiction by reason of S 16, Explanation does not extend beyond British India or to place within it to which Civil Procedure Code does not extend.

Paragraph 20 must receive a liberal rather than a restricted construction. Sections 15 to 20 are applicable to Sch. 2 which is really a part of the Civil

Procedure Code and there is no justification to regard it as a self-contained chapter in itself. Therefore it is not only permissible but obligatory upon the Court to take note of the provisions of Ss. 15 to 20 and with their aid to ascertain which Court is the proper Court to entertain an application under Para. 20. Paragraph 20 (2) makes it clear that the applications should be in every way treated as suits and that the procedure applying to suits should apply to them. Section 17 governs the consideration of the question as to which Court is to be held for the purpose of Sch. 2, Para. 20 to have jurisdiction in a given case. Consequently, when a Court has jurisdiction under S. 17 by reason of part alone of the subject-matter of the award being within its local limits, that jurisdiction extends over the entire subject-matter of the award. There is nothing in the language of S. 89 to warrant that the sections of the Code or the rules in Schedule 1 do not apply to matters arising under Sch. 2. It is not permissible however in view of the explanation to S. 16 to extend the jurisdiction of the Court beyond British India or even to any place within it to which the Code of Civil Procedure does not extend. Consequently, a distinction must be made between cases where the property lies within British India though in different jurisdictions to which the Code applies and a case where some portion of the property is within British India and some portion out of it, in a Native State or in any other place to which the Code as such is not, and could not be made applicable. Section 17 can be displaced only in a case where part of the property is situate outside British India and not in a case where the whole of it is in British India though in different jurisdictions and therefore governed by the Code : *Case law referred.* [P 135 C 2; P 136 C 1; P 137 C 1, 2]

(d) Civil P. C. (1908), Ss. 15 to 25 — Determination of place of suing is same thing as determination of territorial jurisdiction of Court — Objection to territorial jurisdiction can be waived—Court dealing with litigation by reason of S. 17 or omission of party to object to its territorial jurisdiction—Case is one where there is either no initial defect of jurisdiction or if there was one it must be deemed to have been waived.

The determination of the place of suing is the same thing as the determination of the local or territorial jurisdiction of the Court. An objection having reference to the local or territorial jurisdiction of the Court is capable of being waived. If, either by reason of S. 17 of the Code or by reason of the omission of the party to take the objection to the territorial jurisdiction of the Court at the proper time, the Court entertains or deals with a litigation, the case is one where there was either no initial defect of jurisdiction, or if there was such a defect it must be deemed to have been waived. [P 136 C 2]

(e) Civil P. C. (1908), S. 16 and Ss. 17 to 25 — Construction — Ss. 17 to 25 enlarge scope of section 16.

Section 16 is the most important section of the group of sections relating to the place of suing. Section 17 and the later sections in the group proceed to widen and enlarge the scope of S. 16 by enacting other and more liberal rules. [P 137 C 1]

(f) Arbitration — Misconduct of arbitrators—Particulars of misconduct should be explicit — Arbitrator indebted to some of referring parties unknown to others — Court is entitled to hold that it would be unsafe to rely on arbitrator's judgment — It is not misconduct for arbitrator to be wrong.

A broad allegation of misconduct on the part of arbitrators without any particulars is not enough. The particulars of misconduct should be explicit. Fact that an arbitrator was indebted to some of the referring parties unknown to other of the referring parties might well entitle a Court to hold that it would not be safe to rely on his judgment. It is not misconduct for an arbitrator to be wrong. [P 139 C 1; P 140 C 1, 2]

(g) Arbitration — Party with full knowledge of circumstances allowing arbitration to proceed and taking part in it — Aforesaid party seeking to evade it by after-thought objections — Court cannot assist party.

A Court would be unwilling to assist a party who, with full knowledge of the circumstances, allows an arbitration to proceed and takes part in it and then seeks to evade it later on by raising a number of objections which have never occurred to him before : 3 I A 209 (P C), *Rel. on.* [P 141 C 1, 2]

(h) Arbitration—Joint Hindu family—Reference for division of property by male members —Provision for charity and female members is not outside terms of reference.

In the case of a reference by the male members of a joint Hindu family to arbitration for division of the family property a provision by the arbitrators for charity and women members of the family cannot be said to be outside the terms of the reference especially when it has been agreed to by the parties. [P 142 C 1]

(i) Civil P. C. (1908), Sch. 2, Paras. 17 and 19 — Agreement to refer cannot be specifically enforced — But arbitration falling under Sch. 2 can be enforced by Paras. 17 and 19.

Although an agreement to refer to arbitration cannot be specifically enforced under the Specific Relief Act but an arbitration the subject of Sch. 2 can be enforced by the provisions of paras. 17 and 19. [P 142 C 2]

(j) Arbitration—Reference to—Termination of —Old English Common law rule does not apply in India — Death of a referring party does not of itself recall reference — Whether reference continues depends on circumstances of case — Reference by father and sons of joint Hindu family held did not come to an end by father's death.

In India there is no rule that the death of a referring party of itself recalls the reference to arbitration, that is, brings it to an end. Whether it must continue depends upon the special circumstances of each case. The old English Common law rule as to revocation of contracts to refer to arbitration does not apply in India and the fact that the remedy by way of specific performance has been limited to the mode indicated in the Civil Procedure Code is no reason for holding that the contract can be put an end to at the will of one of the parties to it. It rather emphasises its enforceability by the other, though not by suit but by the process of an application. [P 144 C 1; P 146 C 2]

Where the underlying intention of the reference by an old father and sons forming joint Hindu family was a final division of the properties and the probable early death of the father had been in contemplation :

Held that it was not open to one of the sons after the father's death to argue that there was no intention that his legal representatives should be

bound, especially when the son took no objection to the continuance of the reference on the father's death and that the reference in the circumstances of the case did not end by the father's death : *Case law referred.* [P 144 C 1; P 146 C 2]

(k) Arbitration—Reference for adjustment of family disputes — Reasonable degree of latitude must be allowed in examining award — Court will not interfere unless real injustice or substantial divergence from law can be proved.

In examining an award passed in arbitration proceedings relating to the adjustment of family disputes a reasonable degree of latitude must be allowed and the Court will be reluctant to interfere unless some real injustice or substantial divergence from the law can be proved. When the matter has gone on without objection by anybody until after the result, it would be most undesirable to interfere especially in matters of procedure unless the Court felt itself constrained to do so in the interests of justice. [P 144 C 1]

(l) Precedent — Indian Courts are not bound by English rules of common or statutory law except in so far as they furnish standard of justice, equity and good conscience.

The Courts in India are not bound by any English rule of the common or statutory law except in so far as it furnishes a standard of justice, equity and good conscience to be applied to the decision of questions arising for consideration by the Courts of India. [P 145 C 2]

(m) Arbitration — Reference by father and sons of joint Hindu family for division of property — Father by will making disposition of property and appointing his widow as executrix— On father's death reference continuing and award passed without notice to and in absence of executrix —Award is valid — Executrix alone can challenge award — Sons held could not take advantage of executrix's plea.

A reference to arbitration for division of Hindu joint family property was made by father and sons. The father in his will making a disposition of property appointed his widow as executrix. After the father's death however the reference proceeded and an award was passed. One of the sons contended that the award was bad and could not be sustained as it was passed without notice to, and in the absence of, the executrix :

Held that the only party who could be said to have had a grievance was the executrix herself who had not however chosen to challenge the award and that the son who never thought of the objection and never put it forward before the arbitrators could not be permitted to take advantage of a ground which might have been available to some party other than himself, namely the executrix. [P 146 C 2]

(n) Civil P. C. (1908), O. 22—O. 22 does not apply to private reference to arbitrators.

So long as a dispute is pending before arbitrators on a private reference, the proceedings before them are not governed by the provisions of O. 22, and there can be no question therefore of the legal representative of a deceased party being brought on the record. [P 147 C 1]

V. V. Srinivasa Ayyangar, Ch. Raghava Rao and T. Satyanarayana Rao — for Appellant.

P. V. Vallabhacharyulu and K. Bhimasankaran — for Respondents.

Mockett J. — Defendant 1 is the appellant. He is the son of one Chelamiah who died on 15th October 1925 at a great age. Defendant 2 is the brother of defendant 1 and the plaintiff is the third brother. The following facts were stated from the bar and were accepted. In April or October 1917—at this stage it is not necessary to be more precise about the date—the family became divided in status. In 1920, defendant 2 filed, but subsequently withdrew, a suit for partition, but on 22nd May 1921 there was a muchilika entered into between the parties with a view to dividing the property. On that there was a reference to arbitration by the plaintiff and the defendants and it is on that reference that this matter comes before this Court, having been first of all decided by the District Judge of East Godavari. That is all that is necessary at present with regard to the facts, because what is now being dealt with may be called a preliminary point. It can be shortly stated. Mr. V. V. Srinivasa Iyengar for defendant 1 has raised a point which was referred to but not decided by the Judicial Committee of the Privy Council in 51 Cal 361.[1] The point in question is dealt with by Lord Phillimore at p. 372. His Lordship said :

It was contended on behalf of the appellant that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court ; in fact, that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. Their Lordships deem it unnecessary to rest their judgment on any such general proposition.

Lord Phillimore went on to point out why it was unnecessary to decide that point. His reason was this, namely, that it was evident to their Lordships that the property concerned in the case before them was property wholly outside British India and that in the words of their Lordships there was no dispute concerning the ownership and management of properties within the jurisdiction. It must, therefore, be emphasised in that case that what was before the lower Court was an application under para. 20, of Sch. 2, Civil P. C., relating to property wholly outside the jurisdiction of the Courts of British India. What is the procedure set out in Sch. 2? Clause 20 is headed "arbitration without the intervention of a Court" and it says :

Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in

1. ('24) 11 AIR 1924 P C 95 : 83 I C 531 : 51 Cal 361 : 51 I A 72 : 20 N L R 33 (P C), Ramlal Hargopal v. Kishanchand.

the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

And in the case to which I have just referred there was an application to the Court to file an award with regard to property wholly outside British India. In this case it is not necessary to say more than this, that admittedly this award dealt with property and part of it was immovable property within the jurisdiction of the District Judge of East Godavari and part of it outside his jurisdiction, as that term is ordinarily understood. Mr. Srinivasa Iyengar has argued before us exactly the point that was referred to by Lord Phillimore. His argument is that cl. 20 of Sch. 2 to the Code states that the person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award and that means "to a Court having jurisdiction over the whole of the subject-matter of the award" and that, as admittedly part of the subject-matter of this award is situated outside East Godavari judicial district, the District Judge had no jurisdiction. And Mr. Srinivasa Iyengar has also not recoiled from the position that no Judge had any jurisdiction to make an order under cl. 20 in regard to this matter, because once it is conceded that the subject-matter is in more than one jurisdiction, it must follow that no Judge in any one jurisdiction can have jurisdiction over it. That seems to me to be a startling proposition and it is difficult to suppose that the Legislature can have contemplated the results it would produce in numerous cases—for, it naturally and frequently happens—especially on the borders of districts that family lands are partly in one district and partly in another. But authorities have been cited to us which, according to the learned counsel for the appellant, are said to support the proposition. It is as well to state that no authority has been cited to us covering facts similar to the facts now under consideration.

There is no authority which has been brought to our notice in which it has been decided that, when an application under cl. 20 relates to property in two jurisdictions in British India, no Court has jurisdiction to hear the application. But there is clear authority that, when part of the subject-matter is in British India and part of the subject-matter is in a foreign state which naturally in this country usually means "in a native state," the Court in British India cannot exercise jurisdiction over the award. I respectfully agree that that must necessarily be so, because, once it is conceded, and especially in the case of immovable property, that the property in question is wholly outside the jurisdiction of the British Courts, it must follow that a British Court cannot deal with an award because the award could not be enforced in a foreign state and moreover very curious results must follow, if the award was divided. The following result would follow; that is to say A has awarded to him lands in British India and B lands in a foreign state. A partial enforcement of that award would mean that A would get something and B would get nothing. It is obvious that, in order to make an award effective, the whole of it must be enforced except possibly in such cases in which it appears that the award may be equitably divisible and that is a topic on which I desire to express no opinion. This particular topic—severability—has been discussed in one or two cases but does not in this case require any decision from us.

Mr. Srinivasa Iyengar relies very strongly on a decision of this High Court which is reported in 55 Mad 689.[2] The learned Judges in that case, Reilly and Ananthakrishna Iyer JJ. held that the expression "the subject-matter of the award" in para. 20 of Sch. II, Civil P. C., means "the whole" and not "the whole or portion of the subject-matter of the award" and a Court within whose jurisdiction a portion of the immovable properties forming the subject-matter of an award is situated has therefore no jurisdiction to entertain an application to file the award made under that paragraph. That is a very general proposition and, if accepted by us, undoubtedly covers this case and is a clear authority in favour of Mr. Srinivasa Iyengar's argument. But it is most important to emphasise that in that case the properties over which the subordinate Judge of Palghat in this province purported to exercise jurisdiction were partly within the Madras Presidency and partly in Travancore, a state under the rule of His Highness the Maharaja of Travancore. There was some discussion with regard to certain property situate in Bangalore. It is not necessary to go into that as it is sufficient if part of the property concerned lay within Travancore. That judgment therefore deals with the position which I have

2. ('32) 19 A I R 1932 Mad 462 : 139 I C 877 : 55 Mad 689 : 62 M L J 550, Krishna Iyer v. Subbarama Iyer.

previously indicated, namely, where it is obvious that the Court in British India can have no jurisdiction to make any order. It is to be emphasized that there were immovable properties in Travancore State. It does not seem that in that case any argument was addressed to the Court with regard to the position before us now, namely, where the whole of the properties are in British India. At p. 694 Ananthakrishna Iyer J. who gave the leading judgment of the Court says:

> Prima facie the expression 'over the subject-matter of the award' would seem to imply over the whole of the subject-matter of the award. The words 'whole' or 'in part'' occur in para. 11 of Sch. 2, and in S. 17 of the Code, the words 'any portion of the property' occur. If therefore the intention of the Legislature was that the words 'subject-matter of the award' should mean the whole or a portion of the subject-matter of the award, then it is reasonable to expect that it would have said so expressly.

As to this, there seems to me to be little relation between para. 11 and para. 20 which deal with very different topics and with respect I am not able to agree that they can be usefully compared. The learned Judges relied on two decisions, both of this High Court. The first was a decision of Scotland C. J. and Collett J. reported in 5 M H C R 128[3] and secondly reference is made to certain observations of Kumaraswami Sastri J. in 10 M L W 57.[4] Reference is also made to a decision in Rangoon reported in 9 Rang 480.[5] But in that latter case also the subject-matter was immovable properties within the jurisdiction of British Courts and immovable properties in the French territory of Pondicherry. In the case reported in the Madras High Court Reports, the Court observed as follows:

> The application must be made to a Court having jurisdiction in the matter to which the award relates. . . . . From this it appears quite clear that the Court applied to must be one having jurisdiction in respect of the whole matter.

We have had the advantage of seeing the original documents in that case. It was a reference by the Judge of the Small Cause Court, Chittoor, and it is clear from that reference that what the arbitrators had done was to adjudicate on debts payable between the parties, the aggregate thereof being beyond the jurisdiction of the Small Cause Court, but the amount of one of them within the jurisdiction. In other words, what was raised in that reference was, could a Court of Small Causes deal with an award which dealt with matters beyond its pecuniary jurisdiction? And the learned Judges took the view that the Court applied to must be one having jurisdiction in respect of the whole matter. That seems to me to mean "having jurisdiction in the sense that it is understood, the measure of pecuniary jurisdiction" and that, if the award dealt with a matter that was beyond that jurisdiction, it was a clear case when the award as a whole could not be enforced by that Court. The judgment of Kumaraswami Sastri J. does not seem to me to touch the question which we have to decide, because his observations are very general. What had happened in that case was that an arbitrator had joined in an award an order for dissolution of marriage and also for the payment of money. What Kumaraswami Sastri J. held was that the jurisdiction of the Court would depend upon the reliefs awarded by the award and that it was not open to the parties to confer jurisdiction on the subordinate Judge to deal with matters over which he had no jurisdiction at all. It should in this appeal be remembered that the District Court of East Godavari has unlimited jurisdiction. It is well to mention that the decision to which we have just referred in 55 Mad 689,[2] has been considered by a Bench, Broomfield and Sen JJ. of the Bombay High Court in A I R 1937 Bom 211[6] and their Lordships at p. 212 express the view that,

> if the decision in 55 Mad 689[2] is correct, it would mean that in many cases private arbitrations could never be made effective in the manner contemplated by the Legislature, since there would be no Court to which the application could be made. With all deference to the learned Judges who decided this case I am not satisfied that this is the law.

In my view the learned Judges in Bombay have not noticed what seems to me the key to the whole position, namely, that, however general the words in decision, the decision itself actually only deals with references in which property in British India and property in a foreign jurisdiction is concerned. If the decision of the Court was intended to go further than the actual facts before it, I personally should be disposed to share the doubt expressed by the Bombay High Court. But I take the view that that decision extends no further than the actual facts and that it is only due to the generality of the observations of the Court while dealing with those particular facts that it

3. ('70) 5 M H C R 128, Gangappa v. Kapinappa.
4. ('19) 6 AIR 1919 Mad 22 : 51 I C 53 : 10 M L W 57, Rethamali Servai v. Ramaswami Servai.
5. ('31) 18 A I R 1931 Rang 252 : 135 I C 65 : 9 Rang 480 (F B), S. A. Nathan v. S. R. Samson.
6. ('37) 24 A I R 1937 Bom 211 : 169 I C 301 : I L R (1937) Bom 338 : 39 Bom L R 159, Gangadhar v. Dattatraya.

has been possible to attempt to extend the decision so as to bring about the deadlock which the appellant seeks to establish in this case in applications under clause 20 of schedule 2.

In my view there is a complete answer to the argument which has been put before us by Mr. Srinivasa Iyengar. It must be observed in cl. 20 that any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award. How is the Court to determine whether it has or has not jurisdiction? What procedure is laid down? In the case of an ordinary Court, in an ordinary suit, the Civil Procedure Code, Ss. 15 to 25 give guidance to the Courts as to how they should decide whether they have jurisdiction or not and it seems to me that it is by reference to S. 16 that the appellant contends that the Court has no jurisdiction. But it is argued that these sections do not apply to proceedings under cl. 20. The nature of those proceedings is dealt with in sub-cl. (2). It is stated that the application should be in writing and shall be numbered and registered as a suit between the applicant as the plaintiff and the other parties as defendants. A reference to the record in this case shows that the pleadings are described as in an ordinary suit. It is numbered as such. There is the document headed a "plaint". There are three written statements and additional written statements and there were issues. From where is all that procedure derived? It has not been possible for me to understand how, if the Civil Procedure Code does not apply, it is possible for the Court to which application is made under cl. 20 to decide any matters at all.

Once again how can it decide whether it has jurisdiction? It seems to me that the curious position referred to by Lord Phillimore and argued before us to-day is met by the answer that the intention of sub-cl. (2) of cl. 20 is that these applications should be in every way treated as suits and that the procedure applying to suits should apply to them; and I am fortified in that view by the position which at the risk of repetition I will again state that, if it is not so, then apparently there is no procedure and no methods whatever provided by which the Court can deal with those matters. If that is so, S. 17 of the Code provides that where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate. If S. 17 appiles, it is obviously open to the plaintiff as they are described in the pleadings in this case to file their plaint in East Godavari and the East Godavari Court would have jurisdiction to hear that case not only with regard to the property immediately within its jurisdiction but with regard to any other property, the subject of that suit; and the result would be that by the application of S. 17 the East Godavari Court would have jurisdiction over the whole of the subject-matter when the trial starts. If that is so, much of the argument in this case will have been unnecessary. I hold that for the reasons I have given, the District Judge had jurisdiction to deal with the whole of the subject-matter which is situate in the first place outside his jurisdiction, but by the filing of the suit included the other matters in the plaint over the whole of the subject-matter. The arguments which I just referred to were directed from another aspect of the case altogether.

It was contended by the learned counsel for the respondent that it was not open to Mr. Srinivasa Iyengar to raise this objection at all. It had never been argued in the Court below that the Court had no jurisdiction and therefore says the learned counsel for the respondents, S. 21, Civil P. C., is in the appellant's way. It has never been raised as a ground of appeal and therefore again says the respondent, O. 41, R. 2, prevents the appellant from raising it. As the argument was originally put to us by Mr. Srinivasa Iyengar, I am inclined to the view that he was not prevented from raising the point for the same reason that the appellant was not prevented from raising the point in the case before the Judicial Committee to which I have referred, because what he was arguing was that this was a case of no jurisdiction whatever. But in view of what I have held above, I think technically this is a matter relating to the place of suing which should have been raised in the lower Court and that therefore both the provisions of the Civil Procedure Code stand in Mr. Srinivasa Iyengar's way and, speaking for myself, I should not be disposed to grant him any indulgence here to allow him to raise it. All this however is purely academic, because, in order to arrive at a decision with regard to the whole matter, it has been necessary for us to hear it argued in full and I therefore only record my above view for the sake of completeness. For the

reasons I have given I consider that the objection by the appellant that the lower Court had no jurisdiction to hear this application under cl. 20, Sch. 2, Civil P. C., must fail.

Krishnaswami Ayyangar J.—I agree. It is unnecessary for me to refer to the facts which have been sufficiently set out in the judgment of my learned brother just now delivered. In the memorandum of appeal before us the appellant has taken a number of points. We are not now dealing with any of those points but with a question of jurisdiction not raised in the Court below and not mentioned in the grounds of appeal before us. Order 41, R. 2 leaves a discretion in the Court as to whether an appellant may be allowed to urge in support of his appeal a ground of objection not set forth in the memorandum of appeal. I may also mention that, beyond giving the respondent notice that the objection was going to be taken, the appellant has not chosen to follow the procedure indicated by R. 42, Appellate Side Rules, for obtaining leave to raise an additional ground of appeal. Ordinarily, speaking, we should not object to a new ground of appeal being raised and argued if the respondent is not likely to suffer any prejudice thereby. But it seems to me that the facts of this case render it extremely difficult for us to exercise our discretion in favour of the appellant. The application for filing the award was made in the Court below in September 1926 and it was heard and disposed of on 30th October 1935. The application therefore appears to have been pending for a period of nearly nine years in the Court below and the hearing itself before the learned Judge seems to have occupied a period of 12 days. The appeal to this Court was filed about three and half years back and, after all this long lapse of time and after all the expense which must have been incurred, one feels naturally reluctant to allow a point to be raised which had never been taken before. But, in view of the large stakes involved and the possibility of the case proceeding further, it is perhaps proper that we should deal with the merits of the objection.

The objection is that the Court below had no jurisdiction to entertain the application because the whole of the property which formed the subject-matter of the award did not lie within the local limits of its territorial jurisdiction. It is not disputed that except for a house in Innespet, Rajahmundry, and a share in a rice factory in the same place the rest of the large properties, mostly immovable, dealt with by the award were outside the Court's jurisdiction. Mr. Srinivasa Iyengar, the learned counsel for the appellant, has contended that the Court having jurisdiction over an application to file an award under para. 20, Sch. 2, Civil P. C., is the Court having jurisdiction over the whole of the subject-matter of the award and inasmuch as admittedly in this case a portion only of that subject-matter was within the jurisdiction of the Court below, it had no jurisdiction to entertain the application. In other words, a Court having territorial jurisdiction over a part only of the subject-matter is wholly incompetent to deal with an application filed under the paragraph. If the award should be sought to be enforced in a suit it is not disputed that the suit could be entertained by a Court having jurisdiction over part only of the subject-matter of the award. The contention however is that an application coming under para. 20 is not governed in matters of jurisdiction by the rules in the Code which determine the venue for the purpose of a suit. There are two objections to this contention. In the first place, though para. 20 speaks of a Court having jurisdiction over the subject-matter of the award, neither it nor Sch. 2 contains any rules for determining the Court invested with jurisdiction in matters within Sch. 2. We would be left entirely without any guidance on the point unless we can refer to the provisions of Ss. 15 to 25 in the Code as providing the necessary machinery. Section 89 of the Code is not to be regarded as implying a prohibition to this course. That section provides that

> save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all reference to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2.

There is nothing in the language of the section to warrant our holding that the sections of the Code or the rules in Sch. do not apply to matters arising under Sch. 2. For instance, the question whether the procedure of O. 23, R. 3 could be made applicable to matters arising under Sch. 2 was considered in 51 Mad 800[7] and it was ruled that the Code was applicable to Sch. 2 which is really a part of it and that there was no justification to regard it as a self-contained chapter in itself. So it seems

7. ('28) 15 A I R 1928 Mad 1025 : 113 I C 632 : 51 Mad 800 : 55 M L J 429 (F B), Subbaraju v. Venkataramanaraju.

to me that it is not only permissible but obligatory upon the Court to take note of the provisions Ss. 15 to 20 and with their aid to ascertain which Court is the proper Court to entertain an application under para. 20. Among those sections is S. 17 which furnishes a valuable guidance for the determination of the point raised. It enables a party to institute a suit relating to immovable property if a portion at least, though not the whole of the property is situate within the limits of the Court to which he resorts. Where the property is situate within the jurisdiction of different Courts, the plaintiff has the option of choosing any one of those Courts, and when he has once chosen it, he is entitled to bring before it not only so much of the dispute as relates to the property within its jurisdiction but the entire dispute covering that property, and other property in other jurisdictions as well. In other words, where, by reason of S. 17, a Court is given jurisdiction by reason of part alone of the property being within its local limits that jurisdiction extends over the entire subject-matter of the suit.

I am quite unable to accede to the argument that S. 17 does not govern the consideration of the question as to which Court is to be held for the purpose of para. 20 of Sch. 2 to have jurisdiction in a given case. If this construction is not to be accepted it would lead, as my learned brother has observed, to startling results; it would really result in denying altogether to a litigant an easy and inexpensive remedy by way of application in every case where the subject-matter of the award lies in more jurisdictions than one. In fact, if such were the case no Court whatever would have jurisdiction to deal with an application under the paragraph. If this was the intention of the Legislature, one would expect to find more explicit language to have been used. In my opinion it is a forced construction that is sought to be placed upon the word subject-matter in para. 20. It is not to be forgotten that the primary object of the Legislature is to place in the hands of litigants an easy, speedy and inexpensive remedy by resort to a domestic tribunal of their own choice without the necessity of having to institute a suit with all the delay, expense, worry and trouble it might entail. Paragraph 20 appears to my mind to be conceived with the object of promoting such a beneficent purpose and I am of opinion that if I accede to the contention of the appellant, it would result, in an appreciably large number of cases, in the frustration of the very object behind the paragraph. Beyond stating that such was the law and the plain construction of the language, the appellant's learned counsel was unable to point to any intelligible or rational basis for the distinction that he drew between a suit and an application for enforcing an award. And I find it difficult for my part, more especially when the language is not plain, to give my assent to a construction which, far from advancing justice, has the effect of hindering it.

It is true that para. 20 speaks of any Court having jurisdiction. Jurisdiction may be territorial, or pecuniary and may also depend on the nature of the dispute brought up for settlement before the Court. Whether or not an objection to jurisdiction which is based upon the limits of pecuniary jurisdiction or has reference to the nature of the disputed matter can be waived, it seems to me that an objection having reference to the local or territorial jurisdiction of the Court is capable of being waived. This furnishes the second ground for repelling the contention. Section 21, Civil P. C., enacts that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity. Some argument—I confess it was a little too subtle for me—was advanced on behalf of the appellant to the effect that there was a distinction recognised by the Code between what was called 'the place of suing' which is the heading under which Ss. 15 to 25 appear and the jurisdiction of the Court to take cognizance of a matter although that jurisdiction may turn on its local or territorial limits. To my mind the determination of the place of suing is the same thing as the determination of the local or territorial jurisdiction of the Court. If, either by reason of S. 17 of the Code or by reason of the omission of the party to take the objection to the territorial jurisdiction of the Court at the proper time, the Court entertains or deals with a litigation it seems to me that it is a case where there was either no initial defect of jurisdiction, or if there was such a defect it is one that must be deemed to have been waived. As my learned brother has pointed out, para. 20. cl. 2 makes it fairly clear that the procedure applicable to the determination of applications coming within it is the procedure relating to suits

and, if I understood the appellant's learned counsel aright, he seemed to concede this proposition. The considerations adverted to above incline me to the opinion that the District Court of East Godavari which had admittedly jurisdiction over a part of the subject-matter of the award had ample jurisdiction over the whole and was therefore competent to make the order it has made.

It has been contended that there are judicial pronouncements in this Court and in the Privy Council which make it obligatory on us to hold that where the whole of the subject-matter is not within the jurisdiction of a Court but only a part of it, that Court has no power to entertain the application. Before referring to the cases relied upon for the appellant, it is perhaps well to remember that in S. 16 of the Code which lays down the essential test for fixing the venue there is an important explanation added, namely that 'property' in the section means 'property situate in British India'. Section 16, is the most important section of the group of sections relating to the place of suing. Section 17 and the later sections in the group proceed to widen and enlarge the scope of S. 16 by enacting other and more liberal rules. However that may be, it is not permissible in view of the explanation to S. 16 to extend the jurisdiction of the Court beyond British India or even to any place within it to which the Code of Civil Procedure does not extend. In 42 Mad 813[8] the question was whether a mortgage decree for the sale passed by the subordinate Judge of Vizagapatam comprising properties not only within his jurisdiction but also in the Agency tract governed by the Scheduled Districts Act could be held to be valid. The Civil Procedure Code did not extend to the agency and the subordinate Judge who was only exercising jurisdiction under the Code had no power whatever to deal with, or pass any decree relating to, property in the agency. That being so, the objection to the jurisdiction of the Court was held to be one which went to the very root of the matter and the decree was held to be null and void so far as that property was concerned. For the term 'Courts' in S. 17, Civil P. C., as their Lordships point out, could have reference only to Courts to which the Code applies and where the Code did not apply, it was no use referring to S. 21 or any other provision in it, for validating an invalid order. The importance of this decision lies in this, that a distinction must be made between cases where the property lies within British India though in different jurisdictions to which the Code applies and a case where some portion of the property is within British India and some portion out of it, in a Native State or in any other place to which the Code as such is not and could not be made applicable.

It is on the decision in 55 Mad 689[2] that the appellant relied almost exclusively for the argument that the Court below, not having jurisdiction over the whole of the subject-matter, had no jurisdiction at all to deal with the application. A reference to the facts of the case makes it clear that the award in that case comprised property partly situate in British India and partly in Travancore. The Court held that the application could not be entertained as the word subject-matter in para. 20 of Sch. 2, Civil P. C., meant the whole matter dealt with and decreed by the award and not any particular portion of it only and that the Court being incompetent to pass a decree in respect of the whole of the award property could not split it up and deal with only those portions of it that were within its jurisdiction. The learned Judges were concerned as pointed out by Ananthakrishna Iyer J. at p. 696 with the question whether the Court in British India had jurisdiction to pass a decree in accordance with the award when that award dealt with property outside British India. The actual decision was thus circumscribed by reason of the inapplicability of the Code to part of the award property and the consequential incompetency of the Court to deal with it. It is thus clear that S. 17 can be displaced only in a case where part of the property is situate outside British India and not in a case where, as here, the whole of it is in British India though in different jurisdictions and therefore governed by the Code. In fact neither side has been able to point to any precedent governing a case like the one before us. There are however observations in the judgment which tend to support the appellant though the actual decision, as I understand it, does not. We have examined the facts in all the cases referred to by the learned Judges who decided 55 Mad 689[2] and we find that there is none among them which can be said to furnish a parallel to the present case. It will be found on examination that either they are cases where the question did not turn upon

8. ('19) 6 A I R 1919 P C 150 : 51 I C 185: 42 Mad 818 : 46 I A 151 (P C), Ramabhadra Raju v. Maharaja of Jaipur.

territorial jurisdiction at all as for example, 5 M H C R 128[3] and 10 M L W 87[4] or where a single inseparable award had dealt with property situate partly in British India and partly outside. Ananthakrishna Iyer J. has also expressed the opinion that para. 20 provides a special procedure and confers an extra and special statutory right under special conditions imposed by that paragraph. He thinks that there is no hardship in construing S. 20 in the way he does as there is an alternative remedy available to the party by a regular suit which he can by virtue of S. 17 institute in any one of the several Courts within whose jurisdiction the property or any part of it is situate. I regret that with great respect I am unable to agree that this aspect of the question affords a true guidance to the construction of para. 20 which, as I have indicated, must receive a liberal rather than a restricted construction. The Bombay High Court has expressed a view contrary to the one which has found support in 55 Mad 689.[2] The latest case in Bombay brought to our notice is that reported in A I R 1937 Bom 211,[6] to which I shall not refer as it has been already dealt with in detail by my learned brother.

Reference was made to the decision of the Privy Council reported in 51 Cal 361.[1] In that case an award relating to the management of three Hindu temples for the support of which three villages had been endowed two of which were in Berar, was sought to be filed in the District Court of East Berar. Two of the temples were in the Dominions of the Nizam, and the third in British India but not in Berar. The objection to the jurisdiction taken before the District Judge himself in the first instance though not pressed afterwards was allowed to prevail in the Privy Council. The ground of the decision was that all the temples were outside Berar and although two of the endowed villages were within the jurisdiction, there was no dispute concerning their ownership or management or the application of their revenues to the upkeep of the temples. In other words, the award did not in fact deal with properties outside the jurisdiction, or as the Board pointed out, there was no substantial question decided by the award which affected property within the jurisdiction of the Berar Court. It was no doubt contended that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court; in fact that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. But their Lordships did not find it necessary to pronounce on any such general proposition. I am unable to treat this decision as containing any support for the appellant's contention. The point is merely mentioned and not decided, and the relevant provisions of the Code were not noticed. For the reasons which I have endeavoured to explain I am unable to see any substance in the objection to jurisdiction raised on behalf of the appellant and agree that it must be overruled.

[After the decision of the preliminary points their Lordships delivered the following judgments.]

Mockett J. — I will now deal with the objections to this award as stated by Mr. V. V. Srinivasa Iyengar who appears on behalf of defendant 1 Venkatachalam. (1) Chalamiah having died in 1925 was not thereafter a party to the reference which was thereby revoked. (2) If the reference was not thereby revoked, Chalamiah's legal representative should have been added. (3) Matters referred were not decided. (4) Matters not referred were decided. (5) The arbitrators misconducted themselves. (6) The award is bad in part on the face of it. As far as it is possible, I will deal with the arguments addressed separately on these points although many arguments overlapped. Reference must again be made to the following facts: By Ex. C dated 2nd October 1917 by which the family were divided in status there appears also to have been a scheme for the division of the family property. This scheme contains in para. 3 a provision for the building of a house for a purohit and for a choultry. Provision was also made for the mother of the plaintiff and defendants and other lady members of the family. That such provisions are normally expected to be found in a partition in a Hindu family is beyond doubt. The appellant's learned counsel does not seriously contend otherwise. He, however, has frankly stated his position which is this: that his client is aggrieved by this award and that he intends to attack it in every way open to him so far as the law allows. It is well to consider the circumstances under which this award came to be made, the persons concerned and the conditions under which these people lived and where they lived. This is not a reference with the formality associated with a reference under the auspices of the Chamber of Commerce in a

commercial city. It is a reference by a Hindu family all of whom had quite manifestly lived happily together for a long time. Who were the arbitrators? They were three old friends of the family fitted and chosen by the family for their knowledge of the family lands and for their character. Defendant 1 has stated in his evidence that Surappa Raju was to attend to the cultivation of the family lands at Vundur which he knew. He had been doing this for 5 or 6 years before 22nd May 1921, the date of the muchilika. Furthermore the arbitrators were respectable men as defendant 1 conceded in his re-examination. The arbitration was an informal affair and I have little doubt that to the very end they carried it out in a manner approved and known to all concerned including defendant 1. It is agreed that by 1922 nearly all the immovable properties had been divided among the family by the arbitrators. This, it should be observed, was before Ex. A. The date taken for the completion of the division of the immovable property is 30th November 1922 and regard was had to this date in the award by the arbitrators when making what they considered to be fair adjustments between the parties.

It will be convenient to deal first with the broad question of misconduct by the arbitrators. In the grounds of appeal it is very broadly alleged without particulars in para. 38, although para. 27 may be relevant to this allegation. But before us—and we have perhaps been somewhat indulgent to the appellant in hearing him at large on the subject—because particulars of misconduct should be explicit, it has been suggested that this in short was a hole and corner arbitration largely behind the back of defendant 1 and that certain findings by the arbitrators of themselves show prejudice and bad faith against defendant 1. The learned Judge has not been impressed with the truthfulness of defendant 1 and has stated so in no uncertain terms. I have already expressed the view that Venkatachalam knew all about what was going on throughout. Exhibits Q-2, Q, Q-1 and Q-3 and N show that Venkatachalam was corresponding with Venkata Raju with regard to this arbitration and was unquestionably at that time not giving the arbitrators the assistance by his presence to which they were entitled. I have no doubt that he was being requested by Venkata Raju to examine the books. Exhibit P dated 29th April 1924 is a letter to Venkata Raju acknowledging receipt of books. In Ex. P-1 Venkatachalam writes with regard to matters in the books. In this letter he says:

> Posting of ledgers has been almost completed; there is yet a little work to be done, I shall complete it and go there.

In his evidence he says, referring to Ex. O-1:

> I wrote I had prepared the balance sheet up to Sidharathi year. All these show that I had the account books with me at my house for enough time to examine them thoroughly. I never gave the Panchayatdars anything in writing, that I objected to any of the entries in the account books. I told them orally but except my own word there is nothing to show that I did make any representation to the Panchayatdars. The Panchayatdars sent word to me once or twice to go over and complete the award proceedings.

He refers to Ex. Q series. Narasu Raju gave evidence, the other arbitrators being dead. He gave evidence which the learned Judge accepted and which I accept. He says:

> We commenced the division of the properties a month or two after the execution of Ex. A. First the brothers looked into the accounts and settled them. That occupied a year or two. They had scrutinised the accounts by the time we attempted a division of the immovable property. The account books were with my brothers when defendant-plaintiff 1 and defendant 2 examined them.

It is evident that the procedure was very leisurely and that nobody was in any particular hurry. This witness states that defendant 1 took the books to examine all the accounts. I have no doubt that this witness carried out his duties with his colleagues in collaboration with all the referring parties. Yet Venkatachalam states the Panchayatdars did not scrutinise the accounts. That this is wholly untrue is obvious from an examination of the award itself which is elaborate. I can quite understand that in any matters in which the evidence of Venkatachalam conflicted with the evidence of P. W. 2, Narasaraju the learned Judge preferred the latter's evidence. Defendant 2 who gave evidence as P. W. 1 gives an elaborate account of the circumstances concerning this award. He says, all the records with the Panchayatdars were handed over to him after the award had been passed, and that they were all with the Panchayatdars two months after the execution of Ex. A. One or two questions by defendant 1 were directed towards inquiring why the arbitrators had not obtained signatures from the parties on certain occasions. Their answer "we might have thought their signatures were not material", is perfectly reasonable. At that time nobody was objecting to anything, cer-

tainly not to the procedure. Another allegation on which it is attempted to found misconduct is that money was lent to the arbitrators by the defendants, that the arbitrators were therefore in a position to be influenced in their judgment by their obligations. Of course, if it is shown that an arbitrator has debts unknown to other of the referring parties, it might well entitle a Court to hold that it would not be safe to rely on his judgment. But, in this case, these people were all friends and it is evident that there were debts due to Venkatachalam himself by the arbitrators. Exhibit H is an example and EX. H shows that in August 1923 during the course of the arbitration Venkatachalam gives a receipt for monies paid to him on account. That Venkatachalam knew all about the financial transactions between the arbitrators and his brothers and was himself having similar transactions is clear. There is nothing whatever in the financial relations between these parties that would suggest that there were any secret or improper obligations affecting the judgment of the arbitrators. It appears that a sum of Rs. 25,000 money in the hands of the arbitrators was lent by them to a rice-mill concern of which Narasaraju was a part proprietor. This money was subsequently divided among all the brothers and there is nothing in the transaction suggesting any impropriety. On the contrary, the money appears to have been invested temporarily in this manner without objection by any one. The position is stated clearly by Narasaraju in EX. XIV-D. It is evident from the evidence of Venkatachalam himself that from 30th November 1922 he knew that Narasaraju was indebted to the family and raised no objection. He states on 10th November 1922:

> Narasaraju's liabilities were settled, the amount was apportioned between plaintiff and defendant 2. I agree to this apportionment Ex. V-a.

A reference to this exhibit shows that this was so. To return for a moment to the Rs. 25,000, EX. V-a shows quite clearly that there was no sort of secrecy about Rs. 25,000 being deposited with Venkataraju, indeed Venkatachalam's signature is appended to a statement to that effect. Further allegations have been made with regard to misconduct. At the end of EX. B-11 dated 30th November 1922 there is a schedule of debts due to the family. Items 43 to 45 are debts due by Surappa Raju, one of the arbitrators. Narasaraju in his evidence states that the three brothers admitted that these debts were of doubtful recovery. The complaint is that under this award defendant 2 was to have discretion in collecting these debts or not as he thought fit and it is argued that this was a back door method of making Surappa Raju likely to favour the other brother to the prejudice of Venkatachalam. According to P. W. 1 EX. B-11 was drafted at the same time as EX. B-13 at which time all three brothers were present and says P. W. 1's debts due to Surappa Raju were time-barred even when B-11 was drafted and that all the brothers agreed that that was so and that these debts were all of doubtful value. I have no doubt that this arrangement to which B-11 and paras. 60 and 67 of the award are relevant had nothing sinister behind it and was known to defendant 1. Then it is stated that para. 49 of the award dealing with the distribution of jewels reveals bad faith by the Panchayatdars. It will be seen that lacking the assistance of any of the parties the Panchayatdars got the jewels weighed, fixed the price and delivered the jewels to Ammiraju on condition that he should pay the value to joint account with a bond to Venkatachalam to pay it to Ammiraju within a month thereafter. I must confess that how on the face of it this reveals bad faith amounting to misconduct is past my comprehension. A further reference to this allegation will be made later. Then it has been argued that para. 52 of the award can be impugned either as being bad on the face of it or as misconduct. I confess I am not clear under which heading it is alleged. The arbitrators chose on settling accounts in respect of property in the shape of cash and outstandings to fix the date as being the date of the muchilika. It is said that the date chosen should be the date of the severance in status. It is enough to say that even if this is wrong and the learned counsel for the respondent has argued very forcibly to the contrary, it is not misconduct for an arbitrator to be wrong. It seems to me in this difficult task in which it must be remembered that all the immovable properties had been divided by 1922 that there is nothing amounting to misconduct in the choosing of the date of the muchilika. A word only is required to deal with the suggestion that the fact that Narasaraju had a lease of some lands from the plaintiff and defendant 2 is such as to taint his award. The learned Judge has, I think, dealt adequately with that in para. 26 of his judgment with which I am in complete agreement. Exhibits 10 and 10a, sale

deeds dated 13th January 1923 and 1st August 1923 were attacked on similar lines. They were to Ammiraju by Surappa Raju. In Ex. 10-a, there is actually a provision made for payment to Venkatachalam himself and it was admitted before us that this amount was paid. These last objections are characteristic of the manner in which the defendant was prepared to attempt to base charges of misconduct on the flimsiest possible material. Paragraph 64, it is stated, shows such partiality as to render this award bad. It reads as follows :

> The sum of Rs. 12,541-3-9 given to Suryanarayanamurthy from the cash balance amount has been debited as pakka on 30th November 1922. Therefore the sum of Rs. 4210-12-9 being the yearly compound interest on that amount at Rs. 0-12-0 per cent. per mensem should be remitted (paid) to Suryanarayanamurthy from the joint account.

In this connexion it must be emphasised that before us it is admitted that defendant 1 had received more immovable properties in the partition which was completed in 1922 than the others, and 30th November 1922 was chosen because by then the immovable properties had been divided. There is a similar provision, Ex. B-12 relating to the jewels. This provision with regard to compound interest is attacked by the appellant. There seems to me to be nothing amounting to either misconduct or dishonesty in the arrangement at all. The answer given by the respondent seemed entirely reasonable, namely that if the date of the award had been taken, defendant 1 having been in possession of more immovable properties than the others would have had to account for those excess properties since 30th November 1922. Instead, date 30th November 1922 was selected and adjustments for the payment of interest made in order to equalise the position between the parties. Whether this is an ideal arrangement is not for me to decide. All that appears is that it was an attempt to adjust these people's affairs and there is nothing in it to suggest that it was a dishonest attempt or that there were any circumstances surrounding it which make it possible for this Court to set aside this award. Owing to the state of the pleadings and the grounds of appeal it is, as I have said, difficult to appreciate exactly what misconduct is alleged in this case. But we have heard the appellant fully and I have dealt with the points under this heading which were made from the bar.

In my opinion these charges of misconduct are wholly unfounded and are a pure after-thought on the part of a disgruntled party to the reference. I think a reasonable latitude should be allowed in examining awards such as these having regard to the people concerned and the circumstances. More especially would I be unwilling to assist a party who, with full knowledge of the circumstances, allows an arbitration to proceed and takes part in it and then seeks to evade it later on by raising a number of objections which have never occurred to him before. The observations of their Lordships of the Judicial Committee on this topic in 3 I A 209[9] at p. 220 can clearly be called in aid by the respondent. This applies not only to that part of the case which I have dealt with but also with regard to what follows. The appellant has argued that in importing terms of Ex. C into the award the arbitrators have gone outside the scope of the reference. Exhibit C is dated 2nd October 1917. The reference of muchilika is dated 22nd May 1921. Exhibit A is a curiously worded document. It does not say that the property should be divided equally among Chalamiah and his three sons. It says :

> You should effect a partition as you think fit according to your pleasure and give a decision, that you should give some property you think fit to Chalamiah of us out of the properties mentioned above and make proper arrangements therefor as as you please, that you should divide and give the remaining property to Venkatachalam, Suryanarayanamurthi and Ammiraju.

I do not think it has really been doubted in this case that the intention was, Chalamiah being over 90, so we are told, to make reasonable provision during his life and partition between the brothers. The history leading upto Ex. A, is unfortunately not clarified in the evidence. I think this has been one of those cases where knowledge of all the circumstances seems to have been assumed by those in charge of the case in the lower Court and so not proved. According to Ex. 3-B Chalamiah gave a notice to Venkatachalam calling on him to divide the property into four equal shares. That is dated 3rd July 1918 some nine months after Ex. C. What happened I do not know but it seems to me that Ex. A, replaced Ex. C. The arbitrators considered Ex. C very fully and they said regarding it :

> Considering the position and circumstances, status, etc., of this family we are of opinion that the above arrangements subject to the alterations specified hereunder are very proper. All the parties accepted the above terms and have given effect to them till now. The said terms are hereby confirmed subject to the alterations hereunder and it is

9. ('77) 3 I A 209 : 26 W R 10 : 3 Sar 663 : 3 Suther 342 (P C), Chowdhuri Murtaza Hussain v. Mt. Bibi Bachunnissa.

decided that the same should be given effect to. The properties proposed to be given to the various individuals in pursuance of the above terms should be determined and the necessary alterations should be specified according to the partition which we are now effecting.

It seems to me that what the arbitrators did, was to take as the framework of their award a previous agreement which had been entered into between the parties but made certain adjustments which were necessary, for instance, Chalamiah had died and so provision had to be made naturally for his wife, the mother of the plaintiff and the male defendants. It must again be remembered that long before then the immovable properties had beed divided by consent. I do not think it was outside the terms of the reference in a Hindu family for the arbitrators to make the provision for charity and for the women members. In fact that such a criticism could be directed to a family division of property caused me some surprise which was, I understand, shared perhaps even in a greater degree by my learned brother. But any difficulty over this disappears if the evidence of the arbitrator P. W. 2 is accepted, because he stated at the conclusion of his evidence that the allotment of the land to the sisters and to the choultry was agreed to by the parties. This witness's evidence has been accepted throughout by the learned Judge and in my view rightly. In EX. L, dated 23rd April 1926 Venkatachalam is writing with reference to the registration of the land for the choultry and for the sisters. No objection was taken to these matters in EX. XV, the notice sent to the arbitrator. I think it is perfectly evident that this ground also is an after-thought. Apart from the affirmative evidence of the arbitrator the whole of the probabilities in this case point to members of the family assenting to the arrangement being made for pious purposes and for the ladies of their family.

Considerable arguments have been addressed to us on the following topic. It has been contended for the appellant that Chalamiah was one of the referring parties, that as he died on 15th October 1925, the award of 25th August 1926 is bad in law on the ground that the reference was wholly revoked by the death of Chalamiah, a referring party. The Arbitration Act of 1899 applies only to presidency towns and arguments have therefore been based on the common law. Mr. Srinivasa Ayyangar has argued that he is entitled to go back to the position as it was in England before legislation affecting arbitrations and reference is made to the case in (1829-36) 1 Knapp 83 : 12 E R 252.[10] We have been referred to the judgment of Lord Wynford in the course of which the following observation is made :

> If men who submit to arbitration in the instrument of submission bind their representatives in a case where the action would survive to or against their representatives although one or both of the parties should die before the award be made, the arbitrators may proceed with the reference. They have provided for the event of death, and agreed, that those who take their property should take it, subject to the decision of the arbitrators appointed. But if the representatives are not included in the reference, and one of the parties dies, that reference is determined.

Mr. Srinivasa Iyengar contends that in the absence of legislation the whole position turns on the relationship of principal and agent between the referring parties and the arbitrator, that as the death of the principal, in this case one of the referring parties, determines the authority of the agent, so the arbitrator's authority is withdrawn by the death of a referring party. In fact he relies on the general law as he claims it was and still is. It has been contended before us that an agreement to refer cannot be specifically enforced under the Specific Relief Act. This no doubt is so, but an arbitration, the subject of Sch. 2, Civil P. C., can be enforced by the provisions of paras. 17 and 19. If this is a matter to be judged by a consideration of the relationship of principal and agent, it would seem that if the death of the principal revokes his authority, it is equally open to the principal during his lifetime to revoke it himself. But that view is negatived by a decision of this Court in 8 M H C R 46,[11] in which a Bench of this High Court held that in India an agreement to refer an existing dispute to arbitration was as binding and capable of enforcement as any other lawful contract and a submission cannot be revoked without just and sufficient cause. The Court took the view that the English rule was not in consonance with the law of India and referred to the provisions of the then Code of Civil Procedure which are to-day reproduced in the present Code. The learned Judges pointed out that the dislike of private forums which prevailed in the early days in English Courts have never found favour in the Courts of British India where the policy of the Legislature was rather to promote references to arbitration than to discourage them. That

10. (1829-36) 1 Knapp 83 : 12 E R 252, Orphan Board v. Van Reenan.
11. ('76) 8 M H C R 46, Nagasawmy Naick v. Rungasawmy Naick.

case was decided in 1875. In 1868 the Judicial Committee in 12 M I A 112[12] had held that the appellant cannot at his own will and pleasure revoke the authority of an arbitrator in whose appointment he has concurred. Their Lordships took the view that an agreement to refer was by the Indian Legislature put on the same footing as any other lawful agreement. In 1903, in 27 Mad 112,[13] a Bench of this High Court again dealt with the subject more directly now under discussion. The learned Judges made the following observation :

> It follows therefore that contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature, as the District Judge seems to have thought, and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representatives.

In 33 ALL 645[14] Kuramat Hussain and Chamier JJ., accepted the Madras view and stated :

> It seems clear, however, that the authority of an arbitrator is not necessarily revoked by the death of one of the parties to a proposed arbitration. In the present case the right to sue survived, and therefore after substitution of the representative of the deceased party the case should have been referred to the arbitration as prayed.

In the case reported in 27 Mad 112,[13] the reference to arbitration had been filed in Court. In 15 C L J 360[15] Mookerjee and Granduff JJ., had before them a case such as the present, namely where there had been a private submission to arbitration and counsel in that case sought to distinguish between a reference filed in Court and a private submission. The learned Judges observe :

> But, clearly there is no substantial difference in principle between the cases mentioned and the case before us; as pointed out by the learned Judges of the Madras High Court in 27 Mad 112,[13] the rule of the English Common law that a submission to arbitration stands revoked by the death of one of the parties is not applicable to this country. The test to be applied here is, what is the true nature of the submission ? Were the matters in different personal questions in respect whereof it was not intended that the successors in interest of the parties should be affected by the decision of the arbitrators ? If the intention of the parties was that not merely themselves but their representatives in interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked merely by the death of one of the parties.

The learned Judges go on to say :

> If the hearing had not been completed, it would have been necessary to bring the representatives of the deceased party on the record and to make them parties to the submission. Here however the hearing had terminated and nothing remained for the arbitrators to do but to deliver their award.

I cannot see in the case of a private submission to arbitration how the legal representatives of a referring party can be brought on the record, there being no record in the ordinary sense. The only question that arises is whether the result would bind their personal representatives.

In A I R 1922 Cal 226,[16] Woodroffe and Ghose JJ., observed :

> It is true as a general principle that a person who is not a party to, or properly represented, in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Code of Civil Procedure. If there is a binding reference to arbitration all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. The question whether the award would be binding or not must depend upon the circumstances of each case.

A I R 1924 Lah 725[17] is a case of death of a party to a reference. "It is true" says Moti Sagar J.,

> that if, before the death of the party, the hearing of the case has been completed and nothing remains to be done except the delivery of the award, and it is also shown that the intention of the parties was that not merely themselves but the legal representatives should also be bound by the decision of the arbitrator, the award delivered after the death of the party would be binding upon his representatives in interest.

It is important to note that the objection here is not taken by the executor under the will of Chalamiah but by one of his sons and it is not suggested there are any merits in this objection. It is frankly conceded to be purely technical. Personally, I have very little doubt that by this muchilika Chalamiah intended that there should be a division of the property among his sons and provision for him during his few remaining years as he was then a nonagenarian must necessarily have been in his view. But taking all the circumstances into consideration and the absence of any serious objection by the legal representatives or the executor, I think that the underlying intention of this reference was a final division

12. ('68) 12 M I A 112 : 10 W R 51 : 2 Suther 164 : 2 Sar 390 (PC), Pestonjee Nusserwanjee v. Manockjee & Co.
13. ('04) 27 Mad 112, P. Satynarayana v. P. Venkatarangayya.
14. ('11) 33 All 645 : 11 I C 935 : 8 A L J 678, Datta v. Khedu.
15. ('12) 15 C L J 360 : 13 I C 161, Manindra Nath v. Mohanunda Roy.
16. ('22) 9 A I R 1922 Cal 226 : 70 I C 459 : 26 C W N 804, Binayakdas v. Sashi Bhusan.
17. ('24) 11 A I R 1924 Lah 725 : 79 I C 67, Tegha v. Ram Singh.

of the properties and the probable early death of Chalamiah must have been in contemplation. That being so, I do not think it can lie in the mouth of one of the sons to argue that there was no intention that his legal representatives should be bound. Paragraph 11 of the judgment deals apparently with this topic which has been so fully developed here. I doubt very much whether it was argued in its present form before the lower Court. The objection, the learned Judge says, is that provision was not made for Chalamiah. This is a curious objection coming from defendant 1. On the date of Ex. L, Chalamiah had been dead six months. Nobody took any objection to the continuance of the reference. The conclusion I have arrived at with regard to this objection is that it is now clearly established that in India there is no rule that the death of a referring party of itself recalls the reference to arbitration, that is, brings it to an end. Whether it must continue depends upon the special circumstances of each case. I am satisfied in the circumstances of this case that it was the intention of Chalamiah and of all concerned that it should go on and that was fully understood by defendant 1. So far as the will is concerned, I think it was no doubt completely lost sight of in the two partition proceedings, Exs. A and C. It has not even been printed in this appeal and I have not heard what its terms are. Defendant 1 at no time relied on its provisions. For the reasons which I have given, I think the learned Judge arrived at the right conclusion and that he rightly disbelieved the evidence of Venkatachalam on questions of fact which conflicted with that on the other side and rightly held that the arbitrators acted in good faith throughout and that they did nothing without the knowledge and consent of all concerned. Personally I should be very reluctant to interfere with these arbitrations relating to the adjustment of family disputes unless some real injustice or substantial divergence from the law can be proved. When, as in this case, the matter has gone on without objection by anybody until after the result, it would be most undesirable to interfere especially in matters of procedure unless the Court fell itself constrained to do so in the interests of justice.

In the result this appeal must be dismissed with costs. We consider that we should exercise our powers under Rule 46, Appellate Side Rules, in fixing the fee for this case which we fix at Rs. 1000. Our reason is this. In whatever form the case has been brought before us, it has in fact been in substance and has been argued as a first appeal. It has occupied six days of the time of this Court, it has involved investigation of a nice question of law, and we think that it is a proper case for such an order to be made. The civil revision petition and the memorandum of objections which have not been argued are also dismissed, but as to these matters I would make no order as to costs. It is right that I should add that although objections 3 and 4 set out in Para. 1 of this judgment are under Para. 14, Sch. 2, Civil P. C., grounds for remitting the award, not for setting it aside, this case has been argued before us throughout on the basis that the award should be set aside and no application to remit it was made. Indeed it seemed to me that headings 3 and 4 were really included as charges of misconduct rather than under Para. 14, Sch. 2.

Krishnaswami Ayyangar J. — I agree that there is no substance in this appeal, but I would however like to add a word or two on some of the matters on which stress was laid in the course of the arguments of the learned counsel for the appellant. I may at once say that there is no ground for thinking that there is any error of law apparent on the face of the award so far as I can see, nor can I see any ground for attributing corruption or misconduct either in fact or in law to any of the arbitrators. I am satisfied that the arbitrators did not decide any matter not referred to them or omitted to decide any matter referred to them. The objection under this head is that a share should have been allotted to the father, which was not done and that no property should have been set apart for the choultry or for the sisters which is charged as an act outside the reference. The arbitrators were in this case appointed to effect a partition of what was originally a joint family estate between the three brothers, namely the appellant and respondents 1 and 2. The father Chalamiah was alive at the time of the reference and was in fact himself a party to it though he was very very old. Looking at the language employed in the muchilika, Ex. A, there is clear indication that he did not want a share to be allotted for himself but that he only desired that some property should in the discretion of the arbitrators be given to him apparently for the purpose of maintaining himself during the brief period during which he

expected to live. The age of the father and the nature of the provisions to which he had himself agreed in the Samakhya deed, Ex. C, suggest, that such must have been his intention. Nor is there much substance in the contention that the arbitrators exceeded their powers in making certain other minor provisions which are usually made at the time when partitions in a joint family take place. A reasonable provision for charity or by way of portions to sisters, more especially when the family estate is large, is so common a feature of partitions in general that it is a rare thing to see parties raising a controversy about it at the time or later. Even, in the present case, the appellant does not object to the provisions themselves as being either improper or extravagant. His learned counsel has been quite frank when he said that he has a legal right to take advantage of any handy weapon that may be available to him in order that he might get rid of what, according to him, is a hateful award.

In the special circumstances of this case and in view of the very large discretion vested in the arbitrators by the words "you should effect a partition as you think fit according to your pleasure and give a decision." I am unable to agree that in setting apart some property for the sisters of the appellant and some for the choultry the arbitrators travelled outside the reference. In fact it would seem that in this matter they had the consent, express or implied, of all the parties including the appellant who only thought of raising this objection in the appeal before us.

It was strenuously urged that the death of Chalamiah during the pendency of the proceedings before the arbitrators brought about a complete termination of the arbitrator's power to proceed further with the reference. The death of Chalamiah, it was contended, operated in law as a revocation of their authority. The principle relied on is the familiar one of an agent's authority coming to an end on the death of the principal. Whether an arbitrator fills the position merely of an agent whose agency is revocable by the happening of those events which have the effect of determining an ordinary agency is a question not altogether free from difficulty at the first look. The theory of agency had apparently some support in the old common law of England but it must be remembered that it had reference to the authority of the arbitrator rather than to the agreement to refer between the parties. The former was deemed revocable by the exercise of a legal power supposed to be implicit in the submission itself. The latter was irrevocable, being in the nature of a contract which could not be broken without giving rise to a claim for damages. Even in England the integrity of the common law seems to have been materially interfered with by the enactment of statutes. In this country we are governed by the statutory provisions on the subject and it seems to me that it is scarcely permissible to go in search of an ancient principle of the common law, when we find that it has been definitely abrogated even in the country of its origin by S. 1 of Statute XXIV and XXV, George V, Ch. XIV, which enacts that

> an agreement shall not be discharged by the death of any party thereto either as respects the deceased or any other party but shall in such an event be enforceable by or against the personal representative of the deceased.

The idea that the appointment of an arbitrator contemplated in every case the exercise of personal judgment by the party which appears to be the foundation on which the doctrine of revocability by death rested, would thus seem to have been definitely given up in England. We here are not bound by any rule of the common or statutory law of that country except in so far as it furnishes a standard of justice, equity and good conscience to be applied to the decision of questions arising for consideration by the Courts of this country. The question was considered by the Privy Council in 12 M I A 112,[12] with special reference to S. 326 of the Code of 1859, which was the predecessor of the present para. 17 of Sch. II. At pp. 130 and 131, the following pertinent observations occur:

> Their Lordships are of opinion that according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause and that a mere arbitrary revocation of the authority is not permitted. Their Lordships do not think it necessary to refer to the English law on this subject further than to point out, that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration; and to put such agreement for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what

they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract. Their Lordships are, therefore, of opinion, that it was not in the power of the appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had concurred.

The effect of this decision, as I understand it, was to get rid finally and for ever of the doctrine of revocability at will and the distinction supposed to exist between the agreement to refer and the authority of the arbitrators. It is in this sense that this important decision has been understood and acted upon in this Court. In 8 M H C R 46,[11] the learned Judges expressed themselves at page 55 as follows :

The 'horror, which formerly prevailed in the English Courts of a *domestic forum* never found place in British India where it has always been the policy of the Legislature to promote the reference of disputes to arbitration; and the framers of the Code in the Chapter on Arbitration embodied most of the existing law of the Company's Courts. Having regard, not only to the former law in force in this country, but to the provisions of the Indian Contract Act (S. 28) of 1872, we are inclined to say that an agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract, and that a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable.

When the Court was pressed with a previous contrary ruling in 3 M H C R 82,[18] to which Hollaway J., himself was a party, he appears to have expressed himself in a somewhat pungent and, if I may say so with respect, a refreshingly frank manner. He is reported to have observed at page 53 as follows :

That decision is bad. It is one of the worst in the reports. I then had the jargon of the English Common Law running in my head, and my attention was not called to the fact that the Civil Procedure Code had completely altered the law out here. I would not have thought that the point could be doubted or that it was open to argument had not my attention been drawn by Mr. Mayne in 12 M I A 112[12] to the change in the law made by Act 8 of 1859.

After this pronouncement, it is scarcely possible to accede to the contention that the Common law of England should be taken as a guide for our decision. Further in 27 Mad 112[13] we have a modern decision of a strong Bench of this Court which has acted upon the principle recognized in the earlier case. In that case pending a reference by Court on an agreement filed under S. 523 of the Code of 1882 corresponding to the present para. 17, one of the parties died and the question was whether the authority of the arbitrator became ipso facto revoked and whether the legal representatives of the deceased could not continue the proceedings. The learned Judges adverted to the difference between the old English Common law and the law as understood to be applicable in this country and ruled

that contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature . . . . and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative.

This view was expressed after the relevant cases both in England and in this Court had been considered. The decision was that a right to partition which formed the subject-matter of the submission in that case, as it is here, being of such a nature that it would survive to the legal representative, the death of a party could not cause a revocation of the arbitration. In view of these decisions to which no exception seems to have been ever taken since, it serves no purpose to pursue the matter further. It only remains to say that the fact that the remedy by way of specific performance has been limited to the mode indicated in the Code is no reason for holding that the contract can be put an end to at the will of one of the parties to it. It rather emphasises its enforceability by the other, though not by suit but by the process of an application. The contention therefore that the death of Chalamiah put an end to the arbitration must be overruled.

It is however urged that Chalamiah had left a will dated 1st February 1919 by which he had made a disposition of his property appointing his widow, respondent 3 here, as executrix. The argument was that an award passed without notice to, and in the absence of, the executrix is bad and cannot be sustained. It is not necessary to deal with this contention at any length as in my opinion it is enough to say that the only party who could be said to have had a grievance was the executrix herself who has not however chosen to challenge the judgment of the Court below. It seems to me that the appellant who never thought of this objection and never put it forward before the arbitrators cannot now be permitted to take advantage of a ground which might have been available to some party other than

18. ('66) 3 M H C R 82, Alla Aiyyappa v. Nundla Peraiya.

himself. Further the objection loses all its force when it is remembered that the fight all along was between the brothers and the mother seems never to have taken any real part in it at all. I also entirely agree in the view of my learned brother that, so long as a dispute is pending before arbitrators on a private reference, the proceedings before them are not governed by the provisions of O. 22, Civil P. C., and there can be no question therefore of the legal representative of the deceased Chalamiah being brought on the record. Finally, I may add that almost all the objections which have been pressed before us were objections that could well have been taken before the arbitrators themselves, had the appellant chosen to do so. It is now too late to entertain any of them.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 147

LEACH C. J. AND HORWILL J.

Official Assignee, Madras — Appellant

v.

H. D. Hukumchand Khimsura — Respondent.

Appeal No. 13 of 1940, Decided on 9th September 1940, against judgment and order of Somayya J., D/- 8th January 1940.

Transfer of Property Act (1882), S. 130 — Under S. 130 transfer can be one of absolute assignment or by way of security—Form of instrument or words used are not important provided transfer of interest is clearly indicated — Pledge is not assignment and does not satisfy requirements of S. 130—Document held amounted to pledge.

The transfer of an actionable claim referred to in S. 130 can be one of absolute assignment or by way of security. The form of the instrument or words used are not of importance, provided that it is clearly indicated that the owner of the actionable claim is transferring his interest. But a mere intention to create a pledge does not amount to an assignment within the meaning of S. 130. Although the pledgee has a special interest in the property as the holder of security he is not a transferee. He may sell the property pledged if the condition of repayment is not fulfilled, but that does not make him in any way the owner or transferee of the property. An instrument evidencing a pledge and nothing more certainly cannot be read as an assignment and therefore does not satisfy the requirements of S. 130. [P 148 C 1]

The insolvent borrowed a sum of Rs. 300 and as security for the loan deposited with the creditor two policies of insurance on his life. The deposit was evidenced by a document in writing which was in the form of a letter signed by the insolvent in favour of the creditor and ran as follows : I have taken from you a loan of Rupees 300 at 1½ pies per rupee per mensem on the pledge of the articles noted below on the following conditions. I authorise you to hold and retain the below mentioned jewels with you as a collateral security for a general balance of account. If I fail to redeem the articles within six months, or if I fail to pay interest for six months you may realize your dues either by sale or by public auction of all or any of the pledged properties after seven days' notice. Immediately following the signature under the head "particulars of pledge" were given the numbers and description of the policies of insurance :

Held that the document amounted to an instrument evidencing a deposit of the insurance policies by way of pledge and nothing more and could not be read as an assignment : 37 Bom 198 (P C), *Rel. on* ; 30 Mad 75 and A I R 1915 Mad 1031 (F B), *Disting.* [P 148 C 1]

K. V. Ramachandra Iyer and S. Thiagaraja Iyer — for Appellant.

A. V. Seshayya — for Respondent.

Leach C. J. — The appellant in this case is the Official Assignee of Madras, who represents the estate of one C. Subramania Iyah, an insolvent. Before his adjudication, the insolvent borrowed a sum of Rs. 300 from the respondent, who is a money lender and as security for the loan deposited with him two policies of insurance on his life. The deposit was evidenced by a document in writing and the question which arises in this appeal is whether this document amounts to an assignment of the insolvent's interest in the policies. It was held by Somayya J. that the document constitutes an assignment, and the appellant challenges the correctness of this finding. The document is in the form of a letter signed by the insolvent in favour of the respondent and commences thus :

I have taken from you a loan of Rs. 300 in words Rupees three hundred only at 1½ pies per rupee per mensem on the pledge of the articles noted below on the following conditions.

It will be sufficient for the purposes of this appeal to state three of the conditions, namely Nos. 4, 6 and 7, which read as follows:

4. I authorise you to hold and retain the below mentioned jewels with you as a collateral security for a general balance of account, i. e., not only for the aforesaid debt but also for any sums that I might have borrowed or may borrow from you or for any balance of account that may be due to you.

6. I have received today a copy of this letter giving full description of the pledge.

7. If I fail to redeem the articles within six months, or if I fail to pay interest for six months you may realize your dues either by sale or by public auction of all or any of the pledged properties after seven days' notice by post or by personal service or by registered post to the address given above. I shall be responsible for any deficiency and you will refund the surplus if any.

Immediately following the signature are these words :

Particulars of pledge : One Postal Endowment Assurance Policy, No. 22,786 for Rs. 1500. One National Insurance Company Table No. 3 Endowment Assurance sum assured Rs. 1000, Policy No. E. 1,14,692.

The letter was in fact a printed form used by the respondent for an advance on the security of jewellery with certain details filled in by pen. No attempt was made to alter this very inappropriate form to make it read as a transfer of the respondent's interest in these policies. The learned Judge has rightly pointed out that it is well established that the transfer of an actionable claim referred to in S. 130, T. P. Act, may be one of absolute assignment or by way of security. His reasons for holding that the letter signed by the insolvent operates as a transfer are that the law does not require any particular form of writing and that he was satisfied that there was here a writing by which security was created. We find ourselves unable to concur in the opinion of the learned Judge, that the document operates as an assignment. It is quite true that the form of the instrument or words used are not of importance, provided that it is clearly indicated that the owner of the actionable claim is transferring his interest. A mere intention to create a pledge would not amount to an assignment within the meaning of S. 130, T. P. Act. This was pointed out by the Privy Council in 37 Bom 198.[1] In that case the appellant claimed to be entitled to an insurance policy which had been assigned to him in writing. The respondent also claimed to be entitled to it on the ground that it had been deposited by the owner with him by way of pledge, but Lord Moulton in delivering the judgment of the Board pointed out that a pledge does not satisfy the requirements of section 130.

Now, when the document in this case is read, what does it amount to? It amounts to an instrument evidencing the deposit of the policies of insurance by way of pledge, and nothing more. Under this document the respondent has merely the rights of a pledgee of moveable property. A mortgagee is a transferee but a pledgee is not, although the pledgee has a special interest in the property as the holder of security. He may sell the property pledged if the condition of repayment is not fulfilled, but that does not make him in any way the owner or transferee of the property. The only difference which I can see between this case and 37 Bom 198[1] is that in this case there is a document evidencing the pledge whereas in the other case the pledge was unaccompanied by any acknowledgment. An instrument evidencing a pledge and nothing more certainly cannot be read as an assignment. The learned advocate for the appellant has referred us to 30 Mad 75[2] and 38 Mad 297,[3] but the facts in those cases are very different from the facts in the present case. In the first of those cases, on the back of a promissory note was endorsed a direction to pay the amount to a certain person to whom the instrument was delivered. It was held that the direction to pay coupled with the delivery of the instrument amounted to an assignment within the meaning of S. 130, T. P. Act. There are many differences between that case and the present one, but it is only necessary to mention that here there is no direction to the insurance companies to pay the amounts of the policies to the respondent. In the second case the instrument read as follows : (23 M L J 430.)[4]

> As I have received Rs. 600 from you by mortgaging the following, *i. e.*, the house . . . . and the promissory note mentioned as '2' in the schedule . . . . for Rs. 500 executed by my brother Sankarasubbier on 21st November 1901 . . . . I promise to repay the said sum of Rs. 600 with interest thereon at one per cent. per month within a year from the date hereof failing which I shall repay the principal and interest thereon at 1¼ per cent. per month and add the interest to principal every year and repay the same with compound interest at the rate aforesaid failing which you may proceed against the mortgaged properties, other properties or personally for the collection thereof.

There was disagreement in this case between Sundara Iyer and Sadasiva Iyer JJ., and consequently the appeal was placed before a Bench of three Judges. It was held that the mortgage had operated as an assignment of the promissory note. The difference between that case and the present one is that in that case there was a mortgage and a mortgage implies a transfer of the mortgagor's interest in the property, whereas in the present case there has been merely a pledge and a pledge has not the same significance. For the reasons indicated the appeal will be allowed with costs here and below.

C.R.K./G.N. *Appeal allowed.*

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1. ('13) 37 Bom 198 : 17 I C 627 : 15 Bom L R 9 : 40 I A 24 (P C), Mulraj Khatau v. Vishwanath.

2. ('07) 30 Mad 75 : 16 M L J 554 : 1 M L T 329, Rama Iyen v. Venkatachalam Pattar.

3. ('15) 2 A I R 1915 Mad 1031 : 21 I C 316 : 38 Mad 297 : 25 M L J 356 (F B), Muthu Krishna Iyer v. Veeraraghava Iyer.

4. ('12) 23 M L J 430 : 16 I C 601: 12 M L T 315: 1912 M W N 919, Muthu Krishnian v. Viraraghava Iyer.

A. I. R. 1941 Madras 149

Full Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

M. Lakshmana Ayyar and another

v.

Aiyasami Chettiar and another.

Second Appeals Nos. 353 to 355 of 1937, Decided on 25th October 1940, against decrees of Sub-Judge, Dindigul, in Appeals Nos. 50, 51 and 52 of 1936.

Madras Estates Land Act (1 of 1908), Ss. 146, 112 and 53—Landholder can recognise transferee from registered pattadar without any formality prescribed by S. 146 — Action under S. 112 can be taken against transferee as defaulter provided landholder has under S. 53 issued patta which has been accepted by transferee—Patta need not necessarily bear transferee's name but should be one intended to be transferee's — Failure of transferee accepting patta to exchange muchilika is immaterial: 44 Mad 534=A I R 1921 Mad 195 =62 I C 337, OVERRULED.

A land-holder is bound to accept a transferee who complies with the requirement of S. 146 but there is nothing in S. 146 or in the Act which precludes a land-holder, if he chooses, from accepting a transferee as his ryot unless the section is complied with. The land-holder may recognize a transferee of a registered pattadar without any formality and if he does, the transferee becomes a ryot within the meaning of the Act, but before action can be taken under S. 112 the landholder under S. 53 should have issued a patta to the transferee, not necessarily bearing his name, but a patta which is intended to be the transferee's patta. If the transferee accepts it all the provisions of the Act apply to the relationship between the two notwithstanding that the transferee has failed to exchange a muchilika and the transferee must be deemed to be a defaulter within the meaning of S. 112 when he fails to pay arrears of rent: 44 Mad 534=A I R 1921 Mad 195=62 I C 337, *OVERRULED*; 27 Mad 483 (F B) *Ref.* [P 150 C 1, 2]

T. M. Krishnaswami Ayyar and N. Sivaramakrishna Ayyar — for Appellants.

T. P. Gopalakrishnan and L. K. Sarma — for Respondents.

OPINION

Leach C. J. — The question which has been referred for decision is this:

Does the expression 'defaulter' in the Madras Estates Land Act denote only the person who is the registered pattadar, or the heir of the registered pattadar, or the person whom the landholder has become bound to recognize as the ryot by reason of the provisions of S. 146, or does it also include a person who has been accepted by a landholder as his ryot and has defaulted in the payment of his rent.

The reference arises under the unamended Act and has been occasioned by the definition of the word 'defaulter' given by Sadasiva Ayyar J. in 44 Mad 534.[1] When the appeal out of which the reference arises was before the Bench responsible for making the reference it was contended that the definition was too limited in its scope and as it appeared that there was foundation for this argument it was decided to place the question before a Full Bench for decision. Before proceeding to discuss the question it will be helpful in appreciating its full implication to set out the admitted facts. The respondent who was the plaintiff in the suit purchased three holdings from registered pattadars of the appellant, who owns a zamindari in the Madura District. The first purchase was made in 1900, the second in 1906 and the third in 1911. All the transfers were effected by registered conveyances. The appellant accepted the respondent as his ryot and the respondent year by year paid to him the agreed rent. The appellant issued pattas to the respondent, but these did not bear his name. In each case the name of the registered pattadar was inserted. There is no question that the registered pattadars had parted with their interests in these holdings and that the respondent had acquired their interests in full. The pattas issued to the respondent were intended to be his pattas and were accepted by him as such, but he did not tender muchilikas in exchange. In 1931 the respondent defaulted in the payment of his rent and the appellant served upon him a notice of his intention to sell the holdings under the provisions of S. 112, Madras Estates Land Act, 1908. The respondent did not contest the appellant's right to sell and in due course the Collector directed that the holdings should be sold for arrears of rent. The sale took place on 31st October 1933 and at the court auction the appellant bought the kudiwaram rights in the holdings. Before the procedure contemplated by S. 112 can be adopted the relationship of landholder and ryot must exist. The respondent was undoubtedly a tenant of the appellant within the meaning of the Transfer of Property Act, but was he a ryot? Section 3 (15) of the Act says that a ryot must be a person who holds for the purposes of agriculture ryoti land in an estate on condition of payment to the landholder the rent which is legally due upon it, but it is contended that before a transferee can become a ryot so as to be a defaulter within the meaning of S. 112 procedure of the nature contemplated by S. 145 must have been followed. Section 146 (1) says:

Whenever a holding or any portion thereof is transferred by the act of a ryot, or in execution of

1. ('21) 8 A I R 1921 Mad 195 : 62 I C 337 : 44 Mad 534 : 40 M L J 213, Midnapore Zamindari Co., Ltd v. Muthuppudavan.

a decree or order of a civil Court passed against him, or by a sale for arrears of Government revenue or for any demand recoverable as such arrears, such transfer shall, subject to the provisions of S. 145, be recognized by the landholder if notice in writing be communicated to him by the transferor and transferee or a certified copy of a decree or order of a civil Court establishing a transfer is produced, or in cases in which a transfer is effected by sale under the order of any Court or public officer, the sale certificate or a certified copy thereof is produced.

There is direct support for the respondent's contention to be found in 44 Mad 534.[1] It was there held by Sadasiva Ayyar J. in a judgment in which Spencer J. concurred, that the word 'defaulter' in the Madras Estates Land Act denotes only the man who is the registered pattadar, or his heir, or the person whom the landholder has become bound to recognize as the ryot under S. 146 of the Act. While no exception can be taken to the decision of that case on the merits it is manifest that this definition is too limited. There is nothing in S. 146 or elsewhere in the Act which says that a landholder shall not accept a transferee as his ryot, unless the section is complied with. The landholder is bound to accept a transferee who complies with the requirement of S. 146, but he may, if he chooses, accept him without being served with a notice in writing or a certified copy of a decree or order of a civil Court establishing the transfer or by the production of a sale certificate, whichever is appropriate.

Now in the present case there can be no doubt that the respondent was a ryot within the meaning of the Act. He was in possession, for the purposes of agriculture, of ryoti land in an estate on condition of paying to the landholder the stipulated rent, and from time to time pattas were issued to him. The fact that they were not issued in his name, but in the names of his transferors makes no difference, as was decided by this Court in 27 Mad 483.[2] In that case pattas had been issued to a transferee, not in his own name but in the name of his transferor. Russell J., in dealing with the contention that these pattas were not valid said :

> Assuming that pattas drawn up in precisely the same manner had been accepted for a series of years previous to Fasli 1308, in respect of this holding, then I consider that the plaintiff would in this suit be estopped from asserting that the patta is improper.
>
> Under such circumstances, if there was a tender of the patta to the plaintiff though it ran in the name of defendant 1, it would not be open to the plaintiff now to object to it. This seems to me to be the principle of what was decided by the Court in 27 Mad 332[3] and also in S. A. No. 1331 of 1904[4] unreported.

In this case fresh pattas were issued to the respondent and notwithstanding that they contained the names of the transferor he accepted them as pattas issued to himself and embodying the terms of his tenancy. Section 53 of the Act says that no landholder shall have power to proceed against a ryot for the recovery of rent by distraint and sale of his moveable property or by sale of his holding under Chap. 6 unless he shall have exchanged a patta and muchilika with such ryot or tendered him such a patta as he was bound to accept or unless a valid patta or muchilika continues in force. But when a patta is tendered and accepted it governs the rights of the parties, notwithstanding that the tenant has failed to exchange a muchilika. Section 52 (3) provides for this. The respondent having accepted the first patta tendered to him became a ryot within the full meaning of the Act and as he defaulted in the payment of his rent he became a defaulter within the meaning of the Act which entitled the landholder to proceed against him under section 112.

The position may be stated in this way. Before the Madras Estates Land Act can apply, the relationship of landholder and ryot must exist, but this relationship is not confined to the landholder and (a) the person who is the registered pattadar, or (b) the heir of the registered pattadar, or (c) the person whom the landholder has become bound to recognize as the ryot by reason of the provisions of S. 146. The landholder may recognize a transferee of a registered pattadar without any formality and if he does, the transferee becomes a ryot within the meaning of the Act, but before action can be taken under S. 112, S. 53 requires that the landholder shall have issued a patta to the transferee, not necessarily bearing his name, but a patta which is intended to be the transferee's patta. If the transferee accepts it, all the provisions of the Act apply to relationship between the two. We answer the reference in this sense. The costs of the reference will be made costs in the cause.

C.R.K./G.N. *Answer accordingly.*

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2. ('04) 27 Mad 483 (FB), Zamindar of Ettiyapuram v. Sankarappa Reddiar.

3. ('04) 27 Mad 332, Sree Sankarachari Swamiar v. Varada Pillai.

4. S. A. No. 1331 of 1901, Govinda Setti v. Sreenivasa Rao Sahib.

A. I. R. 1941 Madras 151

KING J.

Dharmapuram Mutt represented by Sri La Sri Shanmugha Desika Gnana Sammanda Pandara Sannadhi Avergal — Appellant

v.

Muhamad Usman Sahib and others — Respondents.

Appeal No. 36 of 1939, Decided on 2nd September 1940, against appellate order of District Court, West Tanjore, D/- 24th August 1938.

Deed—Construction—Security bond—In execution of plaintiff's decree certain deposit made in Court—In appeal against decree plaintiff allowed to withdraw deposit on furnishing security—Security bond headed "A. S. No. 60 of 1928" provided "If in this 'number' decision of lower Court is altered in favour of appellant and if the respondent has to pay whole or portion thereof for that amount I shall be liable" — Appellate decree partly in favour of appellant reducing amount payable to plaintiff respondent to certain extent — In second appeal plaintiff's claim dismissed in toto — Word "number" in bond held referred to "A. S. No. 60 of 1928" only and did not mean litigation—Surety held liable only for amount by which amount payable to plaintiff was reduced in first appeal — Application for execution of security bond falls under Art 182, Limitation Act — Time runs from date of second appellate decree.

In first appeal against his decree the plaintiff was allowed to withdraw the amount deposited in Court in execution of his decree on furnishing security. The security bond was headed "A. S. No. 60 of 1928" and provided: "If in this 'number' the decision of the lower Court is altered in favour of the appellant and if the respondent has to pay the whole or a portion thereof, for that amount I . . . . . shall be liable." The appeal resulted in part in favour of the appellant and the amount payable by the judgment-debtor to the plaintiff was reduced by Rs. 550. There was a second appeal to the High Court and also memorandum of cross-objections and the High Court dismissed the plaintiff's suit in toto:

Held that the terms of a bond must be strictly construed and that the word 'number' in the bond was not equivalent to such an abstract term as litigation, but referred to the particular appeal numbered as A. S. No. 60 of 1928 and the parties having made no provision for the contingency of a second appeal, the liability of the surety extended only to the amount for which the decree of the first Court was reduced in appeal in A. S. No. 60 of 1928: *AIR 1939 Mad 152, Rel. on.* [P 152 C 1]

Held further that application for execution of security bond was governed by Art. 182, Limitation Act, and that time began to run from the date of the second appellate decree. [P 152 C 1]

S. Nagaraja Ayyar — for Petitioner.

K. S. Desikan — for Respondents.

Judgment.—One Dawood Sahib obtained a decree in O. S. No. 4 of 1927 in the Additional Sub-Court, Tanjore. In execution of the decree, a deposit of Rs. 2745 was made. Of this sum, deducting what was attached by the creditors of Dawood Sahib, a sum of Rs. 1569-13-3 was available to be paid to him, and he was permitted to withdraw that amount on furnishing security. Security was offered by one Kadir Bivi Ammal who executed a deed of security on 17th October 1928. This bond was executed in the District Court and is headed A. S. No. 60 of 1928. That appeal resulted in part in favour of the appellant and the amount payable by the judgment-debtors to Dawood Sahib was reduced by Rs. 550. This decision was given in April 1929. There was then a second appeal to the High Court and also memorandum of cross-objections. On 20th March 1934, the High Court gave judgment dismissing Dawood Sahib's suit in toto. In October 1935 the successful appellant in the High Court applied to execute the surety bond and to recover from the surety the full sum of Rs. 1569-13-3 which had been paid out to Dawood Sahib in 1928. Both the Courts have dismissed this execution application on a construction of the terms of the bond, and the lower appellate Court has also held that in so far as the bond might have been otherwise enforced, in regard to the decree of the first Court in A. S. No. 60 of 1928, it is barred by limitation. I think there can be no doubt that on a construction of the bond, the Courts below are right. The important clause is this:

> If in this 'number' the decision of the lower Court is altered in favour of the appellant, and to the detriment of the respondent and if the respondent has to pay the whole or a portion thereof, for that amount I . . . shall be liable.

It is argued in this appeal that the word 'number', which is an English word transliterated into Tamil can be used to mean the whole course of litigation and its use can therefore in this instance be taken as representing the intentions of the parties that, if at any time before this litigation came to an end, there was a decree in favour of the appellant, the surety's liability should become due. I am unable to agree with this argument. It seems to me obvious that the extended meaning of the word 'number' in Tamil to cover a suit must have originated from the well-known fact that suits are given a 'number' when they are filed in Court. It is clear that when any person refers to a 'number' he will be referring to an individual suit or individual appeal or some individual proceeding which has a separate number of its own. The Tamil Lexicon, under the word, 'number' gives two

meanings: one, the English 'number' and the second, a suit in a Court of law. It affords no support whatever to the contention of the appellant that 'number' is equivalent to such an abstract term as litigation. It is clear therefore that in the execution of this document, it was contemplated by the parties that if in the decision of the particular appeal numbered as A. S. No. 60 of 1928, the decision of the lower Court should be altered in favour of the appellant, the liability of the surety should ensue. The parties have made no provision, as pointed out by the Courts below, for the possible contingency that the appeal in the District Court would be followed by a second appeal in the High Court. This case seems to me to be almost precisely similar to the one which was recently decided in this Court and reported in 48 M L W 760.[1] The terms of a bond must be strictly construed and if the parties have failed to make a provision for the contingency of a second appeal, that is a misfortune which the Court cannot correct. The liability of the surety in this case can therefore possibly extend only to the amount for which the decree of the first Court was reduced in appeal by the District Court in A. S. No. 60 of 1928. That amount, as already stated, is Rs. 550.

Next arises the question of limitation. The learned District Judge holds that the right to apply in execution of this bond accrued to the appellant on 12th April 1929 and that the application filed more than six years later was barred. It is clear that the article applicable to this application is Art. 182. Column 3 of that article gives the time from which the period begins to run. The date of the decree or order will be the time in ordinary cases, but where there has been an appeal, it is not that date but the date of the final decree or order of the appellate Court. There has been in this case an appeal by both parties and therefore the decision of the lower appellate Court in A. S. No. 60 of 1928 was in peril while the appeal in the High Court was pending. A memorandum of cross-objections had been filed, which, if successful, would have meant that the decree of the first Court would have been restored. The limitation in this case therefore began to run from 20th March 1934 and this application was in time. In the result, the order of the lower appellate Court is set aside and the execution application restored to file. The learned subordinate Judge will enforce the bond to the extent of Rupees 550 with interest at 6 per cent. per annum from the date of the bond. Proportionate costs will be given and taken by the parties throughout. Leave to appeal refused.

C.R.K./G.N. *Order accordingly.*

1. ('39) 26 A I R 1939 Mad 152 : 180 IC 406 : ILR (1939) Mad 290 : (1939) 1 M L J 557 : 48 M L W 760, Paramasivam Pillai v. Ramasami Chettiar.

A. I. R. 1941 Madras 152

WADSWORTH AND PATANJALI SASTRI JJ.

Pandiri Sarveswara Rao — Petitioner

v.

Maturi Umamaheswara Rao and others — Respondents.

Civil Revn. Petn. No. 1020 of 1939, Decided on 13th September 1940, to revise order of Dist. Court, East Godavari, D/- 14th February 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) Proviso (B) — Criterion under S. 3 (ii) Proviso (B) for exclusion from category of agriculturists is actual date of assessment and not actual period for which tax is payable — Retrospective assessment — S. 137-B Madras City Municipal Act does not provide that date of assessment should be deemed to fall within period to which assessment relates — Assessment to profession tax made after 1st October 1937 relating to period immediately preceding — Assessee can claim to be agriculturist.

The words "has within the two years immediately preceding the 1st October 1937 been assessed" in S. 3 (ii) Proviso B mean what they say and nothing else. The criterion in S. 3 (ii) Proviso B for the exclusion from the category of agriculturists is not the actual period for which the tax is payable but the actual date on which the assessment is made. This construction of S. 3 (ii) Proviso B does not run counter to S. 137-B Madras City Municipal Act which is intended to make the machinery for the levy of the tax applicable to a retrospective assessment and to meet any possible objection which might be raised owing to the delay in making the assessment and which in the case of a retrospective assessment, does not provide that the date of the assessment shall be deemed to fall within the period to which the assessment relates. [P 153 C 1, 2]

Consequently a person is not disqualified from claiming to be an agriculturist by reason of an assessment to profession tax made after the 1st October 1937, although relating to the period immediately before the 1st October 1937. [P 153 C 2]

(b) Interpretation of statutes — Government prescribing forms under its rule-making power under Act — Act should not be construed by reference to forms.

The meaning of an Act should not be derived from the forms which have been prescribed by the Government under its rule-making powers under the Act. [P 153 C 2]

(c) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) Proviso (C) — S. 3 (ii) Proviso (C) requires individual to have been actually assessed — It is not sufficient to show that he has interest in property in respect of which some body has been assessed.

It cannot be said that S. 3 (ii) proviso (c) contemplates only the ownership of the property by the individual concerned and not his assessment in respect thereof. Proviso (c) clearly requires that, in order to come within its scope, the individual must have been actually assessed. It is not sufficient to show that he is interested in property in respect of which somebody has been assessed. [P 154 C 1]

Consequently, where husband and wife are separately assessed in respect of certain properties covered by the mortgage executed by the husband alone, the assessment of the entire properties cannot be regarded as the assessment of the husband : A I R 1939 Mad 942, *Approved.* [P 153 C 2] [P 154 C 1]

P. V. Rajamannar and K. Subba Rao — for Petitioner.

K. Bhimasankaran — for Respondents.

Wadsworth J.—This petition raises the question of the precise effect of provisos (B) and (C) of S. 3 (ii) of Madras Act 4 of 1938. The petitioner was the judgment-debtor in a mortgage suit, being himself the mortgagor, and he sought the benefits of the Act under S. 19 in respect of the mortgage-decree. He was held by the lower Court to be disentitled to those benefits on the ground that he was assessed to profession tax in respect of the first half year of the financial year 1937-38. The lower Court also rejected the plea advanced on behalf of the creditor that the petitioner was also disqualified under proviso (C). The petitioner was admittedly not assessed to profession tax within the two years preceding 1st October 1937. His assessment was actually made on 15th January 1938 but it was retrospective, so that it covers the half year beginning 1st April 1937. The learned District Judge, applying S. 137-B, Madras City Municipal Act, has held that a person who is assessed to profession tax in respect of any portion of the two years immediately preceding 1st October 1937, comes within the mischief of proviso (B) to S. 3 (ii) even though the assessment was not made within the two years immediately preceding 1st October 1937. It is difficult to support the view taken by the learned District Judge, but an attempt has been made to support it by referring to the last words of S. 137-B, City Municipal Act which are :

> The provisions of this Act and the rules made thereunder shall so far as may be apply as if the assessment was made in the half year or year to which the tax or fee relates.

It seems to us that this provision is obviously intended to make the machinery for the levy of the tax applicable to a retrospective assessment and to meet any possible objection which might be raised owing to the delay in making the assessment. The whole of S. 137-B was apparently drafted to meet the situation created by the decision in 52 Mad 866.[1] But it must be noted that, in the case of a retrospective assessment, it is not provided that the date of the assessment shall be deemed to fall within the period to which the assessment relates ; and it would obviously be impracticable to read this provision as having that effect, for, there are various matters in respect of which the date of the assessment will be of importance, with regard to which it must necessarily be the actual date of the assessment and not some vague point of time within the period, to which the assessment relates. For instance, with regard to the right to object to an assessment or the right of appeal it must be the actual date, and not any notional date, which will determine limitation ; and with reference to the preparation of the electoral roll, the electoral roll must obviously be prepared with reference to the assessments as they actually exist at the time when the electoral roll is prepared, and it could not be invalidated by any retrospective assessments made thereafter. Moreover, the words of proviso (B) to S. 3 (ii) of Act 4 of 1938 are perfectly plain and it is impossible to read them as if the criterion for the exclusion was the actual period for which the tax was payable and not the time within which the assessment was made.

An argument has been based on the Form B prescribed under the Act for the certificate under S. 27, which form provides for details regarding the period for which an individual has been assessed to tax and does not provide for the entry of the date of the assessment. This may well be a defect in the drafting of the form but we cannot admit the proposition that the meaning of the Act is to be derived from the forms which have been prescribed by the Government under its rule-making powers. To us it is quite clear that the words "has within the two years immediately preceding the 1st October 1937 been assessed" mean what they say and nothing else. We are therefore of opinion that the learned District Judge was wrong in holding that the petitioner was disqualified from claiming to be an agriculturist by reason of an assessment to profession tax made after 1st October 1937, although relating to the period immediately before 1st October 1937.

A further contention advanced by the creditor rests on the fact that, though the

1. ('30) 17 A I R 1930 Mad 200 : 122 I C 360 : 52 Mad 866 : 57 M L J 536, Prince of Arcot v. Corporation of Madras.

petitioner was assessed to house tax on properties having an annual rental of only Rs. 300, his wife has been similarly assessed on properties with a rental value of Rs. 432. Both the properties in the wife's name and the properties of the petitioner are covered by the suit mortgage executed by the petitioner. It is contended that both these properties belong to the petitioner and that the assessment which was made in respect of these properties must be regarded as the assessment of the petitioner. A similar contention was rejected by a Bench of this Court in the case in (1939) 2 M L J 495.[2] It has been argued that the terms of R. 7 framed under the Act lend some support to the creditor's contention. By this rule a person who has been assessed to property tax, which assessment would disqualify him under proviso (c) to S. 3 (ii), is permitted to get rid of the disqualification by proving that during the relevant period he was not the owner of the property in respect of which the assessment was levied. Presumably, the intention of this rule is to cover cases in which the municipal assessment register was not up-to-date so that the assessment would stand in the name of some one who does not actually pay it. We are not concerned now with the validity of this rule, but it may well be argued that proviso (c) contemplates not only the assessment of an individual but also the ownership by that individual of the property in respect of which he has been assessed. It could not however be argued that proviso (c) contemplates only the ownership of the property by the individual concerned and does not contemplate his assessment in respect thereof. Proviso (c) clearly requires that, in order to come within its scope, the individual must have been actually assessed. It is not sufficient to show that he is interested in property in respect of which somebody has been assessed. In the result, therefore, we must allow this civil revision petition with costs and remit the application to the trial Court for disposal in the light of this judgment.

C.R.K./G.N. *Petition allowed.*

2. ('39) 26 AIR 1939 Mad 942 : 186 I C 424 : (1939) 2 M L J 495, Swaminatha Odayar v. Srinivasa Ayyar.

A. I. R. 1941 Madras 154

LEACH C. J. AND HORWILL J.

Mrs. Ida L. Chambers and others — Appellants

v.

Kelland Huxford Chambers — Respondent.

Appeal No. 29 of 1939, Decided on 20th August 1940, from judgment and order of Gentle J. in C. S. No. 75 of 1939, D/- 28th April 1939.

(a) T. P. Act (1882), S. 123—Amounts credited to intended donee in books of account — Interest on amounts paid to donee—Transaction held did not amount to gift nor to declaration of trust.

G, the sole proprietor of a company got certain entries made in the company's account books crediting his wife with certain items after debiting them to his capital account as *G* was not in a position to make gift in cash as his assets were represented by land, buildings and stock-in-trade. A seperate account was thus opened in the wife's name. *G* then wrote to the company to credit some more items to his wife's account. The credits bore interest at a particular rate. *G* also instructed the company to inform his wife that amounts so credited were in the nature of personal gift to her but subject to certain restrictions as to the realisation of the gifts. The wife was actually paid interest on these amounts standing to her credit :

Held that though *G* had the intention of making gifts, the entries in the books did not complete the gifts and what the law required for completion was never carried out, e. g., a registered deed or delivery of possession : A I R 1929 P C 77, *Expl. and Rel. on;* 35 Bom 403, *Dist., English case law considered.* [P 157 C 2 ; P 158 C 1, 2]

Held further that there was no declaration of trust. There was nothing in the testator's subsequent acts or conduct which could be regarded as showing an intention to create a trust or to constitute himself a trustee. [P 158 C 2]

(b) T. P. Act (1882), S. 123— Gift of moveable property — Registered deed or delivery is necessary.

A gift of moveable property, unless it is effected by a registered deed, can only be completed by the delivery of the property to the donee. [P 157 C 2]

King and Partridge — for Appellants.

O. T. G. Nambiar — for Respondent.

Leach C. J.—This appeal arises out of an Originating Summons issued on the original side of this Court at the instance of the respondent. There are two questions involved. The first question is whether there was a valid gift of moveable property. The second question is whether a trust was created, if there was no gift. The respondent is the sole executor and trustee of the will and codicil of Ethel Mary Chambers, deceased, who was the first wife of George Alexander Chambers, deceased, who was the sole proprietor of a business known as the

Chrome Leather Company. It will be convenient to refer to Ethel Mary Chambers as the testatrix and to George Alexander Chambers as the testator. The testatrix died on 23rd March 1924, and the testator on 16th November 1937. Appellant 1 is his third wife and she and appellants 2 and 3 are the executors and trustees of his will and codicil. Appellant 4 is the son of the testator by his second wife, who predeceased him. The Chrome Leather Company had a leather business which was carried on some twelve miles from Madras, and the testator invested a large amount of capital in it. The balance sheet as at 31st March 1920 (which for the purposes of this case has been accepted as being correct) showed that the capital stood at Rs. 16,75,892-11-10. Nearly the whole of this amount, however, represented the value of buildings, land, plant, machinery and stock-in-trade. The cash in hand was in fact only Rs. 538-15-2. In the years 1917 and 1919, the testator caused certain entries to be made in the books of the Chrome Leather Company crediting the testatrix, their son (the respondent) and their two daughters, Phillis Dora Chambers (now Mrs. P. Michell) and Sheila Florence Chambers with certain sums which were debited to his capital account. Separate accounts in the names of the testatrix, the respondent and the two daughters were opened in the books and in these accounts the credits were entered. On 25th July 1919, the testator wrote to the Chrome Leather Company instructing the firm to make such additions to the amounts standing to the credit of his wife and his children in the books as might be required to place "the capital at their credit in the firm" at the following figures : The testatrix Rs. 2,00,000, the respondent Rupees 40,000, and the daughters Rs. 40,000 each. The letter proceeded :

> Please note also that as and from 1st April last these sums at their respective credits are to bear interest at 6 per cent., payable half yearly and when the Chrome Leather Company is converted (either with or without the business of Chambers & Company) into a limited liability company preference shares at 6 per cent., with interest payable half yearly are to be issued for the sums at their credit as stated above or such larger or lesser sums as may then be at their credit should they so desire. You have hitherto paid interest at 8 per cent., on the Rs. 45,000, which Mrs. Chambers has had with the firm, also on Rs. 15,000 which Mrs. Michell had. These payments may be deducted from the interest due on 1st October 1919 on the increased capital bearing interest at 6 per cent.

The business of Chambers and Company also belonged to the testator. In this letter the testator instructed his firm to write to the testatrix, his son and his daughters informing them of the amounts standing to their credit in the firm's books. These letters were written and in each it was said:

> This sum is entirely in the nature of a personal gift from Mr. Chambers to yourself and will bear interest at the rate of 6 per cent. per annum payable half yearly commencing from 1st April last, *viz*, 1919 . . . we wish you to understand that so long as the Chrome Leather Company remains a private company you will not be entitled to withdraw more than 10 per cent. of the capital. In the event of this company being converted into a limited liability company, either with or without the business of Chambers and Company, you will be issued 6 per cent. preference shares to the value of the amount standing at your credit at that date. These preference shares will be subject to the same restrictions, namely, you will not be permitted to place these shares on the market to a greater extent than 10 per cent annually.

The testator made similar allocations to other relations but it is not necessary to refer to them. His object in crediting the members of his family with these amounts appears from a letter which he wrote at a later date. The object was to ensure that his relations benefited as the result of his life's work and to prevent the Government of India from "grabbing" death duties on the whole of his estate. On 27th September 1919 the testator instructed the Chrome Leather Company to place a further sum of Rs. 1,00,000, to the credit of the testatrix. This sum was retransferred to the testator's capital account on 3rd March 1924 as the result of a letter which the testatrix wrote to the company, no doubt written at the behest of the testator. The testatrix was then in the south of France. She sailed with the testator for India shortly afterwards, but died at Colombo. Before she died the testatrix was paid in the aggregate the sum of Rs. 83,606-3-6 as interest on the sums standing to her credit in the books of the Chrome Leather Company.

By her will, the testatrix bequeathed to her trustees the Rs. 2,00,000 standing to her credit after the re-transfer of Rs. 1,00,000, upon trust for the benefit of her son, her two daughters and their issue. For some months after her death interest on the Rs. 2,00,000 was credited to her account in the books of the firm, but as the result of depression in trade then prevailing the National Bank of India objected to any payment of interest until the overdraft which it had granted had been fully discharged. As the result, no further interest was credited in the accounts in respect of this sum. On or about 3rd July 1930 the testator caused to be opened in the books of his firm

with effect from 1st October 1930 separate accounts showing the beneficiaries under the will of the testatrix as creditors and the firm as the debtor in respect of the amounts to which they were entitled according to the will of the testatrix.

In the year 1930, the testator contemplated carrying out a scheme which he had had in mind for many years of transforming the firm into a limited liability company. When interest had ceased to be paid on the amounts standing to the credit of his relatives in the firm's books the auditors included in their statement a certificate that no interest had been allowed on these amounts and the testator was anxious that the certificate should be one without any qualification as it would affect the chances of a successful flotation of his business. The amounts were shown in the balance sheet as "deposits" until the balance sheet for the period ending 31st March 1923. Thereafter they were referred to as "unsecured loans". With the object of obtaining a clean certificate the testator sent to the respondent and the beneficiaries under the will of the testatrix draft letters to be signed and returned by them stating that interest on the amounts at their credit had not been paid for some time and waiving any claim for interest until circumstances enabled the company to make further payments. This led to correspondence with the respondent who had not merely his position as a beneficiary under the will of the testatrix to consider, but his position as a trustee under it. The whole of the correspondence which passed between the testator and the members of his family has not been included in the record, but, in a letter dated 18th January 1932, which the testator wrote to his daughter Phyllis, he said that he had been advised that as he had not received consideration for the transfers of his capital there was no legal claim against him. In the course of this letter he stated :

> I do not wish to withdraw from any undertakings I have made or promises I have given but I am certainly determined not to permit if I can prevent it any doubt to exist as to the position of my affairs when my time comes.

The same attitude was taken up by the testator in a letter dated 12th Novembr 1932 addressed to Messrs. Fraser and Ross, the firm's auditors. The certificate which they had then given did not meet with his approval as the qualifications had not been removed. In his letter to the auditors he said :

> Certain transfers from my capital in our books were made of my own free will and I have no intention of cancelling same, but I have never received any 'loans', and there was never any consideration either given or accepted and as regards payments of interest I am under no obligation to any one.

Some days later the Rs. 2,00,000, was retransferred to the capital account of the testator. This was, of course, done in assertion of his contention that he was under no legal obligation in respect of the allocations of capital to his relations and to avoid the auditors qualifying their certificates. When the respondent came to know of this he protested as a trustee under the will of the testatrix. The testator having died, the respondent instituted the present proceedings in order that the legal position might be determined.

The present appeal is only concerned with Rs. 2,00,000 which was credited to the testatrix in the books of the Chrome Leather Company. The first question which the Court is called upon to decide is whether there was a valid and completed gift of Rs. 2,00,000 by the testator to the testatrix. If this is answered in the negative the Court is required to say whether there was a valid declaration of trust in respect of this sum. The case was heard by Gentle J., who held that there was no gift but that a trust had been created. I agree with the learned Judge that there was no completed gift, but I am unable to concur in his conclusion that the testator created a trust of Rs. 2,00,000.

Before proceeding to state my reasons in detail, I wish to refer to certain of the authorities which have been quoted in argument. In (1862) 4 De G F & J 264 : 45 E R 1185,[1] Turner L. J. pointed out that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. Lord Justice Turner proceeded :

> He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provisions will then be effectual and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent that if the settlement is

1. (1862) 4 De G F & J 264 : 45 E R 1185 : 31 L J Ch 798 : 8 Jur (N S) 806 : 7 L T 178, Milroy v. Lord.

intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

These observations were not in complete accord with what had been said in certain earlier cases, but they have since been accepted as correctly stating the law. In that case one Thomas Madley executed a voluntary deed purporting to assign certain of his shares in a bank to one Samuel Lord to be held by him upon certain trusts for the benefit of the plaintiffs. The shares were transferable only by entry in the books of the bank, but no such transfer was ever made. Lord held a general power of attorney authorizing him to transfer Medley's shares and after the execution of the settlement, Medley gave him a further power of attorney which authorized him to receive the dividends on the shares. Lord received the dividends for three years, but Medley died without the formalities required for the transfer of the shares having been completed. It was held that as it was not the intention of the settlor to constitute himself a trustee of the shares, but to vest the trust in Lord there was no valid trust of the shares created in the settlor. It was further held that no valid trust of the shares was created in Lord, for although he held a power of attorney under which he might have vested the shares in himself, he did not do so, and was not bound to do so without directions from the settlor, since he held the power only as agent for the settlor. In (1874) 18 Eq. 11[2] at p. 13, Jessel, M. R. said :

> The one thing necessary to give validity to a declaration of trust — the indispensable thing — I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his upto the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest.

A decision similar to that in (1862) 4 De G F & J 264[1] was given in (1875) 19 Eq 233.[3] A person who was the owner of colliery gave a share in it to his daughter and at a meeting of the shareholders this was sanctioned. Subsequently the dividend on the share purported to have been transferred was paid by the father to the daughter, but the formalities required for the transfer of the share so as to give the daughter a legal title to it were not carried through. There was no doubt about the father's intention, but it was not carried into effect before he died. In these circumstances it was held that expressions in letters, the signature of a minute in the books of the company and the gift of the dividend did not amount to a declaration by the testator, nor to proof of an intention and determination on his part, that he would hold the share for the plaintiff. There was the intention to make a gift, but he had failed to carry out that intention.

There is no difference here between Indian and English law. A gift of moveable property, unless it is effected by a registered deed, can only be completed by the delivery of the property to the donee. For the creation of a trust of moveable property the requirements of S. 6, Trusts Act, 1882, must be fulfilled. Before there can be a valid trust the author must indicate with reasonable certainty by words or acts (i) an intention on his part to create thereby a trust, (ii) the purpose of the trust, (iii) the beneficiary, (iv) the trust property and must transfer the trust property to the trustee, unless the trust is declared by will or the author of the trust is himself to be the trustee. (1862) 4 De G F & J 264[1] was followed by the Bombay High Court in 10 Bom L R 1209[4] and (1874) 18 Eq 11[2] and (1875) 19 Eq 233[3] were there referred to with approval. Sargent C. J. applied (1874) 18 Eq 11[2] and (1875) 19 Eq 233[3] in 9 Bom 115,[5] where it was held that the fact that the father opened an account in his books in the name of his son to which money was credited did not raise a presumption that the father intended to create a trust in favour of his son of the sums appearing in the account. The Court's attention has also been drawn to 35 Bom 403[6] where Chandavarkar and Heaton JJ. differed as to whether there was a trust or a gift, but I do not consider it necessary to pause to examine this case as the facts are in no way analogous to the facts in the present case.

What is manifest in this case is that the testator was not in a position to make gift in cash of the amount standing to the credit of his various relatives. He had large assets, but they were represented by land, buildings

2. (1874) 18 Eq 11 : 43 L J Ch 459 : 22 W R 584, Richards v. Delbridge.
3. (1875) 19 Eq 233 : 44 L J Ch 277 : 31 L T 821 : 23 W R 374, Heartley v. Nicholson.
4. ('08) 10 Bom L R 1209, Manchersow v. Ardeshir.
5. ('85) 9 Bom 115, Asha Bai v. Haji Tyeb Haji Rahimtullah.
6. ('11) 35 Bom 403: 11 I C 564: 13 Bom L R 564, Bai Mahakore v. Bai Mangla.

and stock-in-trade, and what he purported to give was a share in these properties. So far as the land and buildings were concerned the gifts could only be completed by an appropriately worded and duly registered deed. He could vest a part of the stock-in-trade by registered deed or by actual delivery to the donee, but there was no registered deed and there was no delivery. Of course when moneys were paid by way of interest on the alleged gifts those moneys become completed gifts: *see* 25 Ir R 311.[7] That there was no completed gift of principal was the attitude which the testator himself took up when his right to withhold interest was questioned. That he had the intention of making gifts is beyond question, but the entries in the books did not complete the gifts and what the law requires for completion was never carried out.

On the question of the effect of the book entries the decision of the Privy Council in 57 M L J 581[8] has been quoted. In that case one Brijcomari carried on business on her own account and maintained account books. In 1896 she opened an account in the name of her grand-daughter. This account was continued down to the grand-daughter's death in 1904. In 1901 this account was credited with a sum of Rs. 2,00,000 and in 1903 with a further sum of Rs. 31,000. It was alleged that these were gifts to the grand-daughter by the grandmother. There was no evidence that the grand-daughter ever knew what was done by the grandmother and the account was never operated upon. Whatever was done with regard to the account was done under the direction of the grandmother. The Judicial Committee held that the accounts were themselves mere book entries and did not confer or determine rights. Whatever else they showed they did not show completed gifts to the grand-daughter. In the present case, the testator's family knew all about the allocations in the books of his firm and received certain payments of interest and to that extent the cases differ, but it does not follow that the book entries in the present case confer or determine rights. I have indicated that in my opinion they do not.

In holding that a trust had been created the learned Judge says that the testator has used language which, taken in connection with his acts and conduct, shows a clear intention on his part to divest himself of the beneficial interest in the sum of Rupees 2,00,000 and to exercise dominion and control over it exclusively in the character of a trustee. The learned Judge has read the letter of the Chrome Leather Company of the 6th August 1919 to the testatrix as a declaration of trust and it is evident that it is on this letter that he has largely based his decision. I am unable to read the letter in the same way. In fact, in my opinion, the letter can only be read as evidencing an intention to create a gift. Having said, "This sum is entirely in the nature of a personal gift" the testator adds restrictions with regard to realisation of the gift. I cannot see anything in the letter which savours of a declaration of trust and in my opinion there is nothing in the testator's subsequent acts or conduct which can be regarded as showing an intention to create a trust or to constitute himself a trustee. Some of his subsequent acts point positively in the opposite direction. If the transaction represented anything it represented a gift, not the creation of a trust, but I have said sufficient to indicate that in my opinion the transaction cannot be regarded as a gift because neither the testatrix nor her beneficiaries ever received the property and there was no registered instrument. For these reasons I hold that there was no valid gift of the Rs. 2,00,000 to the testatrix and no trust created in respect of this sum. In my opinion the appeal should be allowed with costs here and below and certificate for two counsel granted.

Horwill J.— I agree.

C.R.K./R.K. *Appeal allowed.*

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WADSWORTH AND PATANJALI SASTRI JJ.

Palani Goundan — Petitioner

v.

Peria Goundan — Respondent.

Civil Revn. Petn. No. 1734 of 1938, Decided on 18th September 1940, to revise order of District Munsif, Namakkal, D/- 21st September 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), Ss. 19 and 7—Object of Act stated—Debtor seeking relief should be agriculturist at commencement of Act, at time of application to scale down debt and on 1st October 1937 — It is immaterial whether he was agriculturist when debt was originally incurred prior to 1st October 1937.

Section 19, read with the definition of 'agriculturist' requires that the debtor seeking relief should be an agriculturist at the time of the application,

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7. 25 Ir R 311, Adams v. Lopdell.

8. ('29) 16 A I R 1929 P C 77 : 114 I C 575 : 57 MLJ 581 (PC), Hariram Serowgee v. Madan Gopal Bagla.

and para. 1 of S. 19 further requires, with a view to prevent abuse of the provisions of the Act, that the debtor should also have been an 'agriculturist' on 1st October 1937. The agriculturist character of the debtor therefore is not relevant for purpose of scaling down debts under the Act except with reference to these three dates, and it is immaterial whether or not the debtor had such character when the debt was originally incurred where it was incurred prior to 1st October 1937. [P 159 C 2]

(b) Interpretation of statutes — Statute conferring substantive rights—Procedure for enforcement of those rights should be construed not to nullify but to give effect to those rights.

The procedure provided in a statute for enforcement of the substantive rights conferred thereby should be construed as far as possible, so as to give effect to and not to nullify those rights. [P 160 C 1]

(c) Madras Agriculturists Relief Act (4 of 1938) — Construction — Act being exproprietary should be strictly construed.

The provisions of the Act being of an exproprietary character should be strictly construed. The scope of the Act ought not to be extended beyond what is clearly and expressly indicated by its terms. [P 160 C 1]

(d) Madras Agriculturists Relief Act (4 of 1938), S. 19—Term "judgment-debtor" in S. 19 includes persons claiming through or under him —Liability of purchaser of property subject to mortgage being debt within meaning of Act, purchaser is entitled to apply under S. 19.

The term 'judgment-debtor' in S. 19 includes a person whose liability is a 'debt' as defined by the Act, more especially as that definition includes a judgment-debt. Consequently "judgment-debtors" must be deemed to include those claiming through or under him: *Case law referred.* [P 160 C 1]

The liability of a purchaser of property subject to a mortgage being debt within the meaning of the Act the purchaser is entitled to apply under S. 19 for scaling down the debt due under the mortgage decree: A I R 1939 Mad 186, *Ref.* [P 159 C 2; P 160 C 2]

V. N. Venkatavaradachariar — for Petitioner.

R. Desikan — for Respondent.

Patanjali Sastri J. — This is a petition to revise an order of the District Munsif of Namakkal dismissing the petitioner's application under S. 19, Madras Agriculturists Relief Act, for scaling down the amount payable under the decree dated 14th August 1932, in O. S. No. 678 of 1932 on the file of that Court. The respondent obtained the decree on foot of a mortgage to which he claimed to be subrogated and was proceeding with its execution when the petitioner, having purchased the equity of redemption in the properties on 17th April 1936, in execution of a money decree against the mortgagors intervened with a claim to have the respondent's decree amended under S. 19 of the Act. There is no dispute that the petitioner is an agriculturist but the respondent objected that the petitioner was not a "judgment-debtor" within the meaning of that section. The Court below upheld the objection and dismissed the application. It appears to have been conceded in the Court below that the defendants in the mortgage suit against whom the decree was passed were not agriculturists at the commencement of the Act as, after the purchase by the petitioner as aforesaid, they had no agricultural lands left in their possession, and it was presumably a matter of indifference to them whether or not the amount of the decree was reduced.

Before dealing with the main question as to whether or not the petitioner can be regarded as a judgment-debtor within the meaning of S. 19 of the Act, we will mention, only to dismiss, the suggestion that, in view of the definition of 'debt' in S. 3 (iii), unless the debt for the repayment of which the decree was passed was a debt due by an agriculturist even at its inception, S. 19 could have no application. The object of the Act is clearly to provide relief for debtors who are agriculturists at the commencement of the Act (*see* S. 7) while S. 19, read with the definition of 'agriculturist' seems to require that the debtor seeking relief should be an agriculturist at the time of the application, and para. 1 of S. 19 further requires, with a view to prevent abuse of the provisions of the Act, that the debtor should also have been an 'agriculturist on 1st October 1937, as the proposal of affording relief to indebted agriculturists was made known on that date. Thus, it is clear that the agriculturist character of the debtor is not relevant for purpose of scaling down debts under the Act except with reference to these three dates, and it is immaterial whether or not the debtor had such character when the debt was originally incurred where it was incurred prior to 1st October 1937.

Turning now to the main question whether the petitioner can be said to be a 'judgment-debtor' within the meaning of S. 19, it will be observed that the definition of that term in S. 2 (10), Civil P.C., as meauing "any person against whom a decree has been passed or an order capable of execution has been made" has not been incorporated in this Act. On the the other hand, the definition of 'debt' in S. 3 (iii) includes debts payable under a decree or order of a Court. According to the decision in I L R (1939) Mad 218,[1] the liability of the petitioner as the purchaser of the properties subject to the mortgage decree is a 'debt' within the meaning of the Act. In these circumstances,

1. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : I L R (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.

if the contention of the respondent were to be accepted, it would have the startling result, that though the petitioner as well as his liability comes within the purview of S. 7 which provides that the debt 'shall be scaled down in accordance with the provisions of this chapter', i. e., of Chap. 2 of the Act which contains the substantive provisions as to scaling down of debts, he would be excluded from such relief by reason of the 'procedure' provided in S. 19 for obtaining it being inapplicable to him. On the other hand, it stands to reason that the procedure provided in a statute for enforcement of the substantive rights conferred thereby should be construed as far as possible, so as to give effect to and not to nullify those rights. This is by no means in conflict with the principle we have often reiterated in connexion with this Act, namely that its provisions being of an expropriatory character should be strictly construed and its scope ought not to be extended beyond what is clearly and expressly indicated by its terms. In the absence of any definition in this Act, there is no obvious reason why the term 'judgment-debtor' should not be understood as including a person whose liability is a 'debt' as defined by the Act, more especially as that definition includes a judgment-debt. As pointed out by learned counsel for the petitioner, there is authority for the view that even under the Civil Procedure Code, the term 'judgment-debtor' notwithstanding the definition contained therein, includes those who claim through or in his right. In 30 Mad 537[2] it was held by a Bench of this Court that S. 258 corresponding to O. 21, R. 2 of the present Code was applicable to persons in the position of the respondent before us. The learned Judges observed :

> We think however that the word 'judgment-debtor' in S. 258 should be construed as including those who claim through him or in his right. To hold otherwise would lead to obvious hardships which we cannot think were contemplated.

This decision was followed by Seshagiri Ayyar J., in 9 M L W 596[3] and was referred to with approval by Wadia J., in 58 Bom 485.[4] The respondent's learned counsel placed reliance on the decision of Horwill J., in (1940) 2 M L J 317[5] which no doubt supports his contention. The learned Judge held that the word 'judgment-debtor' in S. 19 must be understood in the sense defined in the Civil Procedure Code, and therefore a purchaser of the equity of redemption from a receiver in the insolvency of a judgment-debtor was not entitled to apply under that section. Distinguishing 30 Mad 537[2] the learned Judge observed that

> even there it was not said that persons claiming through judgment-debtors were also judgment-debtors. It only says that S. 258 applied to those claiming through them and in their right as well as to judgment-debtors.

We cannot agree with this view of that decision. The learned Judges there referred to the contention for the appellant before them based upon the definition of 'judgment-debtor' in the Code of Civil Procedure, and they expressly held in the passage quoted above that the word 'judgment-debtor' in S. 258 included those who claimed through or under him. Nor is there any change in this respect in the present Code, as the learned Judge appears to have supposed. The learned Judge also placed reliance upon 13 I C 659[6] as expressly deciding the point. The case itself related to the right of a transferee of a decree to apply under O. 21, R. 53 to execute the decree when such decree had been attached by a creditor of the decree-holder. In support of their conclusion that the assignee of an attached decree was not in the same position as the decree-holder himself for purposes of execution, the learned Judges observed :

> We may also point out that the definition of judgment-debtor, as given in S. 2, cl. (10,) Civil P.C., does not include the assignee of the judgment-debtor.

The observation is thus purely obiter, if it is to be understood as anything more than a statement of a fact. However that may be under the Code of Civil Procedure, we consider that there are, as already indicated, cogent reasons for not construing the word 'judgment-debtor' in the restricted sense of the definition in S. 2 (10), Civil P. C., and we are accordingly of opinion that the petitioner is entitled to apply under S. 19 of Madras Act 4 of 1938 for amendment of the decree by scaling down the amount payable thereunder in accordance with the provisions of the Act. In this view it is unnecessary to consider the question whether the petitioner could rely on S. 146, Civil P. C., when the defendants in the mortgage suit had ceased to be agriculturists at the commencement of the Act. We set aside the order of the Court below and remand the case for dis-

2. ('07) 30 Mad 537 : 17 M L J 417 : 2 M L T 466, Panduranga Mudaliar v. Vythilinga Reddi.

3. ('19) 6 A I R 1919 Mad 858 : 50 I C 931 : 9 M L W 596, Matharasappa Chettiar v. Muthu Chettiar.

4. ('34) 21 A I R 1934 Bom 252 : 151 I C 78 : 58 Bom 485 : 36 Bom L R 499, Shivbasappa Chimmappa v. Marigowda Huchangowda.

5. ('40) 27 A I R 1940 Mad 907 : (1940) 2 M L J 317, Ganapathi Bhatta v. D'Sowza.

6. ('12) 13 I C 659 : (1912) 1 M W N 176 : 11 M L T 144, Thiruvengadam Pillai v. D. Subbiah.

posal in the light of our judgment herein. The petitioner will have his costs of this revision petition.

C.R.K./G.N. *Order set aside.*

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Full Bench

LEACH C. J., PANDRANG ROW, ABDUR RAHMAN, KRISHNASWAMI AYYANGAR AND PATANJALI SASTRI JJ.

Thondam Annamalai Mudali — *Plaintiff* — Appellant

v.

Tiruttani Ramasami Mudali and others — *Defendants*— Respondents.

Second Appeal No. 86 of 1935, Decided on 25th October 1940, against decree of Dist. Court, Chittoor, in A. S. No. 55 of 1934.

** *(a) Civil P. C. (1908), S.47 — Application by stranger auction-purchaser at sale held in execution of money decree for delivery of possession as against judgment-debtor or his representative is not covered by S. 47*: 25 Mad 383: 56 Mad 808= AIR 1933 Mad 598=143 IC 854 and 57 Mad 457= A I R 1934 Mad 181=148 I C 55, OVERRULED.

(Per *Full Bench*)—A stranger auction-purchaser at a sale held in execution of a money decree and applying for possession against purchaser at a private sale is the representative of the judgment-debtor. The contest not being a contest between the parties to the suit or their representatives, but a contest between persons claiming under one of the parties, the case does not fall within S. 47, and the stranger auction-purchaser is not entitled to apply for possession as against the judgment-debtor or his representative-in-interest under S. 47. When the judgment-debtor or any one at his instigation resists or obstructs the auction-purchaser the latter must proceed in accordance with the provisions of O. 21, R. 97 : 25 Mad 383: 56 Mad 808=AIR 1933 Mad 598=143 I C 854 and 57 Mad 457=AIR 1934 Mad 181=148 I C 55, *OVERRULED; Case law discussed.* [P 169 C 1, P 170 C 2]

(Per *Patanjali Sastri J.*, concurring but on different ground)—In a case like this the stranger auction-purchaser is to be regarded as the representative of the decree-holder. But the question of delivery of possession to a stranger auction-purchaser does not relate to "the execution, discharge or satisfaction of the decree" within the meaning of S. 47, Civil P. C. [P 173 C 1]

***(b) Civil P. C. (1908), S. 47 — Dispute between party and his own representative or between two persons representing same party—S. 47 does not apply.*

Section 47 does not apply to a case where the dispute arises between a party and his own representative or between the two persons who both represent the same party. The aggrieved party's remedy in such a case is by way of suit. [P 169 C 1, P 170 C 2]

(c) Practice—Precedent — Long course of decisions on question merely of procedure should not be departed from (Per Patanjali Sastri J.)

Where the question is merely one of procedure, it will not be desirable to depart from the long course of decisions and upset what has been regarded in the province as a settled *cursus curiae* for several years. [P 171 C 2]

(d) Civil P. C. (1908), S. 64—Scope and object explained (Obiter) (Per Patanjali Sastri J.)

Section 64 does not render an alienation pending attachment void against all persons and for all purposes, but only against a " claim enforceable under the attachment, " i. e., against the decree-holder's right to bring the property to sale under his attachment unaffected by any alienation by the judgment-debtor subsequent to such attachment : 7 Cal 107 (PC), *Ref.* [P 173 C 2]

(e) Civil P. C. (1908), S. 47 — Term 'representative' explained (Per Patanjali Sastri J.)

The term 'representative' in S. 47 should be understood as merely referring to one who stands in the shoes of another and as meaning more or less the same thing as the expression " claiming under " used in other sections of the Code, *e. g.*, Ss. 11 and 146. [P 174 C 1]

K. Rajah Ayyar and V. Ramaswami Iyer — for Appellant.

T. M. Krishnaswami Ayyar and T. K. Srinivasathathachariar — for Respondents.

ORDER OF REFERENCE

Krishnaswami Ayyangar and Somayya JJ. — The plaintiff appeals against the decrees of the lower Courts dismissing the suit for possession on the ground that S. 47, Civil P. C., bars the suit. This question was tried as a preliminary issue and both the Courts held that the suit is barred by S. 47, Civil P.C. In execution of a money decree obtained by one Kalathi, the suit house was attached on 18th September 1921. On 26th September 1921 the judgment-debtor's widow sold the property to defendant 1. Defendant 2 is the tenant of the first. In pursuance of the attachment made on 18th September 1921 the auction sale was held on 7th January 1922 and the plaintiff, a stranger, purchased it in court auction. For some reasons which it is not necessary to go into at present, the sale certificate was not obtained till 30th November 1931. On 1st March 1932, the suit out of which the present appeal arises was filed by the plaintiff for recovery of the suit property from defendants 1 and 2. Defendants raised various pleas with one of which alone we are concerned in this appeal and that is whether the suit is barred by S. 47, Civil P. C. Plaintiff as stated above is a stranger auction-purchaser. Under S. 47, Civil P. C., two conditions have to be satisfied, (1) the question must arise between the parties to the suit or their representatives-in-interest; (2) the question must relate to the execution, discharge or satisfaction of the decree.

So far as the second question is concerned, the application for delivery of property purchased in execution of a decree is a matter relating to execution, satisfaction or discharge of the decree. This question

has been considered in several cases which arose between the decree-holder auction-purchaser on the one side and the judgment-debtor on the other. The view of the Madras High Court has throughout been that such a question relates to execution, satisfaction or discharge of the decree. It is unnecessary to do more than refer to the recent decision of the Full Bench of this Court reported in (1939) 1 M L J 468.[1] There is a conflict of opinion among the various High Courts and we are bound by the decisions of our Court and these decisions lay down that such a question arising between the decree-holder purchaser (or a subsequent vendee from him) on the one side and the judgment-debtor (or a later purchaser from him) on the other side falls within S. 47. On principle, once the attached properties are sold, the sale confirmed, and the sale proceeds paid over to the decree-holder, the decree-holder drops out and is not interested in the question whether the auction-purchaser gets possession or not. This question is not one which relates to execution, discharge or satisfaction of the decree and hence S. 47 would not apply to proceedings taken by the auction-purchasers for possession of the properties. So prima facie even between a decree-holder auction-purchaser and the judgment-debtor this question of delivery of possession appears to be outside S. 47, Civil P. C. This is the view held by several High Courts.

In Madras for a long time this question has been held to come under S. 47, Civil P. C. But, even in this Court, the position has not been accepted without demur. From time to time this Court has expressed the view that but for a series of decisions holding one way, they would be prepared to hold that the question did not fall under S. 47, Civil P. C.: 26 Mad 740[2] at p. 741 and 28 Mad 87[3] at p. 88. The question, we are told, is under appeal to the Judicial Committee. In A I R 1936 Mad 733[4] Ramesam and Cornish JJ. had to consider this question and that case is, we understand, under appeal to the Judicial Committee and we hope that this conflict would be set at rest by a pronouncement of the Judicial Committee. Every one of the decisions, however, have (with a very few exceptions) dealt with a case of decree-holder, auction-purchaser seeking to recover possession. It does seem to be an extraordinary contention to urge that even a stranger auction-purchaser is bound to proceed in the execution department and that a separate suit is barred. The first question raises the point whether when a stranger auction-purchaser files an application for delivery against the judgment-debtor or a purchaser from him the question is one between the parties to the suit or their representatives-in-interest. In the case of a money decree a stranger auction-purchaser is not a representative of the decree-holder. As pointed out by Oldfield and Seshagiri Iyer, JJ. in 43 Mad 107[5]:

> The weight of authority in this Court is that a stranger auction purchaser in execution of a money decree is only a representative of the judgment-debtor.

According to Abdur Rahim, Offg. C. J., the question whether the auction-purchaser is a representative of the judgment-debtor or of the decree-holder depends upon the nature of the question raised and who the contesting party is. The other two Judges distinctly held that a stranger auction-purchaser in execution of a money decree is not a representative of the decree-holder but a representative of the judgment debtor: *vide* p. 128, Oldfield J., and p. 129 and 130, Seshagiri Iyer J. As pointed out by Seshagiri Iyer J., the decree-holder beyond being the instrument for bringing the property to sale does not, ordinarily speaking, transmit any of of his rights to the auction-purchaser.

> It is on the motion of the decree-holder that the Court proceeds to sell the property of the judgment-debtor and the principle of *caveat emptor* has been applied to purchases so made.

Abdur Rahim J., himself held in a later ruling in 13 M L W 15,[6] that in such cases, the auction-purchaser is the representative of the judgment-debtor. This being so, it is clear that the question that arises in this case is between judgment-debtor's private vendee on the one side and the auction-purchaser in execution of the money decree on the other side who is also a representative of the judgment-debtor. The question does not arise between the parties in the suit if by that expression it is understood parties who were arrayed on opposite sides

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1. ('39) 26 AIR 1939 Mad 869 : 180 I C 855 : I L R (1939) Mad 456 : (1939) 1 M L J 468 (F B), Krishna Iyer v. Subramania Iyer.
2. ('03) 26 Mad 740 : 13 M L J 237, Kattayat Pathumay v. Raman Menon.
3. ('05) 28 Mad 87 : 14 M L J 474, Sandhu Taraganar v. Hussain Sahib.
4. ('36) 28 A I R 1936 Mad 733 : 169 I C 456, Venkatakrishna Iyya v. Venkatanarayana Rao.
5. ('20) 7 A I R 1920 Mad 324 : 54 I C 209 : 43 Mad 107 : 38 M L J 32 (FB), Veyindramuthu Pillai v. Maya Nadan.
6. ('21) 8 AIR 1921 Mad 81 : 61 I C 961 : 13 M L W 15, Yegnaswami Iyer v. Chindambaranatha Mudaliar.

in the suit. This takes us to the next question whether S. 47 applies to a case where the dispute is between two persons both of whom claim under the judgment-debtor, that is under the same party. It is argued that S. 47 applies even to cases where the question arises between a party to a suit and his own representatives or between two persons who both represent the same party. Reliance is placed by the respondents on the decisions in 25 Mad 383,[7] 24 M L J 477,[8] 45 M L J 478,[9] 20 M L W 742[10] and 57 Mad 457.[11]

In 25 Mad 383[7] it was held that the question between the decree-holder and his assignee whether the assignee is entitled to execute the decree came under S. 244 of the old Civil P. C., now S. 47, and reliance was placed upon a decision reported in the footnote on p. 384. There is no discussion in 25 Mad 383[7] or in the case reported in the footnote as to how the question between the decree-holder and an assignee from him came within S. 244, now S. 47. In 24 M J 477[8] the question arose as to whose property (i. e., of which defendant's) should be sold first. It was held that where two persons who were both parties to the suit had conflicting interests in the suit and their conflicting claims were decided, then the requirements of S. 47 are satisfied. In 45 M L J 478,[9] the question arose between two defendants in a mortgage suit as to whose property should be sold first. There was a conflict between the two defendants inter se in the suit itself and this was held to raise a question under S. 47, Civil P. C. On p. 479 it is pointed out referring to the decision in 13 M L W 15[6] and other cases that in each of those cases the matter under consideration referred to a dispute between the judgment-debtor and his own representative. The Judges held that where the question arose between two persons who were both parties to the suit and had conflicting interests in the suit itself S. 47 would apply on the ground that the wording of it is general.

In 20 M L W 742,[10] the question arose between a person who sold some immovable property to one person after executing a contract of sale in favour of another person. The person in whose favour the contract of sale was executed filed a suit impleading the owner as defendant 1 and the subsequent purchaser as defendant 2. A decree was passed and some amount was deposited by the plaintiff. In execution of that decree, the question arose whether the subsequent purchaser was the person who was to execute the sale deed and receive the amount deposited in Court. The original owner opposed the application by the subsequent purchaser for the withdrawal of the amount and it was held that the subsequent purchaser was entitled to draw the amount. The suit which ultimately came up for decision before Madhavan Nair J. was filed by the original owner of the property against the subsequent purchaser for recovery of the amount. It was urged by the plaintiff that the question as to who was entitled to the amount deposited in pursuance of the previous decree was one which fell under S. 47, Civil P. C. Madhavan Nair J. held following the decisions in 24 M L J 477[8] and 18 M L W 311,[9] the latter case being the one reported in 45 M L J 478,[9] that the plaintiff and defendant in the latter suit occupied conflicting positions in the previous suit. He therefore held that the question which arose between these two parties fell within the purview of S. 47. It will be noticed that the question was raised in the previous suit in execution and was decided against the plaintiff in the latter suit.

In 57 Mad 457[11] the question related to an assignment of the decree; the assignee applied to have the assignment recognized and it was opposed by the decree-holder on the ground that the assignment was not supported by consideration. The application was dismissed and the assignee appealed and it was held that such a question fell within S. 47, Civil P. C. Reliance was placed upon the clause in S. 47 requiring the Court to determine whether a person is a representative of a party to a suit or not in the execution itself for the purpose of that section. This clause only means that where a person claiming to be the representative of the decree-holder filed an application against the judgment-debtor and the judgment-debtor denied that the applicant is a representative of the decree-holder that question should be determined by the executing Court for the purpose of section 47 and similarly where a person is alleged to be a representative of the judgment-debtor. There is no reference in the decision in 57 Mad 457[11]

7. ('02) 25 Mad 383, Subbu Thayammal v. Chidambaram Asari.
8. ('13) 24 M L J 477 : 19 I C 448 : 1913 M W N 382 : 13 M L T 347, Mangayya v. Sriramulu.
9. ('24) 11 AIR 1924 Mad 365 : 77 I C 148 : 45 M L J 478 : 18 M L W 311, Vedavias Iyer v. Madura Hindu Labha Nidhi, Ltd.
10. ('25) 12 AIR 1925 Mad 353 : 85 I C 209 : 20 M L W 742, Venkata Sastri v. Venkatagopaladu.
11. ('34) 21 AIR 1934 Mad 181 : 148 I C 55 : 57 Mad 457 : 67 M L J 207, Narasimha Iyer v. Venkatachalapati Iyer.

to any of the earlier decisions of this Court which took the contrary view. In 13 M L W 15,[6] Abdur Rahim and Odgers JJ. held that a question between one party and his own representative does not come under S. 47.

In 70 I C 329,[12] a decision of the Madras High Court, one of two joint decree-holders transferred his interest to a third party and the transferee applied for recognition of the transfer and for further execution. The application was opposed by the other joint decree-holder and it was held that the question between them was not one falling under S. 47 and reference was made to a number of earlier decisions which laid down the rule in the same way. None of these decisions was referred to in the decision in 57 Mad 457.[11] In 23 Mad 361,[13] 24 M L J 477,[8] 31 M L J 44,[14] 16 M L W 760[15] and 24 M L W 70,[16] the rule is laid down in the same way. In 24 M L W 70[16] the case was between two persons one claiming to be an assignee from the decree-holder and the other claiming to have a charge over the decree-holder's interest. Waller and Madhavan Nair JJ. held that this question was one between persons who occupied substantially the position of decree-holder, that judgment-debtors in the suit had nothing to do with this dispute and that therefore no appeal lay under S. 47.

It will be noticed that in 57 Mad 457,[11] the decision confirmed on letters patent appeal was one passed by Waller J. In this decision Waller J. does not refer to his earlier decision in 24 M L W 70.[16] It was not apparently referred to before him. The decision in 24 M L W 70[16] and the one in 57 Mad 457[11] are directly contrary to each other. In 31 M L J 44[14] a receiver was appointed at the instance of the decree-holder and after satisfaction of the decree amount the question arose as to whom among various defendants the property should be handed back. Such a question was held by the learned Judges not to fall under S. 47 as the decree-holder had no interest in the question between two judgment-debtors each of whom claimed possession. The Judges (Sadasiva Iyer and Moore JJ.) referred to an earlier decision of theirs in 3 M L W 105,[17] where the law was laid down similarly. We think therefore that the decision in 57 Mad 457[11] and the cases laying down the rule in similar terms require reconsideration and that the conflict between the various decisions of this Court requires to be set at rest. On principle the decisions in 13 M L W 15[6] and the other cases falling within that group appear to take the correct view.

The respondent urges an independent ground that the Privy Council decided in 19 Cal 683,[18] that irrespective of the question whether the dispute arises between two persons who were arrayed against each other in the previous suit the question as to delivery of possession must be decided in the previous suit itself. He urges that the decision of the Full Bench in 43 Mad 107[5] also decides this point in his favour. The case that went up to the Judicial Committee in 19 Cal 683[18] was a suit filed to set aside an auction sale which had been held in execution of a money decree. The suit was filed by the judgment-debtors on the ground that the sale was brought about fraudulently. They were defendants in the previous suit and had applied in the execution department in the previous suit for setting aside the sale. Their application was dismissed and the order was confirmed on appeal. Then a suit was filed by them for setting aside that very sale on the ground of fraud namely that the decree-holder had agreed after receiving their quota of the decree debt not to proceed against their shares of the property but had brought their shares to sale in execution of that very decree in breach of his agreement and that therefore fraud was practised by the decree-holder on them. In a short judgment, Lord Macnaughten upheld the decisions of the Indian Courts that the question which the plaint sought to raise could only be determined by the Court which executed the decree and that in such a case a separate suit for the purpose of setting aside the sale was barred by S. 244, Civil P. C. Dealing with the argument of Mr. Doyne who appeared for the appellants that the auction-purchaser was also interested in the question of setting aside the sale and that therefore the question did not arise between the parties to the suit in which the decree was passed, it was laid down,

12. ('24) 11 AIR 1924 Mad 518 : 70 I C 329, Hanumantha Rao v. Krishnamma.
13. (1900) 28 Mad 361 : 10 M L J 128 (FB), Ramaswami Sastrulu v. Kameswaramma.
14. ('17) 4 AIR 1917 Mad 218 : 35 I C 179 : 31 M L J 44, Anavarda Khan v. Misiri Khan.
15. ('22) 9 AIR 1922 Mad 68 : 65 I C 732 : 16 MLW 760, Yegnaswami Iyer v. Chidambaranatha Mudaliar.
16. ('26) 13 AIR 1926 Mad 691 : 93 I C 649 : 24 M L W 70, Raman Chettiar v. Chockalinga Chettiar.
17. ('17) 4 AIR 1917 Mad 217 : 33 I C 235 : 3 M L W 105, Lingam Krishna Bhupathi v. Venkataswami.
18. ('92) 19 Cal 683 : 19 I A 166 : 6 Sar 209 (PC), Prosunno Kumar Sanyal v. Kali Das Sanyal.

that when a question has arisen as to execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is not a party to the suit is interested in the result has never been held to be a bar to the application of the section.

It will be observed that according to this decision the question must have arisen between the parties to the suit in which the decree was passed. It must relate to the execution, discharge or satisfaction. If both these tests are satisfied, then the mere fact that a purchaser who is not a party to the suit is interested in the result of the decision does not prevent the applicability of S. 47. It will be noticed that in this case it never occurred to any one to suggest that the stranger auction-purchaser could be regarded as a representative of the decree-holder for the purpose of delivery of possession. This would support the decision of Oldfield and Seshagiri Iyer JJ. on this question in 43 Mad 107[5] and of Abdur Rahim J. in 13 M L W 15.[6] How the learned advocate for the respondent before us wants to read this decision is that if the question releated to the discharge, execution or satisfaction of the decree, S. 47 always applied even though it did not arise between the parties to the suit, i. e., even though in the decision of the question one of the parties to the suit was not at all interested. This view practically abrogates one requirement of S. 47 that the question should arise between the parties to the suit. The decision was expressly based upon the ground that in that case the question whether a sale should be set aside or not was one between the judgment-debtor and the decree-holder. The judgment-debtor alleged that the decree-holder in fraud of his express agreement with him had brought the property to sale and that therefore the sale was vitiated by fraud practised by the decree-holder. This question was one in which the decree-holder and the judgment-debtor were interested and it was a straight fight between them. All that the Judicial Committee held was that in such a case the judgment-debtor cannot file a separate suit for setting aside the sale and cannot escape the applicability of S. 244 merely by reason of the fact that the auction-purchaser was also interested in the decision of this dispute.

It was pointed out in 25 Bom 631[19] by Sir Lawrence Jenkins C. J., that this is the correct view to be taken of the decision of the Judicial Committee in 19 Cal 683.[18] In that case a stranger auction-purchaser purchased some property in execution of a money decree. The judgment-debtor paid the money under S. 310-A, now O. 21. R. 89, and the decree-holder was paid in full. Then judgment-debtor applied to have the sale set aside and the auction-purchaser resisted. Sir Lawrence Jenkins C. J. pointed out that at best the auction-purchaser was a representative of the judgment-debtor and that in the question that arose for decision the decree-holder was not at all interested. It was therefore held that to a case where the dispute was between a party to a suit and his own representative, S. 244 (now S. 47) would not apply. He dealt with the argument based upon the decision in 19 Cal 683[18] and pointed out the correct view to be taken of the decision of the Judicial Committee. The same view is expressed of that decision by Ramesam J., in AIR 1928 Mad 806.[20] It is urged by the respondent's counsel that the Full Bench decision in 43 Mad 107[5] lays down the rule as contended for by him and that the question is therefore concluded by the decision of the Full Bench. Before dealing fully with that case we may draw attention to the way in which Seshagiri Iyer J., answers that question. On page 132 Seshagiri Iyer J., laid down:

I would therefore answer all the questions referred to us by saying that if the points for decision in an application before the executing Court relate *to rival rights* of the *decree-holder and of the judgment-debtor* and also relate to execution, discharge or satisfaction of the decree it should be dealt with in execution and not by separate suit.

(The italics are ours.) Put in such a way, the decision does not lay down the proposition contended for by the learned advocate for the respondent. There must be a question in which the rival rights of the decree-holder and the judgment-debtor arise for decision. In the case before us the execution sale was confirmed, the decree-holder was paid and in the question whether the auction-purchaser is to get possession or not the decree-holder is in no way interested in either contingency. In the case in 43 Mad 107[5] the question arose in execution of a mortgage decree. In execution of that decree some properties were purchased by the decree-holder himself and some by a stranger. Sometimes before that a third party filed a suit against the same defendant, obtained a money decree and attached the property which had been mortgaged already. The statement of facts on page 108 reads as though the mortgage which

19. ('01) 25 Bom 631 : 3 Bom L R 255 Maganlal Mulji v. Doshi Mulji.

20. ('28) 15 A I R 1928 Mad 806 : 111 I C 551, Periyaya Ambalam v. Arulappan.

gave rise to the suit was itself executed after the attachment in execution of the money decree but we have verified from the records and found that the mortgage was long anterior to the money suit. The attachment in execution of the money decree was on 21st June 1916, the suit on the mortgage was filed on 14th July 1916, the auction sale in execution of the money decree was held on 25th October 1916, the sale was confirmed on 25th November 1916 and the properties were delivered on 12th February 1917. At that sale the decree-holder himself became the purchaser and he later on sold it to the appellant in the High Court.

The two purchasers in execution of the mortgage decree were obstructed by the appellant and the obstruction was removed on an application to the executing Court in the mortgage decree and the appellant was directed to hand over possession to the purchasers under the mortgage decree. Appeals were preferred against those orders, there being three appeals before the High Court. The parties to the proceedings in the Court below were the purchasers in execution of the mortgage decree on the one side and the purchaser in execution of the money decree on the other side. Objection was taken that no appeal lay at the instance of the appellant who was the purchaser from the decree-holder auction-purchaser in execution of the money decree. It was contended that the appellant was a representative of the judgment-debtor in the money suit and therefore of the defendant in the mortgage suit. It was also contended that the stranger auction-purchaser in execution of the mortgage decree was a representative of the decree-holder in that suit. If that were so the question would be between a representative of the defendant mortgagor on the one side and the decree-holder auction-purchaser or his representative, the stranger auction-purchaser in the mortgage suit, on the other. If the appellant in the High Court was the representative of the mortgagor but the stranger auction-purchaser in execution of the mortgage decree was not a representative of the mortgage decree-holder but only of the mortgagor defendant, then the question so far as this item was concerned would be one between two representatives of the same party. Oldfield and Seshagiri Iyer JJ. referred three questions for decision by the Full Bench. They are all set out on page 113 :

(1). Whether a purchaser at a sale held in execution of a money decree is a representative of a party and, if so, of which party for the purpose of inquiry into a question relating to the execution of (a) that money decree, (b) any other decree affecting the purchased property and against the same judgment-debtor.

(2). Whether a purchaser from a decree-holder purchaser under a money decree is a representative of a party for either of these purposes and, if so, of which.

(3). Whether a stranger purchaser at a sale in execution of a mortgage decree is the representative of a party and, if so, of which.

Abdur Rahim, Offg. C. J., considered the question whether an auction-purchaser in execution of money decree is to be deemed a representative of the decree-holder or the judgment-debtor in that suit. If he is considered to be a representative of the judgment-debtor in that suit, then he would be a person claiming under the defendant in the mortgage suit as the auction sale in execution of the money decree was subsequent to the institution of the mortgage suit. This answer would no doubt lead to the conclusion that in those applications in which the question arose between the mortgagee decree-holder auction-purchaser and the appellant before the High Court the question of delivery would be directly between the decree-holder on the one side and the judgment-debtor's representative on the other. But, this by itself, would not solve the question in the case between the stranger purchaser in execution of the mortgage decree (as I already observed, some lots were purchased by stranger auction-purchaser) and the appellant who was the representative of the mortgagor. The question would still remain whether the stranger auction-purchaser in the mortgage decree was a representative of either party to the mortgage suit and if so of which party? That is one of the questions formulated for decision at p. 113. But this question is not answered in any of the judgments. Applying the tests laid down by Seshagiri Iyer J. on pp. 131 and 132 the question of delivery of possession of that particular item was not one in which the decree-holder in the mortgage suit was interested. So, point B as formulated on p. 131 would not be satisfied. Whether a stranger auction-purchaser succeeds in obtaining the possession of the property which he purchased or not, the decree-holder was absolutely unaffected. Therefore, if we adopt the proposition of Seshagiri Iyer J., the answer should be that it is not a case falling under S. 47.

In the judgments of the other two learned Judges there are some observations which

show that they considered that the decision in 19 Cal 683[18] held that all questions relating to execution must be decided in the execution department and not by a separate suit. When the matter came up before the Division Bench, Oldfield and Seshagiri Iyer JJ. seem to have thought that the opinion of the Full Bench would govern all the cases. Then they decided the question on the merits. This decision is reported in 43 Mad 696.[21] It will be observed that there is no discussion as to how the Full Bench decision applied to the case in which the stranger auction-purchaser in execution of the mortgage decree was interested. It is therefore really the assumption on which the decision in 43 Mad 696[21] is based that can be said to be the authority for the proposition that as between the stranger auction-purchaser and the mortgagor or his representative the question of delivery of possession of the property purchased in execution is also a matter falling under S. 47. It will be observed that Oldfield J. refers on page 127 to a decision in 31 Mad 177[22] and does not express any disapproval of it.

Now the decision in 31 Mad 177[22] is upon the very question namely whether as between a stranger auction-purchaser and the judgment-debtor the question of delivery of possession of the property purchased in court auction would come under S. 244 and the decision was that it did not. If the decree-holder himself was the purchaser and he sought possession from the judgment-debtor or from a purchaser from the judgment-debtor the case would fall under S. 47. Similarly, where a person who purchases from the decree-holder court auction purchaser seeks possession from the judgment-debtor or a purchaser from him, the question is still under S. 47, but where the court auction-purchase itself was by a stranger auction-purchaser, 31 Mad 177[22] decides that that is not a case which would fall under S. 244, now S. 47. This decision is declared to be in some respects not the law in the judgment of Offig. Chief Justice at p. 124 but to what extent this decision must be considered to have been overruled is not very clear from the judgment. So far as we can see, there is no decision anywhere in any of the High Courts including the Madras High Court which holds expressly that a stranger auction-purchaser must apply in execution department itself for possession of the property purchased by him and that a separate suit therefor is barred under S. 47. The decision of Sir Lawrence Jenkins C. J. in 25 Bom 631[19] is referred to with approval by Oldfield J. in 43 Mad 107[5] at page 125.

We may also point out that in the case which is reported in 13 M L W 15,[6] Abdur Rahim J. laid down that before S. 47 could apply, the question must be one between the rival parties to the suit or their representative and not between a party and his own representative. The decision of the Full Bench in 43 Mad 107[5] was referred to in the judgment. Evidently, Abdur Rahim J. himself did not understand the Full Bench decision in 43 Mad 107[5] as dispensing with the requirement that the question must be one between the parties to the suit or their representatives. Abdur Rahim J. in 13 M L W 15[6] refers to the Full Bench in 43 Mad 107[5] as deciding that the purchaser in execution of a money decree is a representative of the judgment-debtor. He is there evidently acquiescing in the majority view expressed by Oldfield and Seshagiri Iyer JJ. In holding that the question must arise between the rival parties to the suit Abdur Rahim J. relied upon the decision of the Bombay High Court in 25 Bom 631.[19] It is therefore difficult to say that Abdur Rahim J. laid down the proposition in 43 Mad 107[5] that the question need not arise between the parties to the suit and that a question between a party and his own representative was also within S. 47, Civil P. C.

There is however one decision in 41 M L J 120[23] which needs scrutiny. In that case a stranger auction-purchaser in obtaining possession through the Court amin took possession of much more than what he was entitled to under the sale certificate. The judgment-debtor filed a suit for recovery of possession of what he alleged was wrongfully taken by the stranger auction-purchaser in the delivery proceedings and objection was taken in the High Court that the suit was barred by S. 47. Krishnan J. held that the decision of the Full Bench in 43 Mad 107[5] was that even in the case of a stranger auction-purchaser the question of delivery of possession must be fought out in that suit itself in execution department and that a separate suit is barred by S. 47, Civil P. C. Ayling J. observed that the Full Bench judgment in 43 Mad 107[5] seemed to

21. ('20) 7 A I R 1920 Mad 126 : 58 I C 501 : 43 Mad 696 : 39 M L J 456, Veyindramuthu Pillai v. Maya Nadan.

22. ('08) 31 Mad 177 : 3 M L T 306, Krishna Satapasti v. Saraswatula Sambasiva Rao.

23. ('21) 8 AIR 1921 Mad 420 : 63 I C 200 : 41 M L J 120, Jainulabdin Sahib v. Krishna Chettiar.

extend the applicability of S. 47 to a degree hardly suggested by the wording of that section but he was not prepared to dissent from the view of that judgment taken by his colleague Krishnan J. This matter was considered by Ramesam J. in the decision reported in A I R 1928 Mad 806.[20] Ramesam J. pointed out that the decision of the Judicial Committee in 19 Cal 683[18] cannot apply to a case where the question did not involve the rival claims of the parties to the suit, i. e., between the decree-holder on the one side and the judgment-debtor on the other side. He referred to the decision in 43 Mad 107[5] and of Krishnan J. in 41 M L J 120[23] and while dissenting from the view of Krishnan J. expressed in 41 M L J 120[23] Ramsam J. did not think it necessary to refer it to a Bench. He takes it that the Full Bench in 43 Mad 107[5] did not decide that the question between the stranger auction-purchaser and the judgment-debtor fell within S. 47, Civil P. C., and observed that it is only 43 Mad 696[21] decided or assumed it to be so.

It is urged that the decree-holder at whose instance the property was put up for sale in execution is bound to see that the sale is completed in all its stages, that delivery of property to the purchaser is one such stage that he should see to the last stage of the transaction, and that therefore he is also interested in the question of delivery of possession. He urges that in the case of a private sale the vendor is bound to put the vendee in possession and asks us to apply the same rule by analogy in the case of a court sale. We are unable to appreciate the analogy pressed before us by the learned counsel. Differences between a private sale and court auction are obvious. If it means that the decree-holder is in law bound to see that the purchaser is put in possession we are not aware of any such rule of law. This is not the ground which was suggested in any of the decisions which have been brought to our notice. As pointed out in a recent case in L. P. A. No. 70 of 1937,[24] the question as to the applicability of S. 47 depends upon the question at issue. In that case, a court sale was held under which money was paid by a stranger auction-purchaser and drawn out by the decree-holder. Thereafter the judgment-debtor applied to have the sale set aside and the sale was set aside. The auction-purchaser filed an application for return of the money from the decree-holder under R. 93 of O. 21. The decree-holder objected that the application was barred by limitation. The first Court held that it was not barred and directed the decree-holder to refund the amount.

The decree-holder filed an appeal. The question was whether an appeal lay and whether it was a matter coming under S. 47. If the law is that the auction-purchaser is always a representative of the judgment-debtor then the question in that case was between the decree-holder who was resisting the application for refund of money and the stranger auction-purchaser who, according to the above rule, would be a representative of the judgment-debtor. The result should be that an appeal would lie but it was held in that decision that the matter did not come under S. 47. As pointed out therein, we have to see what the nature of the question involved is. Once the auction sale was set aside and that decision became final, the judgment-debtor was not interested at all in the question whether the decree-holder was bound to refund the amount. The question arose between the decree-holder on the one side and the auction-purchaser on the other side but in that question the judgment-debtor was not interested. Therefore there was no rival claim between the decree-holder and the judgment-debtor so as to bring the case under S. 47, Civil P. C. In claiming the money back after the sale had been finally set aside, the auction-purchaser was representing no one but himself. He claimed the money in his own right. He had ceased to be the representative of the judgment-debtor. In such a case S. 47 would not apply.

In cases where the rights of third parties to the properties purchased in court auction come up for decision the auction-purchaser would be a representative of the judgment-debtor. There is much to be said for the view that the auction-purchaser represents no one but himself in the delivery proceedings. He wants possession of the properties which he has purchased. He is opposed by the judgment-debtor. It is difficult to postulate that in such a case the auction-purchaser is a representative of the judgment-debtor who is fighting him tooth and nail. We are inclined to say, as was said in L. P. A. No. 70 of 1937[24] that in such a case the auction-purchaser represents neither the decree-holder nor the judgment-debtor but he represents himself only. We must see in each case how the question arises and whether in the

24. *Reported in* ('39) 26 A I R 1939 Mad 740 : 188 I C 187 : (1939) 2 M L J 353, Ramasami Chettiar v. Meyappan.

determination of this particular question, he is a representative of this party or that party. In this state of things we cannot but endorse the statement of Mr. Mulla, Code of Civil Procedure on p. 181 (Edn. 10) that so far as the Madras High Court is concerned the question whether a stranger auction purchaser is bound to seek delivery in that very suit and whether a separate suit is barred is in "a hopeless state of uncertainty". As he points out the conflict was sought to be set at rest by a reference to a Full Bench in 43 Mad 107,[5] but it cannot be said that the object has been achieved. In this state of authorities we would suggest that the matter should be referred to a Full Bench so constituted as to be in a position to deal with the correctness of the opinions of the Judges in 43 Mad 107.[5] We need hardly add that a question of this kind should be settled authoritatively. We frame the following questions for consideration and decision of the Full Bench: (1) Whether an application by a stranger auction-purchaser for delivery of possession as against the judgment-debtor or his representative is covered by S. 47? (2) Whether S. 47 applies to a case where the dispute arises between a party and his own representative or between the two persons who both represent the same party?

OPINION

Leach C. J.—This Full Bench has been constituted to decide two questions referred by Krishnaswami Ayyangar and Somayya JJ., in a second appeal arising out of a suit for possession. The two questions are:

> (1) Whether an application by a stranger auction purchaser for delivery of possession as against the judgment-debtor or his representative is covered by S. 47, Civil P. C.? (2) Whether S. 47 applies to a case where the dispute arises between a party and his own representative or between the two persons who both represent the same party?

Before proceeding to discuss these questions, I will state the circumstances under which they arise. One Kalathi Mudaliar obtained a money decree and on 18th September 1921 in execution of that decree attached certain immovable property. On 26th September 1921 the judgment-debtor's widow sold the property to defendants 1 to 3. On 7th January 1922 the property was sold by the Court in the execution proceedings and the plaintiff, a stranger, became the auction-purchaser. On 1st March 1932, the plaintiff filed a suit for possession of the property. The trial Court (the District Munsif's Court of Tirupathi) dismissed the suit on the ground that S. 47, Civil P. C., barred its institution. The plaintiff then appealed to the Court of the District Judge of Chittoor, who concurred in the decision of the trial Court and against his decision the second appeal out of which this reference arises was filed. The learned Judges who have made the reference have made an exhaustive examination of the authorities, and although it will be necessary to refer to some of the cases with which they have dealt it will not be necessary to travel over all the ground. Section 47, Civil P. C., reads as follows:

> (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree, and not by a separate suit. (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees. (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

It will be observed that for a matter to come within the purview of the section the following conditions must be fulfilled: (i) It must relate to a question arising between the parties to the suit in which the decree was passed or their representatives; and (ii) it must relate to the execution, discharge or satisfaction of the decree. If these conditions are fulfilled the question must be determined by the Court executing the decree and a separate suit will not lie. In 19 Cal 683,[18] the Privy Council, while pointing out that S. 244, Civil P. C., 1872, which corresponds to S. 47 of the present Code contemplated a question between the parties to the suit with regard to the execution, discharge or satisfaction of the decree, observed that it did not necessarily follow that the question must be raised by a party to the suit. An auction-purchaser could have a question decided under S. 244 when the question raised was a question which affected the parties. The Board did not, however, consider the question whether an auction-purchaser was a representative of the decree-holder or of the judgment-debtor. There has been much controversy in this and other High Courts in India with regard to the question whether a stranger to a suit who purchases property at a court auction in execution of a money decree must be regarded as a representative of a party. Owing to a conflict of decisions in this Court, Oldfield and Seshagiri Iyer JJ. in 43 Mad 107,[5] referred the following questions to a Full Bench:

> 1. Whether a purchaser at a sale held in execution of a money decree is a representative of a party

and, if so, of which party for the purpose of inquiry into a question relating to the execution of (a) that money decree, (b) any other decree affecting the purchased property and against the same judgment-debtor.

2. Whether a purchaser from a decree-holder purchaser under a money decree is a representative of a party for either of these purposes and, if so, of which.

3. Whether a stranger purchaser at a sale in execution of a mortgage decree is the representative of a party and, if so, of which.

The Full Bench which was constituted to decide these questions was composed of Abdur Rahim, Offg. C. J., and the two referring Judges. The learned Judges delivered separate judgments, but in no judgment were precise answers given to the questions referred, although the judgments of Oldfield and Seshagiri Iyer JJ. have been construed as holding that a stranger auction-purchaser in execution of a money decree must be regarded as a representative of the judgment-debtor. Abdur Rahim Offg. C. J. answered the question in this way:

> The law, therefore, in my opinion is that a person who has bought the property of the defendant in a suit since the institution of that suit, whether at a court auction held in execution of a money decree passed in another suit or by private purchase, is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree decided under S. 47 by the Court executing the decree, when his interest is affected either by the decree itself or by the sale held in execution of that decree: and the same rule applies to a purchaser of the property under such sale, whether he is the decree-holder himself or a stranger. Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is.

In a later case, 13 M L W 15,[6] the learned Officiating Chief Justice sitting with Odgers J. expressly stated that the decision in 43 Mad 107[5] may be taken as deciding that the auction-purchaser is a representative of a judgment-debtor. Oldfield J. held that the purchaser in execution of a money decree is ordinarily the representative of the judgment-debtor. Seshagiri Iyer J. expressly held that he was not the representative of the decree-holder, and left it to be inferred that he was the representative of the judgment-debtor. His answers to the questions referred were in these words:

> I would therefore answer all the questions referred to us by saying that if the points for decision in an application before the executing Court relate to the rival rights of the decree-holder and of the judgment-debtor and also relate to execution, discharge or satisfaction of the decree, it should be dealt with in execution and not by separate suit. The right of appeal and second appeal will be governed by the same rules as affect applications under S. 47.

Notwithstanding the lack of precision in language used in the judgments it has been accepted by the parties concerned in the present reference that 43 Mad 107[5] did put an end to the controversy whether a stranger auction-purchaser at a sale held in execution of a money decree, is the representative of the judgment-debtor, and I see no reason to take a different view. All the right, title and interest of the judgment-debtor passes to the stranger auction-purchaser and therefore he stands in the shoes of the judgment-debtor. Different considerations may arise when a sale is held in pursuance of a mortgage decree as the mortgagee's interest has there to be considered, but it is not necessary to define the position of an auction-purchaser in such a case, as here the Court is merely concerned with the position which arises when there has been a sale of the property attached under a decree for payment of money. The contest in the suit out of which this reference arises is, as has been shown, between a stranger auction-purchaser in execution proceedings relating to a money decree and the purchasers in a private sale from the widow of the judgment-debtor. The judgment-debtor having died the property devolved on the widow. The conflict is merely one between persons claiming under the judgment-debtor and the decree-holder is in no way concerned with it. He has been paid his money and has disappeared from the proceedings. The contest not being a contest between the parties to the suit or their representatives, but a contest between persons claiming under one of the parties, the case does not fall within the decision of the Judicial Committee in 19 Cal 683,[18] and this being the position the dispute cannot be settled in an application under S. 47, Civil P. C. With this expression of opinion I will now proceed to answer the questions referred.

The answer which I give to the first question is that a stranger who purchases property at a court auction held in execution of a money decree is not entitled to apply for possession as against the judgment-debtor or his representative-in-interest under S. 47. When the judgment-debtor or any one at his instigation resists or obstructs the auction-purchaser the latter must proceed in accordance with the provisions of O. 21, R. 97. The answer to the second question is directly in the negative. The aggrieved party's remedy in such a case is by way of suit. These answers, in which my learned brothers concur, although my learned bro-

ther Patanjali Sastri bases his answer to the first question on different grounds, involve the overruling of the decisions in 25 Mad 383,[7] 56 Mad 808[25] and 57 Mad 457.[11] In 25 Mad 383,[7] Davies and Moore JJ., held that an order refusing to recognise the transferee of a decree may, contest or no contest, for purposes of appeal, be regarded as an order passed under S. 244 of the Code of 1872. This was an application for execution by an assignee. It was objected to by an attaching creditor on the ground that the assignment was fraudulent. This was clearly not a contest between the parties to the suit or their representatives, but it was a contest between a stranger and a person who claimed to represent the decree-holder.

In 56 Mad 808[25] Madhavan Nair J., held that a contest between the auction-purchaser and the judgment-debtor fell within S. 47. The learned Judge refused to accept the decision of Abdur Rahim and Odgers JJ., in 13 M L W 15[6] and preferred to decide the case on the decision of Ayling and Krishnan JJ., in 41 M L J 120[23] in which it was held that a claim for the recovery of properties alleged to have been delivered to an auction-purchaser in excess of what was actually sold under a mortgage decree when the claim was raised by a defendant in the mortgage suit came within S. 47. The case before Madhavan Nair J., was one relating to the execution of a money decree and 41 M L J 120[23] was not really in point. The case which was in point was 13 M L W 15,[6] which was rightly decided. 57 Mad 457[11] is a decision of Beasley C. J., and Bardswell J. There the assignee of a decree applied for execution. This was opposed by his assignor. Therefore, the contest was one between the decree-holder and his own representative. The learned Chief Justice considered that the case was governed by sub-s. 3 of S. 47. That sub-section merely states that where a question arises as to whether any person is or is not the representative of a party such question shall for the purposes of the section be determined by the Court. This sub-section cannot be held to affect the meaning of the words used in sub-s. (1). The contest was not between the parties to the suit or their representatives. The contest was between one party and another person who claimed to stand in his shoes. In 25 Mad 383,[7] 56 Mad 808[25] and 57 Mad 457[11] the true effect of S. 47 was not realized and these cases having been wrongly decided they cannot be allowed to stand. The costs of this reference will be made the costs in the appeal.

Pandrang Row J. — I agree with my Lord.

Abdur Rahman J. — I agree.

Krishnaswami Ayyangar J. — I also agree. I may add that the answers given by my Lord the Chief Justice are substantially the same as those which were indicated by the referring Bench of which I was a member.

Patanjali Sastri J. — I agree with my Lord the Chief Justice that both the questions referred to the Full Bench should be answered in the negative, but as my answer to the first question rests upon different grounds, I am stating them in a judgment of my own. As regards this question, it has to be observed that, though there has been considerable divergence of opinion among the other High Courts in India (*see* 53 Cal 781,[26] 31 ALL 82,[27] 48 Bom 550,[28] 10 Pat 670[29]) this Court has consistently adhered to the view, notwithstanding doubts expressed in some of the cases, that where a decree-holder himself is the auction-purchaser, questions as to delivery of possession to him relate to the execution, discharge and satisfaction of the decree within the meaning of S. 47, and there is a catena of cases to that effect from 13 Mad 504[30] to the recent decision in (1939) 1 M L J 468.[1] Though none of them can be said to be binding on this Bench as it has been constituted, still as the question is merely one of procedure, it will not be desirable, as observed by my Lord, the Chief Justice, in the latest decision referred to above, to depart from this long course of decisions and upset what has been regarded in this Presidency as a settled *cursus curiæ* for over 50 years.

This consideration however does not apply to a stranger auction-purchaser seeking to obtain delivery of possession from a judgment-debtor or his representative, as there has been no such course of decisions settling the procedure in such a case. Indeed, I have not been able to find any decision of this

25. ('33) 20 AIR 1933 Mad 598 : 143 I C 854 : 56 Mad 808 : 65 M L J 253, Sorimuthu Pillai v. Muthukrishna Pillai.

26. ('26) 13 A I R 1926 Cal 798 : 95 I C 494 : 53 Cal 781 : 43 C L J 345 : 30 C W N 649 (FB), Kailash Chandra v. Gopal Chandra.

27. (09) 31 All 82 : 1 I C 416 : 6 A L J 71, Bhagwati v. Banwari Lal.

28. ('24) 11 A I R 1924 Bom 429 : 83 I C 932 : 48 Bom 550 : 26 Bom L R 601 (FB), Hargovind Fulchand v. Bhuder Raoji.

29. ('31) 18 A I R 1931 Pat 241 : 133 I C 337 : 10 Pat 670 : 12 P L T 423 (FB), Tirbeni Prasad v. Ramasray Prasad.

30. ('90) 13 Mad 504, Muttiah v. Appaswami.

Court holding that the question as to delivery of possession to a stranger auction-purchaser related to execution, discharge or satisfaction of the decree within the meaning of S. 47 except 41 M L J 120[23] at p. 122, which relied, for this point, on two cases which however related to decree-holder purchasers. The point was raised in 31 Mad 177[22] but it was left open as unnecessary to decide in that case, as the learned Judges based their conclusion on other grounds. And, though one of the appeals that came up before this Court in 43 Mad 107[5] related to a stranger auction-purchaser seeking removal of obstruction by a person claiming under the judgment-debtor, it was there assumed by the referring Judges, without any discussion or consideration of the point, that the question as to delivery to such a person related to execution, discharge or satisfaction of the decree, and it was not among the questions referred to the Full Bench (see p. 113); nor does it appear to have been considered by the Division Bench in their judgment finally disposing of the case after the Full Bench answered the reference: *see* 43 Mad 107.[5]

It seems to me, therefore, necessary to examine whether the principle underlying the series of decisions applying S. 47 to a decree-holder purchaser seeking delivery of possession applies equally to a stranger auction-purchaser asking for similar relief. For, if it does, there will be no reason why the latter should also not be held bound to follow the same settled procedure by way of an application under that section. On a careful consideration of these cases, however, I am clearly of opinion that the grounds on which they are based cannot reasonably be held to apply to the case of a stranger auction-purchaser whose position seems, for this purpose, to be essentially different from that of a decree-holder auction-purchaser. These decisions proceed on the ground that where a decree-holder himself purchases the property in court auction, he cannot be regarded as having secured the full fruits of his decree until he obtains delivery of possession of the property purchased and the decree cannot be deemed to be completely satisfied until such delivery is obtained. Any steps, therefore, that he might take for obtaining such delivery must be deemed to be steps in furtherance of the execution of his decree. In one of the earliest cases of this Court, 13 Mad 504,[30] Muttuswami Ayyar J. observes :

> I am unable to uphold the contention that the court sale operated to *satisfy* the decree in O. S. No. 4 of 1882 and that a subsequent agreement regarding the purchase prior to the delivery of possession under S. 318 does not relate to the execution of the decree. The purchaser in this case was the decree-holder and the party obstructing the delivery of possession was a judgment-debtor, and the oral agreement set up in justification of the obstruction prevents in effect the *completion of the purchase by transfer of possession.*

(Italics mine.) At p. 508, he observes :

> The application for delivery under S. 318 is substantially an application for execution of the decree by ordering delivery of possession of the property purchased.

The Calcutta High Court which, after some conflict, has settled down to the same view on this point by a majority of four to one in the Full Bench case in 53 Cal 781[26] is equally clear as to the ratio decidendi. Chatterjea A. C. J. observes at p. 794 :

> The property purchased represents the money for which he obtained his decree. It is to be observed that the decree-holder has to purchase with the permission of the Court, and under O. 21, R. 72, the purchase money and the amount due on the decree may be set off against one another. But the decree-holder does not actually get the benefit of the money due under his decree until he gets possession of the property of the judgment-debtor purchased by him.

In Bombay and Allahabad also, similar reasoning was employed in support of the same conclusion : *see* 35 Bom 452[31] at p. 459 and the dissenting judgment of Stanley C. J. in 31 ALL 82,[27] though it is no longer the prevailing view in those provinces : *see* 48 Bom 550[28] and 31 ALL 82.[27] Such being the ratio decidendi of the cases holding that questions as to delivery of possession to a decree-holder auction-purchaser relate to the execution, discharge or satisfaction of his decree, it cannot obviously apply to a case where a stranger purchases property in an execution sale. For, here, as soon as the sale is confirmed and the purchase money is paid to the decree-holder, the debt due under the decree is satisfied pro tanto or in full, as the case may be, and so far as the property sold is concerned, the execution is at an end. The fruits of his decree have been secured whether or not the auction-purchaser obtains delivery of possession of the property brought to sale. On the other hand, the purchaser, provided he purchases bona fide, is not affected by any subsequent variation or even reversal of the decree : *see* 10 ALL 166.[32] It seems to me, therefore, to follow that questions as to delivery of possession to a stranger purchaser cannot be

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31. ('11) 35 Bom 452 : 11 I C 987 : 13 Bom L R 661, Sadashiv v. Narayan Vithal.

32. ('88) 10 All 166 : 15 I A 12 : 5 Sar 129 (P C), Zaimul Abdin Khan v. Mohomed Ashgar Ali Khan.

said to relate to execution, discharge or satisfaction of the decree. Though, as observed already, there appears to be no case in this Court in which the question can be said to have been considered in relation to a stranger auction-purchaser, the Calcutta High Court, which takes the same view as this Court as regards a decree-holder purchaser, has recognised this well marked distinction between a decree-holder purchasing property in execution of his own decree and a stranger auction-purchaser, and has consistently refused to apply S. 47 to a case where the latter seeks delivery of possession of the property. It is enough in this connection to refer to the observation of Chakravarthi J. in 53 CAL 781[26]:

> So far as this question is concerned, I think there is a long series of decisions of this Court in which the distinction between the decree-holder auction-purchaser and a third party auction-purchaser has been well maintained.

Similarly, in Bombay, when the prevailing view as regards a decree-holder purchaser was the same as in Madras, the case of a stranger purchaser was held to be distinguishable: *see* 44 Bom 352[33] at p. 364. For these reasons I hold that the question of delivery of possession to a stranger auction-purchaser does not relate to "the execution, discharge or satisfaction of the decree" within the meaning of S. 47, Civil P. C. Though this view renders unnecessary the consideration of the further point, also involved in the first question referred, as to whether a stranger auction-purchaser is a representative of the decree-holder or of the judgment-debtor within the meaning of S. 47, as I consider that in a case like this he is to be regarded as the representative of the decree-holder, I shall briefly indicate the grounds on which I base my opinion. The question is by no means free from difficulty, as can be seen from the numerous conflicting decisions upon it, and it is not without regret that I differ from my Lord, the Chief Justice and my learned brothers whose opinion, I need hardly say, I have respectfully considered. The answer, which, in my opinion, is the right one, cannot be put more tersely than in the words of the learned Judges in 18 Mad 13[34] at p. 18 :

> A purchaser in a court sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of sale, and represents the execution creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree,

whether in a particular case he represents the one or the other depending (as observed by Abdur Rahim Offg. C. J. in 43 Mad 107[5] at p. 124) upon the nature of the question raised and who the contesting party is. In the present case, having regard to the nature of the dispute which relates to the superior title claimed by the appellant under a court sale as against respondents 1 to 3 who have purchased the property under a private sale from the judgment-debtor's widow pending attachment, it seems to me that the appellant can and should be regarded as the representative of the decree-holder. The position is this : The judgment-debtor having already sold the property to respondents 1 to 3, the appellant who purchased only the right, title and interest of the judgment-debtor at the court sale would get nothing under the sale but for the protection afforded by S. 64, Civil P. C., to a decree-holder executing his decree. That section, it will be observed, does not render an alienation pending attachment void against all persons and for all purposes, but only against a "claim enforceable under the attachment," i.e., against the decree-holder's right to bring the property to sale under his attachment unaffected by any alienation by the judgment-debtor subsequent to such attachment : *see* the observations of the Privy Council in 8 I A 65[35] at p. 75 on S. 240, Civil P. C. of 1859 which was in even wider terms than S. 64. The appellant cannot therefore claim to treat the purchase of respondents 1 to 3 as a nullity except by invoking this right of the decree-holder under S. 64, Civil P. C., and, to this extent and for this purpose, the appellant can and should, in my opinion, be treated as claiming under or representing the decree-holder.

Now, the term "representative" is not defined in the Code. It has been held that it is a term of wider import than "legal representative" as defined by S. 2 (11) of the Code and means "a representative in interest" : *see* 24 Cal 62.[36] Does it, however, necessarily import, as a condition of its application, a transmission of interest in property, or does it merely connote standing in the place of another for the purpose of deriving some right or advantage from him. The latter is undoubtedly the ordinary

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33. ('20) 7 A I R 1920 Bom 90 : 56 I C 349 : 44 Bom 352 : 22 Bom L R 296, Ramachandra Vithal v. Gajanan Narayan.

34. ('95) 18 Mad 13, Krishnabhupathi Devu v. Vikrama Devu.

35. ('80) 7 Cal 107 : 8 I A 65 : 10 C L R 281 : 4 Sar 213 (PC), Dinendronath Sanial v. Ramcoomar Ghosh.

36. ('97) 24 Cal 62 : 1 C W N 36 (F B), Ishan Chander v. Beni Madhub.

meaning of the term and it is commonly used in a variety of contexts which do not involve the idea of any interest in property passing. In the absence of any indication in S. 47 that the term is used in a more restricted sense, there seems to my mind to be no reason why it should not be understood in its ordinary meaning referred to above. Indeed, there is authority for the view that even the expression "legal representative", notwithstanding the terms of its definition referring to the devolution of an estate, can appropriately be applied to cases where there is and can be no transmission of interest in property. Dealing with the claim of a remoter reversioner to be substituted in the place of the deceased presumptive reversioner who had brought a suit for a declaration that an adoption made by a widow was invalid, their Lordships observed in 38 Mad 406[37] at p. 413:

> The phraseology of sub-s. (11) in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his *reversionary* right, the estate of the last male owner, and that on his death such *right* devolved on the petitioner.

(Italics mine). It is, of course, plain that the right here referred to is not an interest in property as a reversioner, presumptive or remote, has only a spes successionis. I am therefore of opinion that the term 'representative' in S. 47, Civil P. C., should be understood as merely referring to one who stands in the shoes of another to use an expression familiar in legal parlance and as meaning more or less the same thing as the expression 'claiming under' used in other sections of the Code, *e. g.*, Ss. 11 and 146. The conclusion that a stranger auction-purchaser should, in certain circumstances, be regarded as representing and claiming under the decree-holder who brought the property to sale derives support from decisions on closely analogous subjects, in the wider perspective of which the question now under consideration should, as it seems to me, be viewed. In the well known case in 19 I A 203,[38] the question arose whether a purchaser in execution of a mortgage decree obtained by a mortgagee from a person who had no title to the property but whose mortgage had to be upheld as valid by estoppel against the true owner, could avail himself of such estoppel in a question with a private purchaser from the true owner even though the auction-purchaser was fully aware, at the time of his purchase, that the mortgagor had no title to the property. Their Lordships observed at page 215:

> And their Lordships must further observe that, as the mortgage was effectual as a valid title to Kalimuddin, the lender, under which, in default of payment of the money lent, he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of the hiba and that it had been originally invalid.

It was, no doubt, a case of an auction-purchaser in execution of a mortgage decree and it has been suggested in some decisions that such a purchaser derives the rights of both the mortgagor and the mortgagee and can thus be regarded as the representative of the decree-holder also. Assuming, that such a distinction is valid (as to which, however, see the observations in 41 M L J 120[23] at p. 123), I am unable to read the decision of their Lordships as proceeding upon any such narrow ground. Their reasoning, as is clear from the passage quoted above, was that the mortgagee decree-holder was entitled, by virtue of the estoppel, to sell the property validly as against the true owner and that, therefore, the purchaser at the sale in enforcement of that right was really purchasing the property "from him," and thus acquired a good title, by the same estoppel, against the true owner although he (the purchaser) was actually aware of the circumstances. In other words, their Lordships regarded the execution purchaser as one claiming under or representing the decree-holder, in so far as the latter had the right to sell the property validly through Court against the true owner in satisfaction of his decree. That principle is, to my mind, equally applicable to an auction-purchaser in execution of a money decree who has also a right to bring the property to sale, by virtue of his attachment and the operation of S. 64, unaffected by the title having become vested in an alienee from the judgment-debtor before the execution sale. In this connexion I may refer to the distinction pointed out by their Lordships of the Privy Council between a private sale and an execution sale. Their Lordships observed:

> In the former the price is fixed by the vendor and purchaser alone; in the latter the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor, and cannot acquire a better

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37. ('15) 2 AIR 1915 P C 124 : 29 I C 298 : 38 Mad 406 : 42 I A 125 (P C), Venkatanarayana Pillai v. Subbammal.

38. ('93) 20 Cal 296 : 19 I A 203 : 6 Sar 224 (P C), Sarat Chunder Dey v. Gopal Chunder.

title than that of the vendor. Under the latter, the purchaser, notwithstanding he merely acquires the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution. *See* 8 I A 65[35] at p. 75.

These observations and the remark in 19 I A 203[38] that the auction-purchaser was purchasing the property from the mortgagee in so far as the latter was seeking to enforce his right to sell through Court in the mortgage suit, show the existence of what has been called the "privity in law" between the decree-holder and the auction purchaser. The decision in 18 Mad 13,[34] furnishes another illustration of circumstances where a stranger auction purchaser in execution of a money decree can appropriately be held to be the representative of the decree-holder. The defendant in that case had attached certain properties of his judgment-debtor in execution of a money decree. The plaintiff intervened with a claim based upon a gift deed executed in his favour by the judgment-debtor but his claim was disallowed. He thereupon sued the decree-holder to have his title recognised and the property released from attachment and the suit was dismissed on the ground that the gift was inoperative. The property was subsequently brought to sale on account of that decree as well as three other decrees, held by the same decree-holder, and it was purchased by a third party. The plaintiff then brought the suit (out of which the case in 18 Mad 18[34] arose) against this auction purchaser for a declaration of the validity of the same gift which he failed to obtain in this earlier suit against the decree-holder, and the question arose whether the finding in the previous suit was res judicata. The learned Judges, Muttuswami Ayyar and Best, held that it was and observed at p. 18:

> It is a well-known principle that a purchaser at a court sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of sale, and represents the execution creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree. Hence, it follows that the purchaser is a party claiming in this case under the execution creditor, Ramamurti, within the meaning of S. 13, and the Judge has apparently overlooked the privity in law which exists between the two. The decision in 19 I A 203[38] is a clear authority for the proposition that when the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution sale as his representative or as one claiming under him.

The learned Judges no doubt proceeded to distinguish certain cases as decisions relating to S. 244, Civil P. C., (corresponding to S. 47), but, I respectfully share the inability of Abdur Rahim Offg. C. J., in 43 Mad 107[5] at p. 122 to see why the principle should not be applied to S. 47, of the Code as well. It is open to this Bench, of course, to say that the decision in 18 Mad 13[34] is wrong, but it seems to me, if I may say so, to be unquestionably good sense and good law; for, it would be an inconvenient state of the law, if it were found necessary, after a decree-holder establishes his right to sell certain properties as belonging to his judgment-debtor and free of the claim put forward by a third party, in a litigation which may extend over years and pass through several Courts, that the execution purchaser has to go through the same process all over again against the same party in respect of the same claim.

On the other hand, the decision in 51 M L J 143[39] shows that it might not be correct, in certain circumstances and for certain purposes, to hold that an execution purchaser is a representative of the judgment-debtor, though he gets the right, title and interest of the latter at the execution sale. A certain property was purchased by the plaintiff in that case in execution of a money decree. It had been attached before the court sale, and during the pendency of the attachment, there was a usufructuary mortgage by the judgment-debtor to the defendant. Nearly 27 years after the purchase, the purchaser brought the suit for redeeming the mortgage on the ground that the defendant was only a mortgagee and that he (the purchaser), being the owner of the equity of redemption, was entitled to redeem the property. The purchaser, it will be noted, did not claim to treat the mortgage as void, though he was entitled to do so, as it was effected pending attachment. He was content, evidently in order to get over the bar of limitation, to take up the position that it was a valid mortgage and that he purchased only the equity of redemption. In other words, he asked to be treated as one standing in the shoes of the judgment-debtor, i. e., as his representative, and to be allowed to redeem the property on that footing, even as the judgment-debtor would be entitled to do if he continued to be the owner. But the Court rejected his prayer and dismissed the suit, holding, on the strength of the observation of the Privy Council in 8 I A 65,[35] that there was no

39. ('26) 13 AIR 1926 Mad 966 : 97 I C 718 : 51 M L J 143, Srinivasa Iyengar v. Vellayyan Ambalam.

privity between him as the execution purchaser and the defendant as the mortgagee from the judgment-debtor. For these reasons, I am inclined to hold that the appellant in this case is to be regarded as the representative of the decree-holder within the meaning of S. 47, Civil P. C. On the second question referred, I agree with the judgment of my Lord, the Chief Justice, which I have had the advantage of reading and have nothing material to add.

C.R.K./D.S. *Answered in the negative.*

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* A. I. R. 1941 Madras 176

Full Bench

LEACH C. J., VENKATARAMANA RAO AND HORWILL JJ.

Chinatalapati Venkatanarasimharaju — Appellant

v.

Surisetti Ramaswami and another — Respondents.

Second Appeal No. 620 of 1937, Decided on 8th November 1940, against decree of Sub-Judge, Vizagapatam, in A. S. No. 101 of 1936.

(a) Easement—Interference of—Considerations governing access of light and air or support from adjoining land do not necessarily apply to right of way.

The considerations which may apply when the interference complained of has reference to the access of light and air or to support from adjoining land cannot necessarily apply when the interference has reference to the use of a way over another's land. [P 177 C 2]

** (b) Easement—Right of way — Person using for less than prescriptive period cannot sue to prevent stranger from obstructing way — Action can only be maintained where obstruction deprives person using way of enjoyment of his property.*

A person who has been using a particular way over land adjoining his, but for less than the prescriptive period cannot in ordinary circumstances maintain an action to prevent a stranger from obstructing him using the way. Such an action can only be maintained where the obstruction to user has the effect of substantially depriving the person using the way of the enjoyment of his property: AIR 1916 Mad 801, *Approved;* 34 Mad 178, *Expl.;* (1851) 5 Ex 792 and (1895) 4 H & N 153, *Expl. and Approved;* 5 M L J 24, *Ref.* [P 179 C 1, 2]

V. Govindarajachari and B. V. Ramanarasu— for Appellant.

C. Rama Rao — for Respondents.

ORDER OF REFERENCE

Krishnaswami Ayyangar J. — The appellant in this second appeal was the defendant in a suit instituted by the respondents for a declaration that they are entitled to a right of way along the passage marked E in the plan attached to the plaint and for an injunction restraining the defendant from interfering with their exercise of the right. According to the respondents the passage which is the subject-matter of the dispute between the parties is a portion of the gramakantam land of the village belonging to the Government. They alleged that from time immemorial the owners of the house which now belongs to them have been exercising the right. They further alleged that they anticipated obstruction to their right of way by the appellant and hence instituted the suit. The appellant denied that the passage E is a portion of the gramakantam and denied also the right of passage along it claimed by the respondents. The main issue framed in the suit by the District Munsif was whether the plaintiffs are entitled to the easement claimed. The learned District Munsif did not frame any issue as to the title to the property in which the passage E lay, though as I have mentioned the plaintiffs claimed that the whole of the land in which that passage lay was gramakantam. Indeed he made it perfectly clear at about the end of para. 8 that in his opinion this question of title did not require to be decided and he accordingly gave no decision regarding it. He however considered the evidence on the question whether the plaintiffs had established user of the passage as of right for the statutory period and came to the conclusion that they had not made out their case. The suit was accordingly dismissed. The plaintiffs preferred an appeal which was heard by the subordinate Judge of Vizagapatam. In the appellate judgment two findings have been recorded both findings of fact *viz.* (1) that the site in which the passage E lay was not proved to be the property of the defendant and (2) that the plaintiffs had established long user for over 20 years of the passage E for egress and ingress to their house.

From the finding of the learned Judge that the site in which the passage lay did not belong to the defendant it followed that the title was in the Government, the land being gramakantam land. On this footing the learned Judge was of opinion that the respondents had not prescribed a right of easement as against the Government as there had been no enjoyment as of right for 60 years which is the period of limitation as against the Government. None the less he held that the appellant who was a mere stranger cannot obstruct the respondents who had had more than 20 years enjoyment of the right of way and who were in the process of acquiring a full easementary right

against the Government. The learned Judge observes as follows:

> The progress of the acquisition of easement cannot be obstructed by any other than the owner of the servient tenement and a mere stranger cannot obstruct any person in the exercise of what may be called an inchoate easement.

In support of this opinion he relied upon the observations of the learned Judges who decided the case reported in 67 M L J 262.[1] On a reading of the case cited above it is clear that no decision was actually rendered on the precise question which arises for consideration in this second appeal. It may be that there is some indication of an inclination in favour of the view of the subordinate Judge in this sentence which occurs at p. 264:

> It may be a question whether a mere stranger can obstruct another person in the exercise of even what may be called an inchoate right of easement.

But it is fairly clear that a decision regarding the correctness of the proposition was not called for in the view that the learned Judges took of the facts of the case before them. Lower down in the same paragraph the Court observed:

> All that I am concerned to point out is that the case cannot be compared to that of a mere stranger interfering with the use of a right of way by a person who is in the process of acquiring it by a course of prescriptive enjoyment.

Mr. Govindarajachari appearing for the appellant has drawn my attention to the decision reported in 38 Mad 280[2] where Miller and Sadasiva Ayyar JJ. held that unless an easement had ripened into a prescriptive one, mere enjoyment of the user for any length of time short of the full period of prescription gave no right for the enjoyer to maintain an action against any person infringing such a user. There is a reference in this decision to an earlier decision of a Bench of this Court reported in 34 Mad 173.[3] The headnote in the latter case runs as follows:

> It is well settled law that a trespasser, in enjoyment of land for less than the statutory period, is entitled to be maintained in possession against all persons except the true owner. The same principle is applicable to incorporeal rights such as rights to light and water courses. A person in enjoyment of a water course for less than 20 years is entitled to protection in such enjoyment against persons who have no right to such water course.

In spite of the observations in 38 Mad 280[2] to the contrary I find it impossible to reconcile the two decisions or to escape the conclusion that they are really in conflict. It appears to me the only way in which this conflict is to be solved is by having the point referred to a Full Bench and obtaining an authoritative ruling and not by my preferring one view to the other. The papers will therefore be placed before my Lord the Chief Justice for orders as to the case being posted before a Full Bench, for a decision of the following question, namely, whether a person who is in the enjoyment of an easement but who has not acquired a title to it by prescription or otherwise, can maintain an action to prevent its obstruction by any person other than the owner of the servient tenement?

OPINION

Leach C. J. — The question which has been referred reads as follows:

> Whether a person who is in the enjoyment of an easement, but who has not acquired a title to it by prescription or otherwise, can maintain an action to prevent its obstruction by any person other than the owner of the servient tenement?

The considerations which may apply when the interference complained of has reference to the access of light and air or to support from adjoining land may not apply when the interference has reference to the use of a way over another's land and as this reference arises out of a case relating to an alleged right of way we consider that the question should be reframed in these terms: "Can a person who has been using a particular way over land adjoining his, but for less than the prescriptive period, maintain an action to prevent a stranger from obstructing him using the way."

In 5 M L J 24,[4] a Bench of this Court (Collins C. J., and Parker J.) held that a plaintiff who had received light through a window opening on vacant ground, but had not enjoyed the light sufficiently long to acquire an easement, was entitled to an injunction against a person who was not the owner of the vacant land, restraining him from building on it so as to cause obstruction to the light. The Court said:

> It was not necessary for plaintiff to establish prescriptive rights of easement against a wrongdoer and that the mere fact of plaintiff's enjoyment is sufficient to entitle him to an injunction.

The authority for this statement was the well-known case in (1851) 5 Ex 792 : 155 E R 347[5] where Parke B. observed:

> If a house is de facto supported by the soil of a neighbour, this appears to us to be sufficient title

1. ('34) 21 A I R 1934 Mad 575 : 152 I C 216 : 67 M L J 262, Chinnasami Goundan v. Balasundara.
2. ('16) 3 A I R 1916 Mad 801 : 29 I C 255 : 38 Mad 280, Narasappayya v. Ganapati Rao.
3. ('11) 34 Mad 173 : 6 I C 266 : 20 M L J 803 : 7 M L T 352 : (1910) M W N 117, Kondappa Rajan Naidu v. Dewarakonda Suryanarayana.
4. ('95) 5 M L J 24, Jootoor Acchanna v. Vanamala Venkamma.
5. (1851) 5 Ex 792: 20 L J Ex 14 : 155 E R 347, Jeffris v. Williams.

against any one but that neighbour, or one claiming under him. Just as one who should prop his house up by a shore resting on his neighbour's ground, would have a right of action against a stranger, who, by removing it, causes the house to fall; but none against his neighbour, or one authorized by the neighbour to do so, if he took it away and caused the same damage.

The strict form of pleading of the olden days was an important factor in the decision in (1851) 5 Ex 792,[5] but nevertheless the case established the principle that a person without title cannot interfere with the enjoyment of property by one whose title does not even extent beyond possession. (1851) 5 Ex 792[5] cannot however be read as laying down the proposition that there is in the person in possession the right of action against a stranger who interferes with the acquisition of an easement which is not essential for the enjoyment of the property possessed. Interference with the normal enjoyment of the property is the essence of the decision.

What the Court is called upon to decide in this case is whether a person who has been in the habit of using a way over his neighbour's land, but has not acquired an easement, can prevent a stranger obstructing his user of the way. There is no direct authority to be found either in the English or in the Indian decisions, but there are emphatic statements against the maintenance of such an action to be found in "The Common Law" by Holmes, in Salmond on "The Law of Torts" and in Pollock "On Torts." Holmes takes the case of a way used de facto for four years, but in which no easement has been acquired, and asks whether the possessor of the quasi dominant tenement would be protected in his use as against third persons. He says, "it is conceivable that he should be, but I believe that he would not." ("The Common Law" by Holmes at p. 241). At p. 354 we have this passage:

> A way, until it becomes a right of way, is just as little susceptible of being held by a possessory title as a contract.

And at page 382 this:

> But, as has been said before, the Common law does not recognize possession of a way. A man who has used a way ten years without title cannot sue even a stranger for stopping it. He was a trespasser at the beginning, he is nothing but a trespasser still. There must exist a right against the servient owner before there is a right against anybody else.

Salmond (Salmond on the Law of Torts, Edn. 8, p. 259) says that the rule in (1851) 5 Ex 792[5] and (1859) 4 H & N 153 : 157 E R 795,[6] the latter case followed (1851) 5 Ex 792[5]— cannot be extended,

> to cover all cases of the de facto enjoyment of servitudes. It cannot be the law that a mere trespasser who has been in the habit of crossing another man's land can sue a stranger for an act which obstructs his use of this de facto easement. Nor can it be supposed that a poacher can sue a stranger who by polluting the water of a stream has interfered with his practice of catching fish therein.

Having put the question as to what forms of de facto possession the principle recognised in (1851) 5 Ex 792[5] does apply, Salmond submits that the true principle is this: (page 259):

> As against strangers the possessor of land is entitled to the use and enjoyment of it free from all harmful interference due to acts done on the adjoining land; and all such interference by a stranger is actionable, even though had it been done by the lawful owner of the adjoining land it would have been *damnum sine injuria* because of the absence of any acquired servitude making it illegal. Where, on the other hand, the act complained of has produced no harmful effects upon the plaintiff's land, it is necessary for him to plead and prove, even against a stranger, that he has a legal right to the benefit of which he complains that he has been deprived.

In dealing with wrongs to easement and other incorporeal rights in property, Pollock says: (Edn. 14, p. 299).

> The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled,

and proceeds to quote the passage from Holmes which says, "a man who has used a way ten years without title cannot sue even a stranger for stopping it." Later he says (Edn. 14, page 300):

> De facto enjoyment does not even provisionally create any substantive right, but is material only as an incident in the proof of title.

There are here strong expressions of opinion that where the right of way has been enjoyed for less than the prescriptive period the person enjoying it cannot bring an action against a stranger who obstructs the use of the de facto easement, the principle being that a person cannot assert even against a trespasser a right which does not really interfere with enjoyment of his own property. It is conceivable that a case might arise where the principle involved in (1851) 5 Ex 792[5] could be appropriately applied, but it would be a very exceptional one. Take for instance, the case where as the result of some catastrophe access to land could only be obtained over the land of another. If a stranger attempted to prevent the possessor of the land so cut off from gaining access to his land the Court would surely interfere, as the stranger would be interfering with enjoyment of the land.

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6. (1859) 4 H & N 153 : 28 L J Ex 182 : 7 W R 198 : 157 E R 795, Bibby v. Carter.

At this stage it will be convenient to refer to two decisions of this Court which are in conflict and in consequence have given rise to this reference. In 34 Mad 173,[3] Benson and Krishnaswami Ayyar JJ. after observing that it was well settled law that if any trespasser was in enjoyment of land for less than the statutory period he would be entitled to protect that possession against any one but the true owner, went on to say that they did not think that there was any distinction in principle, because the right to be protected was in the nature of an incorporeal right in process of acquisition. This statement is certainly open to strong criticism and it was criticized in 38 Mad 280,[2] but as pointed out in that case, 34 Mad 173[3] can be supported on the ground that the plaintiff was in possession of the channel which had been obstructed and having a possessory title had a cause of action against the defendant for obstruction. In 38 Mad 280[2] Miller and Sadasiva Ayyar JJ. held that mere enjoyment of an easement for any length of time short of the full period of prescription gave no right of action against a person obstructing the user. In that case the plaintiff sought an injunction preventing the defendants from cutting a channel from a tank from which he watered some of his fields, so as to deprive him of the water. The District Munsif granted the injunction, but this was dissolved by the District Judge, who held that the plaintiff had no right to the water of the tank, though he had been in the habit of taking the water through a channel for some years. A second appeal was filed to this Court and the learned Judges upheld the decision of the District Judge. I regard the decision as being a correct decision. It was not a case where the plaintiff was in physical possession of the channel from the tank, but a case where the defendants were claiming a right to water which they did not possess.

In my opinion where a right of way has not been acquired by enjoyment for the prescriptive period there is ordinarily no right of action for interference. In a very exceptional case where access to the plaintiff's land would otherwise be cut off altogether a suit might be maintained against a stranger on the principle propounded in (1851) 5 Ex 792[5] but not otherwise. The answer that I would give to the question referred in its altered form is that an action cannot be maintained in ordinary circumstances. It can only be maintained if the obstruction to user will have the effect of substantially depriving a person of the enjoyment of his property. To avoid any misunderstanding I would add that the Court is not dealing with the rights of the villagers to pass over gramakantam land.

Venkataramana Rao J. — I agree.

Horwill J. — I also agree.

C.R.K./G.N. *Answer accordingly.*

A. I. R. 1941 Madras 179

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Gnanaprakasam Pillai and another — Appellants

v.

Parasakthy Ammal and others — Respondents.

Appeal No. 249 of 1937, Decided on 26th March 1940, against decree of Sub-Judge, Kumbakonam, in O. S. No. 57 of 1934.

(a) Will — Onus — Plaintiff denying genuineness of will and testator's capacity to make it — Onus is on defendant to prove that testator was major and of sound mind.

Where in his suit the plaintiff denies the genuineness of a will and the testator's capacity to execute it, the burden is on the defendant to establish that the testator was major and of sound mind at the time of the execution of the will and that the will is genuine : A I R 1915 Mad 815, *Rel. on.*

[P 180 C 2]

(b) Will — Validity — Will by minor is ineffective.

A will executed by a person, who is not a major at the time of the execution thereof is ineffective.

[P 180 C 2]

T. R. Venkatarama Sastri and T. V. Rajagopalan — for Appellants.

K.V. Krishnaswami Iyer, S. Muthiah Mudaliar, M. Chockalingam, S. K. Ahmed Meeran and T. S. Vaidhyanatha Iyer — for Respondents.

Abdur Rahman J. — This appeal arises out of a suit instituted by two plaintiffs, one of whom is a minor, for a declaration that the will, Ex. X alleged to have been executed by one Thangavelu on 10th August 1928 was not executed by him and could not be, at all events, said to have been a valid will as the testator had not attained majority on the date on which the will was said to have been executed and that inasmuch as he (*i. e.* the testator) was suffering from cholera and died within a few hours of the alleged execution of the will he could not be said to have possessed a sound disposing mind. The will was presented for registration a week after Thangavelu's death by one Kuppusami who was the husband of the testator's sister Rajambal and was ordered to be registered on 4th October 1928 in spite of objections raised by defendant 14 — the elder brother of the present plaintiffs and by one Kanda-

sami. The present suit was instituted on 8th August 1934. The present plaintiffs alleged that they were the nearest heirs to the estate of the late Thangavelu along with their elder brother defendant 14 and were held to be so by the trial Court. Since no objection was raised before us in regard to that finding, it may be taken to be correct. Several defences were raised to the suit, but the three questions in regard to which we have been invited to express our opinion relate to the genuinenesss of the will and to the testator's capacity to execute the same, raised on behalf of the plaintiffs and to limitation raised on behalf of the defendants. The capacity to make the will was attacked both on the ground that the testator was a minor and that he had no sound disposing mind at the time when the will was alleged to have been executed by him. The lower Court came to the conclusion that the suit was barred by limitation and Thangavelu had attained majority before 1928 and possessed a sound disposing mind at the time when the will was executed by him. The suit was therefore dismissed and the plaintiffs have preferred this appeal.

Since Art. 92, Limitation Act, would only apply if we were invited to give a declaration in regard to the invalidity of the will on the ground of its being a forged one and inasmuch as the will was also being contested as above stated by the plaintiffs on the ground that Thangavelu had no capacity to make the will to which Art. 120 and not Art. 92, Limitation Act, would apply, we decided in spite of the fact that one of the plaintiffs was a minor, to hear arguments first on the question of his (i. e., Thangavelu's) majority as we felt that if he was found to be a minor on the date of the alleged will, it may be unnecessary for us to decide the remaining questions of forgery, of Thangavelu's sound disposing mind and even of limitation. Although we heard arguments on the other points in the end as well, yet we are of opinion that this case can be finally decided as we anticipated on the question of Thangavelu's majority on the date of the alleged execution of the will. We thus propose to go into that question now.

There is not the slightest doubt that in a probate proceeding, if the will was being propounded by the defendants as petitioners, the onus of proving that the testator had the capacity to make a will and was possessed of a sound disposing mind at the time of its execution, would lie on the propounders. The question is whether this rule as to the onus of proof would be affected by the fact that we are not dealing with the will in a probate proceeding or that the validity of the will was being relied upon not by the petitioners, as it would be in the case of a probate proceeding, but by the defendants in the suit. After hearing the learned counsel for the parties we are of opinion that the onus of proof would not be affected by these facts. It is the defendants who come before the Court with a positive case and although the objection regarding the want of Thangavelu's capacity to make the will was raised in the plaint it was really a denial of a positive allegation which the plaintiffs anticipated would be made by the defendants if they wished to contest the claim. The common law rule of evidence is that the burden of proof lies on the party who asserts the affirmative. The plaintiffs were denying the genuineness and Thangavelu's capacity to make the will. They did not come to Court with a negative allegation which they would have been expected to establish. Had the assertion and proof of a negative fact been essential for their success the onus would have been on them to establish that negative fact. But they were in this case merely traversing an affirmative allegation which they thought would be, and was in fact made on behalf of the defendant. This question was fully considered by a Division Bench of this Court in 38 Mad 166[1] and we are in respectful agreement with the conclusions contained in that decision. We would therefore hold that the burden of establishing that Thangavelu was a major would lie on the defendants although after the evidence has been led on behalf of the parties as it is in this case it may not be of very great consequence. (Their Lordships went into the evidence relating to the testator's majority and proceeded.)

Having regard to the documentary evidence to which we have already referred, our finding must necessarily be that Thangavelu was born in 1911 and was not therefore a major on the date on which he is said to have executed this will Ex. X and consequently the will Ex. X even if it was otherwise validly executed, must be held to be ineffective on that account. In view of our finding in regard to Thangavelu's age, we do not consider it necessary to go into the question in regard to his sound disposing mind although the fact that he was

1. ('15) 2 A I R 1915 Mad 815: 19 I C 452: 38 Mad 166: 24 M L J 517, Krishnamachariar v. Krishnamachariar.

suffering from cholera and admittedly died within a few hours after the execution of the will would have compelled us to look into the evidence of his execution and of his sound disposing mind—if it were necessary to have done so—with greater vigilance than we would have done if this circumstance was non-existent.

We have already remarked in the beginning that it would be futile for us to consider the question of limitation. Since we have abstained from considering the question whether the will EX. X was a forged document it is useless to decide when the period of limitation would have started or would start even as against the plaintiff who was born when the will was said to have been executed and continues still to be a minor. On the finding that the will EX. X was ineffective, it must be held that the suit should have been decreed. The appeal therefore succeeds and is hereby accepted. The plaintiffs will have their costs here and in the Court below from the defendants (one set) to be divided between respondents 1 and 2 according to the value of the property in their possession.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1941 Madras 181

LAKSHMANA RAO J.

In re Guru Subramania Chetty — Petitioner.

Criminal Revn. Case No. 368 and Petn. No. 357 of 1940, Decided on 17th October 1940 to revise order of Stationary Sub-Magistrate, Saidapet, D/- 29th April 1940.

Penal Code (1860), S. 406 — Offence under Section 406 — Accused illegally arrested without warrant but released on bail — Charge sheet filed and summons served without reference to prior proceedings — Accused appearing of his own accord on date fixed in summons — On date to which case was fixed as result of second adjournment accused objecting to Magistrate's competency to try case on ground of his illegal arrest — Illegal arrest held had no bearing on subsequent proceedings and even otherwise could not affect Magistrate's jurisdiction.

The accused was illegally arrested for an offence under S. 406 on 27th December but was released on bail on 31st December. The charge sheet was filed on 5th March and a summons was issued for the appearance of the accused on 20th March without reference to the prior proceedings. The accused appeared of his own accord on that day. The case was adjourned to 30th March for inquiry and was again adjourned to 3rd April on which date the accused objected to the competency of the Magistrate to try the case on the ground that his arrest on 27th December was illegal:

Held that the propriety of the arrest on 27th December had no bearing on the subsequent proceedings and even otherwise it could not affect the Magistrate's jurisdiction to inquire into the offence under S. 406 committed by the accused within his jurisdiction. [P 181 C 2]

A. S. Nataraja Iyer — for Petitioner.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

Order. — The petitioner was a resident of Tiruvattiyur and a complaint of criminal breach of trust was received against him. He was arrested by the Sub-Inspector of Tiruvattiyur at Bangalore (Civil and Military Station) without a warrant on 27th December 1939, and produced before the first class Magistrate there on 28th December. The Magistrate remanded him to the custody of the Sub-Inspector for production before the Sub-Magistrate of Saidapet on 30th December, and he was produced before the Sub-Magistrate of Saidapet on 30th December. The Sub-Magistrate remanded him for ten days to enable the police to complete the investigation, and an application for bail was moved the next day. The petitioner was released on bail on 31st December and he returned to Bangalore. The charge sheet was filed on 5th March 1940 and a summons was issued for the appearance of the petitioner on 20th March. The petitioner appeared on 20th March and the case was adjourned to 30th March for inquiry as it stood posted to 20th March only for apprehension of the petitioner. The case was then adjourned to 3rd April and objection was taken on that day to the competency of the Sub-Magistrate to try the case on the ground that the arrest of the petitioner at Bangalore on 27th December was illegal. The objection was overruled and hence this petition.

The arrest of the petitioner on 27th December was undoubtedly illegal, but the petitioner was released on bail on 31st December and he returned to Bangalore thereafter. The charge sheet was filed on 5th March and a summons was issued for the appearance of the petitioner on 20th March without reference to the prior proceedings. The petitioner appeared of his own accord on that day and the propriety of his arrest on 27th December has no bearing on the present proceedings. Even otherwise it cannot affect the jurisdiction of the Sub-Magistrate to inquire into the offence under S. 406, Penal Code, committed by the petitioner within his jurisdiction, *vide* 35 Bom 225,[1] and the objection was rightly overruled. The petition therefore fails and is accordingly dismissed.

C.R.K./G.N. *Petition dismissed.*

1. ('11) 35 Bom 225 : 10 I C 956 : 13 Bom L R 296, Emperor v. Vinayak Damodar.

A. I. R. 1941 Madras 182

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Madhavi Amma v. *Nagappan Nayar.*

Letters Patent Appeal No. 94 of 1938, Decided on 11th December 1939, against judgment of High Court, *Reported in A I R 1939 Mad 151.*

Marumakkattayam Act (22 of 1933), Ss. 43 and 38 — Application under S.43 for registration of tarwad pending—Tavazhi is not precluded from filing partition suit — Hindu law of partition applies — Partition suit precludes other members from applying for registration — Doctrine of lis pendens has no application.

Chapters 6 and 7 stand apart and there is nothing in any of the sections of these two Chapters which suggests that a tavazhi is precluded from filing a suit for partition under S.38 because there happens to be pending an application for registration under S.43. The ordinary rule of Hindu law that the filing of a partition suit involves the automatic severance of the joint status applies to tarwads and hence the filing of a partition suit under S.38 puts an end to the right of the other members of the tarwad to apply for registration under S.43. The doctrine of lis pendens obviously can have no application to such cases inasmuch as the right to partition is given by Chap. 6 and there is nothing in Chap. 7 which prevents that right being exercised while the tarwad remains unregistered: *AIR 1936 Mad 155, Ref.* [P 182 C 2; P 183 C 1]

B. Sitarama Rao — for Appellants.

Ch. Raghava Rao and M. Chinnappan Nayar — for Respondents.

Leach C. J. — The parties are members of a Marumakkattayam tavazhi. On 15th August 1933 certain members of the tarwad, representing a two-thirds majority, applied to the Collector for the registration of the tarwad as impartible under S. 43 of the Marumakkattayam Act, 22 of 1933. As required by the statute, notice of the application was served upon respondent 1, who on 23rd October 1933 filed a suit in the Court of the District Munsif of Alatur for partition of the tarwad under the provisions of S. 38 of the Act. Notwithstanding the suit, the registration application was proceeded with and resulted in the Collector passing an order on 15th January 1934 for the registration of the tarwad as impartible. The District Munsif held that the registration of the tarwad had the effect of defeating the suit and accordingly he dismissed it. The respondent then appealed to the District Court of South Malabar. The District Judge held that the registration of the tarwad did not affect the respondent's right to bring the suit and he remanded it to the trial Court to be dealt with on the merits. The defendants then appealed to this Court. This appeal was heard by King J., who concurred in the decision of the District Judge. The present appeal is from the judgment of King J.

Section 38 of the Act states that any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal, and separate from the tarwad, provided that no tavazhi shall claim to be divided from the tarwad during the lifetime of an ancestress common to the tavazhi and to any other tavazhi or tavazhis of the tarwad, except with the consent of the ancestress, if she is a member of the tarwad. There is an explanation to the section which says that for the purposes of chap. 6 (which deals with the right of partition) a male member of a tarwad or a female member without any living child or descendant in the female line, shall be deemed to be a tavazhi if he or she has no living female ascendant who is a member of the tarwad. The respondent has no living female ascendant and he himself constitutes a tavazhi. Therefore he had the right to institute the suit for the partition of the tarwad. Sub-section (1) of S. 43 allows two-thirds of the major members of a tarwad to present a petition to the Collector for the registration of the tarwad as impartible. Sub-section (3) states that if after giving notice to all the major members of the tarwad and making such enquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and desire the registration of the tarwad as impartible, he shall register the tarwad as impartible. Section 43 is embodied in chap. 7 which deals exclusively with impartible tarwads. Chapters 6 and 7 stand apart and there is nothing in any of the sections of these two chapters which suggests that a tavazhi is precluded from filing a suit for partition because there happens to be pending an application for registration under chapter 7.

If the ordinary rule of Hindu law that the filing of a partition suit involves the automatic severance of the joint status applies, it is clear that there would be no power in the Collector to register a tarwad as impartible once a suit for partition has been filed. It is not contested that the ordinary rule of Hindu law does apply. In fact it was so held in 59 Mad 693.[1] This being the position, the filing of the suit on 23rd

1. ('36) 23 AIR 1936 Mad 155 : 160 I C 594 : 59 Mad 693 : 70 M L J 114, Kunchi Amma v. Minakshi Amma.

October 1933 put an end to the right of the other members of the tarwad to apply for registration under S. 43, and the Collector had no power to order registration. His order of 15th January 1934 must be regarded as being null and void. Mr. Sitarama Rao has suggested that the doctrine of lis pendens applies and that, inasmuch as the application under S. 43 was filed first, the suit was incompetent. The doctrine of lis pendens obviously can have no application here. There is a right to partition given in chap. 6 and there is nothing in chap. 7 which prevents that right being exercised while the tarwad remains unregistered. We consider that the decision under appeal is correct. The appeal will be dismissed with costs in favour of respondent 1.

C.R.K./G.N. *Appeal dismissed.*

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* A. I. R. 1941 Madras 183

LEACH C. J. AND HORWILL J.

D. D. Italia v. *Offiial Assignee of Madras.*

Appeal No. 27 of 1940, Decided on 12th September 1940.

* *Presidency Towns Insolvency Act (1909), Ss. 108 and 53—Construction—Proceedings under S. 108 — Since mere attachment creates no charge attaching creditor is in no better position than ordinary creditor—Attachment followed by sale—Attaching creditor is entitled to proceeds irrespective of S. 53.*

The administration in insolvency of a deceased debtor's estate under S. 108 must necessarily mean that the uncharged assets of the estate are to be utilized for the benefit of the general body of creditors, and as a mere attachment creates no charge, an attaching creditor is in no better position than any other ordinary creditor. But, if the attachment has resulted in a sale and the sale proceeds are in Court, the attaching creditor is entitled irrespective of S. 53, to the money or so much of it as is necessary to meet his claim : 26 Mad 673 and A I R 1938 Mad 360 (FB), *Rel. on ;* 15 Cal 202, *Approved.* [P 185 C 1]

R. Purushothama Iyengar and T. Aravamudha Iyengar — for Appellants.

T. V. Subramania Iyer, T. V. Srinivasam, C. R. Rajagopalachariar and King and Partridge — for Respondents.

Leach C. J. — This appeal raises two questions of law with regard to the administration in insolvency of the estate of a deceased person. On 15th July 1938 one S. V. Kannabhiran Pillai died, and by an order of the original side of this Court passed on 18th April 1939 it was directed that his estate should be administered in insolvency under the provisions of S. 108, Presidency Towns Insolvency Act. The appellants are creditors. On 9th August 1938 they obtained a decree against the deceased's estate in C. S. No. 154 of 1938. In execution proceedings filed on 26th January 1939 they attached the deceased's interests in certain immovable property, which was the subject-matter of another suit, C. S. No. 189 of 1938, and in moveable properties, which were in dispute in a third suit, C. S. No. 198 of 1939. The moveable properties included a sum of Rs. 483-7-10 which was standing to the credit of the deceased in the books of the Egmore Benefit Society. A garnishee order was issued by the Court in respect of this sum on 13th February 1939, and the money was paid into Court on 27th March 1939.

The first question which arises is whether the order of this Court directing the estate to be administered in insolvency puts an end to the insolvency proceedings and relegates the appellants to the position of ordinary creditors. The second question is whether the appellants' claim to the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society stands on a different footing from their claims in respect of the other attached properties. Section 108 (1), Presidency Towns Insolvency Act, provides that a creditor of a deceased debtor, whose debt would have been sufficient to support an insolvency petition had the debtor been alive, may present a petition to the Court praying for an order for the administration of the estate of the deceased under the Presidency Towns Insolvency Act. Subsection (2) states that on the prescribed notice being given to the legal representative of the deceased debtor, the Court may, upon proof of the debt, unless it is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in insolvency of the estate. Sub-s. (3) says that a petition of this nature shall not be presented after proceedings have been commenced for the administration of the deceased debtor's estate, but in that event, on proof that the estate is insufficient to pay its debts, the Court may transfer the proceedings to the Court exercising jurisdiction in insolvency under the Act. Section 109 (1) provides that, upon an order being made for the administration of a deceased debtor's estate under S. 108, the property of the debtor shall vest in the Official Assignee, who shall forthwith proceed to realize and distribute the assets in accordance with the provisions of the Act. Sub-s. (2) of this section says that with the modifications thereinafter mentioned, all the provisions of Part 3 of the Act, shall, so far as they are applicable, apply to the case of an administration order in like manner as to

an order of adjudication under the Act. The only modification is in sub-clause (3) which makes the proper funeral and testamentary expenses incurred by the legal representative of the deceased debtor a preferential claim payable in full in priority to all other debts. Part 3 of the Act contains the provisions with regard to the administration of the property of an insolvent and included in this part is S. 53, sub-s. (1) of which reads as follows:

> Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Official Assignee, except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication, and before he had notice of the presentation of any insolvency petition by or against the debtor.

The learned advocate for the appellants has conceded that, if S. 53 applies to an administration of a deceased debtor's estate under Ss. 108 and 109 his clients are out of Court, except as regards the sum of Rupees 483-7-10 paid into Court by the Egmore Benefit Society. This case was decided on the original side by Mockett J., who held that S. 53 is not applicable to proceedings under Ss. 108 and 109 and in this connexion relied on the judgment in (1899) 1 Q B D 699.[1] The learned Judge, however, decided against the appellants on the ground that in this country an attachment confers no title and creates no charge, relying here upon the decision in 44 Cal 1016[2] and 1938 M W N 1127.[3] In 44 Cal 1016[2] the Calcutta High Court also held that S. 53 is not applicable to cases of administration under Ss. 108 and 109 and discussed (1899) 1 Q B D 699.[1] In (1899) 1 Q B D 699[1] the Court of appeal said that an order for the administration of the estate of a deceased debtor under S. 125, Bankruptcy Act, 1883 (which corresponds to S. 108, Presidency Towns Insolvency Act) is not equivalent to a receiving order for the purposes of S. 45 of the Act (which corresponds to S. 53, Presidency Towns Insolvency Act) and that a creditor who had proceeded in execution was entitled to retain as against the trustee of the debtor's estate, the benefit of an execution not completed before the date of the administration order. In that case a writ of *fieri facias* had issued. By S. 26, Sale of Goods Act, 1893, it was enacted that a writ of *fieri facias* should bind the property in the goods of the execution debtor as from the time when the writ was delivered to the sheriff to be executed. Therefore, S. 45 of the Act could not apply. The Calcutta High Court in following (1899) 1 Q B D 699[1] on the question of the applicability of S. 53 (1), Presidency Towns Insolvency Act, held that an attachment in India only prevents alienation and does not confer any title or create any charge or lien on the property such as attaches in England upon seizure under the writ of *fieri facias*. In these circumstances the attaching creditor in India has merely the right of sharing rateably with the other creditors of the estate.

For the purpose of this appeal it is not necessary to decide whether S. 53, Presidency Towns Insolvency Act, applies to the administration in insolvency of a deceased debtor's estate, because it is manifest that in any event the appellants are not entitled to succeed, except as regards the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society. There are two decisions of this Court, each by a Full Bench, which lay down that in this country an order of attachment does not create any charge. The first decision was in 26 Mad 673[4] where it was said that the effect of an attachment under the Code of Civil Procedure was to prevent alienation and not to confer title. The second decision was in ILR (1938) Mad 744[5] where it was again contended that inasmuch as an attachment had taken place the petitioner was in the position of a secured creditor. It was pointed out that this question had been decided by this Court in 26 Mad 673[4] and that the Privy Council in 56 Mad 405[6] had not overruled it, as was suggested. The Judicial Committee had refused to go into the question and reserved their decision for a future occasion. The judgments in 26 Mad 673[4] and ILR (1938) Mad 744[5] conclude the question so far as this Court is concerned. It may be mentioned, however, that the Calcutta High Court gave a similar decision in 15 Cal 202[7] which was also decided by a Full Bench.

As the result of decisions of this Court we must hold that in India no charge is

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1. (1899) 1 Q B D 699 : 68 L J Q B 486 : 80 L T 454 : 47 W R 471 : 6 Manson 146 : 15 T L R 277, Hasluck v. Clark.
2. ('18) 5 A I R 1918 Cal 351 : 43 I C 348 : 44 Cal 1016, In re Prem Lal Dhar.
3. ('39) 26 AIR 1939 Mad 204 : 182 I C 254 : 1938 M W N 1127, Nicholson Town Bank Ltd., Tanjore v. Varadarajulu Naidu.
4. ('03) 26 Mad 673, Krishnaswami Mudaliar v. Official Assignee of Madras.
5. ('38) 25 AIR 1938 Mad 360 : 174 I C 423 : ILR (1938) Mad 744 : (1938) 1 M L J 351 (F B), Manickam Chettiar v. Income-tax Officer, Madura.
6. ('33) 20 AIR 1933 P C 134 : 142 I C 552 : 56 Mad 405 : 60 I A 167 (PC), Ananthapadmanabhaswami v. Official Receiver, Secunderabad.
7. ('88) 15 Cal 202, Soobul Chundra Law v. Russick Lall Mitter.

created by an attachment and when the judgment-debtor becomes an insolvent the attachment falls to the ground, provided, of course, that the attachment has not resulted in a sale. There is no difference here between the administration of the estate of an insolvent who is alive and the administration of the estate of a person who dies insolvent, but was not adjudicated before his death. The administration in insolvency of a deceased debtor's estate under S. 108, Presidency Towns Insolvency Act, must necessarily mean that the uncharged assets of the estate are to be utilised for the benefit of the general body of creditors, and as a mere attachment creates no charge, an attaching creditor is in no better position than any other ordinary creditor. If he were, there would be little virtue in the provisions of Ss. 108 and 109 of the Act. The learned Official Assignee has conceded that, if the attachment has resulted in a sale and the sale proceeds are in Court, the attaching creditor is entitled irrespective of S. 53, to the money or so much of it as is necessary to meet his claim. Except as regards the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society, the attachments have not resulted in the realization of any of the assets attached. With regard to Rs. 483-7-10 it has transpired that after the Egmore Benefit Society had paid the money into Court the Master passed an order giving the appellants the right to withdraw it from Court. The matter has gone beyond the interim order stage and in these circumstances the learned Official Assignee has rightly conceded that the appellants are entitled to this money. The result is that the appeal will be allowed to the extent of this sum of Rs. 483-7-10, but it will stand dismissed in all other respects. As the appellants have in the main failed there will be no order as to costs in the appeal.

C.R.K./G.N. *Appeal partly allowed.*

A. I. R. 1941 Madras 185

LEACH C. J. AND HORWILL J.

Municipal Council, Palni, through Commissioner—Appellant

v.

Sri Dhandayuthapani Devasthanam Palni through managing trustee, T. P. Venkatarangam Pillai—Respondent.

Second Appeal No. 931 of 1937, Decided on 19th September 1940.

Madras District Municipalities Act (5 of 1920), S. 83 (1) — Hill set apart for public worship — Power house on part of hill used for public worship (lighting temple in hill and approach to it) as well as commercial purposes — Power house is not exempt from tax : 1936 M W N 1088, OVERRULED.

The words " places set apart for public worship and either actually so used or used for no other purpose" in S. 83 (1) read with the opening words of the section mean that there shall be exemption for places set apart for public worship and used for that purpose and for places set apart for public worship, but not actually in use. If a place is used for a purpose other than public worship, the place does not fall within the exemption, even though the intention was that it should be used for public worship. Where a power house built on a part of a hill set apart for public worship is used for lighting the temple on the hill and approach to it and is also used for supplying electricity to the shopkeepers and hotel-keepers within the hill at profitable rates, the power house being used for public worship as well as commercial purposes is not exempt from taxation : 1936 MWN 1088, *OVERRULED*; AIR 1915 Mad 594, *Expl.* [P 186 C 1, 2]

K. S. Sankara Aiyar for T. R. Venkatarama Sastri — for Appellant.

T. M. Krishnaswami Aiyar— for Respondent.

Leach C. J. — The Municipal Council of Palni has assessed to the property tax leviable under S. 81, Madras District Municipalities Act, 1920, a power house belonging to the Sri Dhandayuthapani Devasthanam. The power house is situate at the foot of the Palni-andavar Hill and within the municipal limits. The trustees objected on the ground that this building was exempt from taxation by reason of the provisions of S. 83 (1) (a) of the Act. The property having been assessed to this tax and the tax having been paid, the trustees instituted a suit in the Court of the District Munsif of Palni for the recovery of the amount. The District Munsif found against the plaintiff and dismissed the suit, but on appeal his decision was reversed and the suit was decreed. The Municipal Council now appeals to this Court.

It is common ground that the whole hill was set apart for religious purposes. On the top of the hill is a famous temple, which is approached by means of a long flight of steps. At the top of the hill there are also shops and a hotel which supply the needs of the pilgrims who visit the temple. In 1929, the trustees built the power house and installed electric plant for the purpose of lighting the way upto the temple and the temple itself. Later on, they supplied electricity to the shopkeepers and the hotelkeeper for which the trustees charged profitable rates. The fact that electricity was supplied to the shops and to the hotel led the Municipal Council to assess the power house to the property tax. If the power house is to be exempt from this tax, the building must come within the purview of

S. 83 (1) (a) because there is no other section in the Act which can relieve the trustees from the obligation of paying the property tax. Section 83 (1) reads as follows :

The following buildings and lands shall be exempt from the property tax—(a) place set apart for public worship and either actually so used or used for no other purpose, choultries, buildings used for educational purposes, including hostels, public buildings and places used for the charitable purpose of sheltering the destitute or animals, libraries and play grounds which are open to the public and such ancient monuments protected under the Ancient Monuments Preservation Act, 1904, or parts thereof as are not used as residential quarters or as public offices.

It is not necessary to go beyond the words "places set apart for public worship and either actually so used or used for no other purpose," as it is clear that the power house is not a building of the nature of any of those subsequently mentioned. In our opinion, the words "places set apart for public worship and either actually so used or used for no other purpose" read with the opening words of the section mean that there shall be exemption for places set apart for public worship and used for that purpose and for places set apart for public worship, but not actually in use. If a place is used for a purpose other than public worship, the place does not fall within the exemption, even though the intention was that it should be used for public worship. It has been suggested that the use of the word 'or' instead of 'and' makes a difference. It does make a difference, but not the difference suggested. If the word were 'and' and not 'or' there would only be exemption when a place was set apart for public worship and actually used for that purpose, but as a result of using the word 'or' there is exemption when the place has been set apart for public worship, but is not actually in use. The drafting leaves much to be desired, but it is obvious that the intention is to exempt buildings which are intended for religious purposes and are not being used for secular purposes.

What is the position here? The hill has been set apart for public worship and it cannot be disputed that if this power house were merely used for lighting the temple and the approach to it the power house would be exempted from taxation. But, inasmuch as the power house, which stands on a part of the hill, is being used for commercial purposes as well as purposes of public worship, the conditions of the exemption are not fulfilled. The Municipal authorities are not suggesting that because a part of the hill, namely, the site of the power house, is being used for other purposes the whole hill and everything erected thereon should be deemed to be taken out of the section. Their case is merely confined to the power house and we considered that it is well founded.

In the course of arguments two decisions of this Court were referred to, namely 1936 M W N 1088[1] and 27 M L J 231.[2] The first case certainly supports the trustees, but we consider that it was wrongly decided. The second case is not really in point. In 1936 M W N 1088[1] the Council wished to assess to property tax certain shops within the Srirangam temple. The learned Judge (K. S. Menon, J.) considered that as the word 'or' and not the word 'and' was used in section 83 (1) (a), the shops were not taxable. We have said sufficient to indicate that in our opinion this argument cannot be accepted and that the decision of K. S. Menon J., ought not to be followed. In 27 M L J 231,[2] the question was whether buildings used for stabling Devasthanam horses which were employed in carrying drums in temple processions or allowed for the use of pilgrims to whom honour was shown by the mahant were exempt from the property tax. It was held that they were exempt. This decision is not open to criticism, because the buildings were used for purposes connected with worship in a public place. If the power house with which this appeal is concerned were merely used for lighting the approach to the temple and the temple itself, there would, as I have already indicated, be no doubt, that the municipality would not be entitled to levy the tax. But the power house is being used for commercial as well as religious purposes and this brings it within the taxing section. The appeal will be allowed and the suit dismissed with costs here and in the two Courts below.

C.R.K./G.N. *Appeal allowed.*

1. ('36) 1936 M W N 1088, Municipal Council, Srirangam v. The Srirangam Devasthanam.
2. ('15) 2 AIR 1915 Mad 594 : 26 I C 96 : 27 M L J 231, Municipal Council, Tirupati v. Mahant Prayag Dossjee Varu.

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*A. I. R. 1941 Madras 186

PANDRANG ROW AND ABDUR RAHMAN JJ.

Patinhare Valappil Pokker — Appellant

v.

Alakkal Kunheethutti — Respondents.

Second Appeal No. 396 of 1937, Decided on 31st July 1940, against decree of Dist. Court, South Malabar, in A. S. No. 400 of 1935.

(a) Malabar Tenancy Act (14 of 1930), Ss. 22 and 23 — Redemption suit by jenmi against kanomdar — Application by sub-kanomdar who was also defendant for renewal—Parties to suit agreeing that suit should proceed on basis that renewal was already granted by kanomdar alone — Plaintiff held could not subsequently resile from his position and challenge validity of renewal.

In the redemption suit by the jenmi against the kanomdar the sub-kanomdar who was also a defendant to the suit applied under Ss. 22 and 23 for renewal in respect of portion of the suit lands in his possession. The parties to the suit agreed that the suit should proceed on the basis that the renewal was granted by the kanomdar alone :

Held that the parties to the agreement could not be allowed to resile from the position agreed to and it was not open to the plaintiff to contend in second appeal that the renewal must be regarded as invalid even as between the parties thereto, either because it was a renewal granted during the pendency of the suit, or on the ground that it was actually granted after the suit had been disposed of in view of his agreement at the trial to proceed on the basis that a renewal had been granted already by the kanomdar to the sub-kanomdar.

[P 187 C 2]

* *(b) Malabar Tenancy Act (14 of 1930), S. 26 —Construction—Object stated — Renewal of part of original holding by intermediary in favour of tenant in actual possession of that part is valid.*

Section 26 is an exception to the general rule that a person cannot grant what he does not possess himself; and it was intended to guard or protect the interests of sub-tenants or sub-kanomdars who get a renewal only from their immediate landlord and not from the ultimate jenmi. Such sub-tenants or sub-kanomdars do derive a valid interest under such renewal obtained from the intermediary though subject to certain conditions which are contained in that section. Consequently the renewal in respect of a part of the original holding by an intermediary in favour of the tenant in actual possession of that part is valid.

[P 188 C 1, 2]

P. Govinda Menon — for Appellant.
N. R. Sesha Aiyar — for Respondents.

Pandrang Row J. — This appeal comes before us as a result of the order made by Burn J., to the effect that an important question is raised in this appeal arising out of the Malabar Tenancy Act which frequently comes up for decision and on which there is no authority. This question is whether the renewal in respect of a part of the original holding by an intermediary in favour of the tenant in actual possession of that part is not permitted under the Malabar Tenancy Act, XIV of 1930. Before dealing with this question a few necessary facts have to be stated. Plaintiff 1 in the suit is the jenmi of the properties and plaintiff 2 is an assignee of his in whose favour the plaintiff prays for a decree. Five items of properties were demised on kanom tenure by plaintiff 1 in favour of the tarwad of defendants 1 to 20 under Ex. A of 11th September 1911. One of these five items was set apart in favour of defendant 3 whose assignee subsequently got a renewal from the jenmi in respect of that item. We are therefore not concerned with that item in this case. Defendant 31 purchased the tarwad's kanom right in the remaining four items in a court sale. Defendant 27 is the sub-kanomdar of a part of one of these four items, namely of item 3. The plaintiff filed a suit for redemption of Ex. A and while the suit was pending defendant 27 put in an application purporting to be under Ss. 22 and 23 of the Act for a renewal in respect of the portion of item 3 in his possession and making the plaintiff as well as defendant 31 party respondents. This application after several adjournments came on for hearing on 5th September 1935 the very day on which the suit itself came on for hearing and was actually tried.

It is clear from the order of the trial Court made on this date on the petition as well as from the statement contained in para. 19 of the judgment of the trial Court that the parties agreed to the following course being adopted, namely defendant 27 was content with getting a renewal only from defendant 31 and the question whether such a renewal granted by defendant 31 would be of any force as against the plaintiff, was left to be decided in the suit which was to proceed on the basis that the renewal had already been granted by defendant 31 to defendant 27. Having regard to the course taken during the trial of the suit and the hearing of the petition based on the agreement of the parties, it is not possible in our opinion to allow either party now to resile from the position then agreed to, that is on 5th September 1935 by the parties concerned. It is therefore not open, in our opinion, to the appellant, that is plaintiff 2 to contend in this second appeal that the renewal as between defendants 27 and 31 must be deemed to be regarded as invalid even as between the parties thereto, either because it was a renewal granted during the pendency of the suit, or on the ground that it was actually granted after the suit had been disposed of. No such objection is available to the appellant in view of his agreement at the trial to proceed on the basis that a renewal had been granted already by defendant 31 to defendant 27. The only question therefore which remains is what has been mentioned at the outset, namely, whether the renewal of a portion of item 3 by the intermediary in favour of the tenant in actual possession is binding on the plain-

tiffs, that is on the jenmi ; in other words, whether S. 26, Malbar Tenancy Act of 1930 which expressly provides what effect renewal should have on the rights of the landlord's landlord applies to cases where the renewal is of only a portion of the original holding and does not take in the entire original holding.

In S. 26 itself there is nothing to show that the provisions thereof are limited to cases where the renewal granted by the intermediary in favour of the tenant in actual possession must be in respect of the entire original holding created by the jenmi in favour of the intermediary. The relevant words are : "And the tenant in actual possession of the holding." It is not disputed that the word 'tenant' found in this section would include a sub-kanomdar like defendant 27. If he is a tenant in actual possession of the holding, the holding can only refer to his holding, that is, the holding or parcel of land included in the engagement to which he was a party and cannot be taken to mean the holding created by the engagement entered into by his landlord with the superior landlord or jenmi.

As the section also clearly provides — and indeed the section seems to have been enacted expressly for the purpose—for cases where the grantor intermediary for his own part does not obtain a renewal for any reason; in other words the section is an exception to the general rule that a person cannot grant what he does not possess himself; and it was intended to guard or protect the interests of sub-tenants or sub-kanomdars who get a renewal only from their immediate landlord and not from the ultimate jenmi. It is clear from S. 26, that such sub-tenants or sub-kanomdars do derive a valid interest under such renewal obtained from the intermediary though subject to certain conditions which are contained in that section, one of which is that the landlord is to be free to evict the tenant on the ground specified in S. 20 other than the ground of non-payment of renewal fee. Unfortunately, in this present case the ground on which eviction is sued for is the ground of non-payment of renewal fee, and the right to evict on this ground is not saved by S. 26. Some stress was placed before us on sub-s. (2) of S. 26, which provides for the recovery of the proportionate share of renewal fee by the jenmi from the grantor of the renewal, but we are of opinion that this does not affect the amplitude of the provisions of sub-s. (1) of S. 26. There may be, as suggested by the appellant's advocate, a misprint in the words 'such grantee or interest' in sub-s. (2), the misprint being 'grantee' for 'grantor' and it may be there may be some difficulty in exactly calculating the proportionate share of the renewal fee in certain given cases. But we do not feel called upon to decide these matters in the present case in which they do not arise. We are satisfied, however, that these matters do not affect the decision of the general question whether S. 26 (1) does apply to a case of this kind, that is, to a case of renewal of only a portion of the original holding which had been demised on sub-kanom in favour of the tenant in actual possession. This point must therefore be answered against the appellant, that is to say, S. 26 (1) does apply to such renewals of even parts of the original holding. As this is the only ground on which the decrees of the Courts below are attacked it follows that this second appeal must fail. It is accordingly dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 188

PANDRANG ROW AND HORWILL JJ.

R. M. S. Firm, consisting of partners Raman Chettiar and others —

Appellants

v.

S. L. M. Muthuswami Odayar —

Respondent.

Appeal No. 7 of 1937, Decided on 8th February 1940, against decree of Sub-Judge, Tiruvarur, in O. S. No. 39 of 1935.

(a) Transfer of Property Act (1882), S. 53 — Members of Christian family by agreement making arrangement for payment of creditors and incidentally making small provision for religious purposes — Dedication held real and not made to defeat or delay creditors — Intention of parties at date of dedication could not be judged by subsequent events.

The members of a Christian family entered into an agreement whereby the father was to divest himself of all his rights in the family properties, which were very considerable, except for a small house, and all the properties of the family, that is, the entire 1300 acres of land and the outstandings due to the family with the exception of less than 50 acres of land reserved for the charity were placed in the hands of the sons for the express purpose of paying off all the debts, one of the conditions being that the sons were not to alienate any of the properties or to make any partition as between themselves of the properties till all the debts were paid. The assets of the family were worth at least Rs. 6 to 6½ lakhs at the date of the agreement and the debts could in no case be said to have exceeded Rs. 4½ lakhs. The religious purposes for which the small dedication was incidentally made were however being carried out:

Held that the purpose of the dedication was real and not illusory, and that in the particular circumstances of the case the dedication of a small extent of land less than 50 acres could not be said to have been made with intent to defeat or delay the creditors. Nor could the intention of the parties at the date of dedication be judged by what had happened since. [P 190 C 2 ; P 191 C 2]

(b) Transfer of Property Act (1882), S. 18 — Question whether particular charity is for public benefit or not is of fact and should be specifically pleaded — Whether offering of prayers or performance of ceremonies at tomb is for public benefit is question of fact.

The question whether a particular charity was for the benefit of the public or not is a question of fact on which evidence can be led and therefore the question should be specifically pleaded. Whether the offering of prayers at a tomb or the performance of other ceremonies there are for the benefit of the public is a question that cannot be answered as a question of law; for the answer must depend on the beliefs entertained by the class or community to which the dedicators belonged. [P 191 C 2 ; P 192 C 1]

(c) Transfer of Property Act (1882), S. 18 — Dedication by Roman Catholic—Dedication providing for feeding pilgrims, distributing oil among them during certain days and for offering prayers at dedicator's father's grave — Dedication held for benefit of public within meaning of S. 18.

It cannot be said that *ex necessitate rei* the offering of prayers, japams etc., at the grave can never be for the public benefit or for the benefit of any section of the public. At any rate, where this purpose is subordinate to the main purpose of the dedication to feed poor pilgrims and distribute oil among them during certain days, the dedication is obviously for the benefit of the public within the meaning of S. 18 and does advance religion according to the tenets of Roman Catholics. [P 192 C 2]

(d) Transfer of Property Act (1882), Ss. 14, 16, 17 — Disposition to private person — Trust deed on ground of Ss. 14, 16 or 17 cannot be attacked except in suit for administration (Obiter).

Even where questions may arise under Ss. 14, 16 or 17 in connection with certain dispositions in favour of private persons, nevertheless an attack on the trust deed on such grounds cannot be made except in a suit for administration of the trust or the assets belonging to the person who made the dedication or created the trust. [P 192 C 2]

V. Ramaswami Ayyar — for Appellants.

K. Bhashyam and T. R. Srinivasan — for Respondent.

Pandrang Row J. — This is an appeal from the decree of the subordinate Judge of Tiruvarur dated 24th August 1936 in O. S. No. 39 of 1935 on his file, a suit to set aside the order made on a claim petition on 11th October 1933 in favour of the defendant. The subject-matter of the dispute is about 47 acres of land situated in two villages which were under Ex. 1, dated 25th June 1927, dedicated for certain purposes connected with the tomb of the defendant's father Chinnayya Odayar and the well-known annual Roman Catholic festival at Velanganni. The principal facts of the case are that the defendant is the head of a family which possessed considerable landed property and also engaged in trade on a fairly large scale in several places. The landed property of the family was as much as 200 velies, a veli being equal to about 6½ acres. The defendant was assisted in the business by his three sons and the defendant and his sons executed Ex. 1 which is styled a partition deed on 25th June 1927. The partners are however Christians and the phrase 'partition deed' is perhaps not the correct description to be applied to the document. It is this document that was put forward as a shield by the defendant when the properties in question which had been dedicated for the purposes mentioned above were attached in execution of a decree obtained by the plaintiffs who are Nattukottai Chettis against the defendant. The claim put forward by the defendant on the strength of Ex. 1 was allowed and the attachment was cancelled and the present suit was instituted by the plaintiffs to set aside the order on the claim petition and to declare that the properties covered by Ex. 1 are liable to be attached and sold in execution of the decree obtained by them against the defendant. The main contest in the Court below centred round the question whether the dedication made by Ex. 1 was valid. The finding was in favour of the defendant, that is to say, in the affirmative and the suit was dismissed with costs.

The plaintiffs are the appellants and the same point which arose for decision in the Court below is the point for determination in this appeal. The truth of the document, that is to say, its execution or registration is not denied and the only attack made on it is in respect of its validity. This attack is based on more than one ground and it will be convenient to deal with each separately. In the first place it was contended that the dedication was not real but only sham or illusory, in other words, that there was no intention whatever to make a dedication or create a trust, but the document was executed merely for the purpose of screening the properties in question from creditors. So far as this ground of attack is concerned, very little need be said in support of the finding of the Court below for this part of the case has been very fully dealt with in the judgment appealed from and the attack on this part of the judgment was never very serious. It is not as if the properties concerned formed any considerable portion of the properties of the executants. As mentioned already, the

landed properties of the family were very considerable in extent, being about 1300 acres and what was dedicated by EX. I was less than 50 acres of land; a very small fraction indeed of the total property. It cannot be said that if the idea was to screen the properties from the creditors the executants would have thought of screening only a very small fraction of their total property from the creditors. Secondly, there is no doubt that actually the purposes mentioned in EX. I for which the dedication was made were being carried out though much better evidence could have been perhaps adduced.

There is very little reason to doubt the actual fact that the charities mentioned in EX. I were being performed both before the document was executed and afterwards and the dedication in EX. I was merely to give a permanency to what was being done for several years in commemoration of the deceased father of the defendant who had died about 30 years before. As pointed out by the learned subordinate Judge, action was taken after EX. I as if it was a genuine dedication because the patta was taken out for the lands in the name of the charity and receipts were being granted in the name of the charity. Lease deeds were also taken in the name of charity and account books were maintained showing the extent of the income of these lands for the charity. It is also found that EX. I was mentioned in all subsequent important transactions with the creditors and it is obvious that but for EX. I there could not have been these transactions. The main object of EX. I, as a perusal of EX. I will show, was to make arrangements for the satisfaction of the creditors of the family treating all the debts incurred by whichever member of the family as debts binding on the family and making all the properties belonging to the family liable in respect of such debts. The arrangement was that the father, that is, the defendant was to divest himself of all his rights in the properties which, as mentioned already, were very considerable except for a small house worth about Rs. 2000 and all the properties of the family, that is, the entire 200 velis of land and the outstandings due to the family with the exception of property reserved for the charity were placed in the hands of the sons for the express purpose of paying off all the debts, one of the conditions being that the sons were not to alienate any of the properties or to make any partition as between themselves of the properties till all the debts were paid.

It is thus clear that the main object of EX. I was to make an efficient arrangement for the payment of all the creditors and incidentally to make a small provision for a religious or charitable purpose. It is found that there was an endowment in respect of the tomb of the defendant's grandfather which was being administered for a long time and it was nothing out of the way therefore for the defendant and his sons to agree to create a similar endowment for the tomb of the defendant's father. It is really unnecessary to say more on this topic, for, it is futile to contend that the dedication was not real or was only illusory. That the intention was to make a real dedication is clear not only from the document itself but also from the surrounding circumstances and the subsequent conduct of the persons connected with the document. The attack therefore on the document on the ground that it did not make a real dedication of the properties for any religious or charitable purpose must fail.

The real attack on the document is on the ground that it was in fraud of creditors and it is this aspect of the case that has taken most of the time during the argument before us. In deciding this question regard must be had to the state of affairs at the time EX. 1 was executed, that is, June 1927. In other words we have to ascertain what was the actual financial condition of the defendant and his sons in June 1927 when this dedication was made. This evidence has been analysed by learned counsel and the gist of the evidence is as follows. The assets of the family were a house worth Rs. 2000 and 200 velis of land and certain outstandings. What exactly the outstandings were it is not possible to say and the appellants' advocate has valued the lands at a flat rate of Rs. 300 an acre, proceeding on the basis of the price paid for the lands now in dispute under EX. 3. The valuation therefore on behalf of the plaintiffs of the assets is Rs. 3,92,000 and it omits all mention of outstandings and is based on a mere estimate of the value of the lands and not on the actual values fetched subsequently. It is not denied that the price of land fell after 1927 and the evidence shows that 536 acres were sold in discharge of debts during the period 1930-34 for Rs. 2,64,000, making an average of nearly Rs. 500 an acre; and it is seen that another 540 acres still remained subject to encumbrances to the extent of about Rs. 2,10,000. Making allowance for the fall in the price of lands after 1927, it would

not be wrong to say that the value of the lands in 1927 must have been at least Rs. 600 an acre. Even allowing only Rs. 500 an acre, the value of the lands, namely 200 velis or 1300 acres would be Rupees 6½ lakhs. This figure may, in our opinion, be taken as a conservative estimate of the value of the lands in June 1927. As regards the liabilities the statement furnished to us by the appellants' advocate shows only Rs. 4,22,870 as the total amount of the debts. Out of this amount it is obvious that at least Rs. 40,000 should be deducted because this amount of Rs. 40,000 is included in the larger amount of rupees 1,09,370 shown as the amount due to the Hongkong and Shanghai Bank. A reference to the document relating to this debt at p. 78 of the printed record shows that this debt of Rs. 40,000 was incurred on a promissory note executed on 26th July 1927. It is thus clear that this debt of Rs. 40,000 was not in existence on the date of Ex. 1. The finding of the learned subordinate Judge is as follows:

> Upon a review of the evidence of the parties as well as the transactions of the debts and discharge it appears to me to be safe to infer that the properties were worth Rs. 5 lakhs and the debts did not exceed that figure.

He also points out that there are no sufficiently strong circumstances which indicate that there was any intention to defeat or delay creditors and that no creditor thought of challenging Ex. 1 from 1927 onwards till the attachment was made by the plaintiff in 1933, though all the creditors would have been aware of the document very soon after it was executed. Plaintiff 3 in his evidence admitted that the value of the assets was Rs. 4½ lakhs, on the then basis, that is to say, on the basis of the value in 1927. He said so even in his examination-in-chief and repeated it in cross-examination. It is therefore clear that even according to his own statement the assets are worth more than the amount of the liabilities, because, according to the statement furnished to us by the appellants' advocate, the liabilities were then only Rs. 4,22,870. This value is certainly less than the then value of the assets according to plaintiff 3 himself. In this connection, some allowance has to be made also for the natural propensity of mankind to take a rosy view of things and to value one's own property at a little higher figure than would perhaps be fetched in the market. There is the undoubted fact that a portion of the property was actually sold for Rupees 2,64,000 and another portion of the property is still regarded as sufficient security for Rs. 2,10,000 and a balance is left of about 200 acres. As we have said already on a conservative estimate, the assets must have been worth at least six to six and half lakhs and as the debts could in no case be said to have exceeded rupees four and half lakhs in 1927, the position was certainly not unfavourable and the defendant and his sons could never have thought for a moment that any of their creditors were likely to be defeated or delayed by reason of the dedication of a small extent of land less than 50 acres for a religious purpose. In other words, the circumstances do not permit any inference against the honesty or integrity of those who brought about Ex. 1. We have no doubt that they must be deemed to have acted honestly and that there could not have been any intention to defraud or even knowledge that any creditor would be defrauded thereby. If, as a matter of fact, one or two creditors still remain unpaid, it is perhaps due to the forced sales which took place after 1927 and the fall in prices. It is not proper to judge the intention of the defendant and his sons in 1927 by what has happened since. No circumstance existing at the time has been made out from which an inference of fraud can be drawn. This is itself sufficient to support the finding of the Court below and it is really not necessary for us to go further into details which have been correctly stated in the judgment appealed from.

The next ground of attack is that the dedication is not a valid one and in any case cannot prevail as against the creditors of the defendants. The learned advocate for the appellants even went to the length of saying that even assuming that the dedication by Ex. I was for a religious purpose the purpose was only private and not public and that therefore the trust could not be regarded as valid in view of S. 14, T. P. Act. There is really no substance in this contention. It is clear from S. 18, T. P. Act, that the restrictions in Ss. 14, 16 and 17 do not apply in the case of transfers of property for the benefit of the public in the advancement of religion, etc. In this case, there can be no doubt that the purpose was a religious one, that is to say for the advancement of religion and there is nothing to show that it was not for the benefit of the public. If it had been intended to attack the validity of the dedication in Ex. I on the ground that there was no benefit to the public thereby it should have been pleaded in so many words, for the question whether a particular charity was for the benefit of the public or not is a ques-

tion of fact on which evidence can be led. For instance, whether the offering of prayers at the tomb or the performance of other ceremonies there are for the benefit of the public is a question that cannot be answered as a question of law; for, the answer must depend on the beliefs entertained by the class or community to which the dedicators belonged. Even otherwise, it seems to us that really the purpose of the dedication was not private. The main purpose was obviously for the benefit of the public. By far the more important purpose was the feeding of the poor pilgrims twice a day on ten days during the festival of Arogyamatha Swami at Velanganni without distinction of caste or religion and the distribution to them, the number not being less than 1000, of oil on Wednesdays and Saturdays and also 1000 mud vessels. It is clear that it was a purpose that must necessarily consume by far the greater part of the income derived from the land set apart for this charity. No doubt it is added at the end later on that arathanai and japams should be daily performed at the grave with lights, flowers, incense, etc., according to the custom of the family. It does not follow that the introduction of this clause about the performance of japams, etc., at the grave makes any difference. Even the feeding of the pilgrims and the distribution of oil among them is to be done in the name of the tomb charity or the samadhidharmam as described in the document.

The learned subordinate Judge has stated with reference to the clause in Ex. 1 regarding the offering of prayers, japams, etc., at the tomb that the dedication for such a purpose is not valid, relying on 15 Mad 424,[1] which held, following the older English cases, that a dedication for perpetual masses for the benefit of the soul of the departed was void as being one for superstitious uses. It may be necessary that the ruling in 15 Mad 424[1] which relies on those old cases which were subsequently overruled by the House of Lords in (1919) A C 815[2] may have to be considered if anything really turned on this aspect of the case. Our attention has been drawn to the recent case, (1937) 1 M L J 166,[3] decided by the Privy Council in 1936. Though that was a case in which the trust deed had not been attacked on the ground of being an attempt to defraud creditors, nevertheless in dealing with the question whether the trust itself is valid because the dedication was partly for purposes which were not for the public benefit can be raised in a suit of this kind has been decided by their Lordships of the Privy Council against the present contention of the appellants. In other words, even where questions may arise under Ss. 14, 16 or S. 17, T. P. Act, in connexion with certain dispositions in favour of private persons, nevertheless an attack on the trust deed on such grounds cannot be made except in a suit for administration of the trust or the assets belonging to the person who made the dedication or created the trust. It is however not necessary to rely on this aspect because in this case there is no foundation laid for the attack on Ex. 1 on this ground, namely that any of the purposes for which the dedication was made were purely for private benefit and not for the public benefit.

It cannot be said that *ex necessitate rei* the offering of prayers, japams, etc., at the grave can never be for the public benefit or for the benefit of any section of the public. In any case, this purpose appears to be obviously subordinate to the main purpose of the dedication which was to feed poor pilgrims and distribute oil among them during the ten days of a well-known festival in the neighbourhood. Such a dedication is obviously for the benefit of the public and it certainly advances religion according to the notions of the community to which the executants of Ex. 1 belong; in other words the feeding of poor pilgrims does advance religion according to the tenets of Roman Catholics, and it cannot be said therefore that the dedication was not "for the benefit of the public" within the meaning of these words which are found in S. 18, T. P. Act. This attack on Ex. 1 on the ground that it offends against the provisions of S. 14, T. P. Act, is one of which no hint is given in the plaint. For the reasons given above we see no reason to interfere with the finding of the lower Court on the only question which arises in this litigation, *viz.*, the validity of Ex. 1. Once Ex. 1 is found to be valid, it is obvious the suit must fail, and the suit must therefore be deemed to have been rightly dismissed. The appeal is accordingly dismissed with costs of the defendant-respondent.

C.R.K./G.N. *Appeal dismissed.*

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1. ('92) 15 Mad 424, Most Reverend Joseph Colgan v. Administrator-General of Madras.
2. (1919) A C 815 : 89 L J Ch 17 : 121 L T 426 : 63 S J 606 : 35 T L R 560, Bourne v. Keane.
3. ('37) 24 A I R 1937 P C 4 : 166 I C 4 : I L R (1937) All 8 : 64 I A 5 : (1937) 1 M L J 166 (P C). Kayastha Patasala, Allahabad v. Mt. Baghavathi Devi.

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WADSWORTH AND PATANJALI SASTRI JJ.

A. Sankara Ayyar — Petitioner

v.

Yagappan Servai — Respondent.

Civil Revn. Petn. No. 1729 of 1938, Decided on 21st August 1940, to revise order of Sub-Judge, Dindigul, D/- 5th September 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), Ss. 8, 9 and 13—Claim for interest on debt falling under Ss. 8, 9 or 13 — Court must scale down claim in manner mentioned in section whether debt on which interest is claimed is subject-matter of proceeding or not — Pronote executed in January 1937 for interest due on mortgage bond of 1929 must be taken to be renewal under S. 9 (1) of previous liability to pay interest — Decree on pronote must be dealt with under S. 8.

Sections 8, 9 and 13 clearly enact that interest due on the various classes of debts for which they respectively make provision should be dealt with in the manner mentioned therein, and it is the duty of the Court whenever a claim is made for interest on debts falling under one or other of these classes to scale down the claim in accordance with these provisions whether or not the debt in respect of which such claim is made is the subject-matter of the proceeding. Consequently, a pro-note executed in January 1937 for interest due on a mortgage of 1929 must under S. 9 (1) be taken to be a renewal of previous liability to pay interest and must be dealt with under S. 8 : C. R. P. No. 769 of 1940, *Approved.* [P 193 C 2; P 194 C 1]

(b) Promissory Note—Execution of pronote for interest due on other debt does not amount to payment of interest — Sum under pronote is not fresh advance as principal.

The execution of a promissory note for interest due on another debt does not amount to a payment of interest on the debt and a fresh advance of the sum as principal under the note. The debtor in executing the pronote merely gives the creditor a document or voucher of debt possessing certain legal attributes : A I R 1933 P C 108, *Rel. on.* [P 194 C 1]

V. Seshadri — for Petitioner.

K. P. Panchapakesa Iyer — for Respondent.

Patanjali Sastri J. — This is a petition to revise the order of the Court of the subordinate Judge of Dindigul dated 5th September 1938 whereby it entered satisfaction of the decree in S. C. S. No. 40 of 1937 on application by the judgment-debtor, respondent before us, under S. 19, Madras Agriculturists Relief Act. The respondent executed a mortgage for rupees 800 in favour of the petitioner on 16th September 1929, and for interest due on the mortgage, he gave on 23rd January 1937, a promissory note for Rs. 595-7-0, the sum being endorsed on the mortgage bond as received for interest. The decree which is sought to be scaled down was obtained on this promissory note. The respondent applied in the Court below alleging that he was an agriculturist and that by virtue of the combined operation of Ss. 8 and 9 of the Act, the decree must be deemed to have been satisfied. The application was allowed and full satisfaction of the decree was accordingly recorded. There was no dispute that the respondent was an agriculturist within the meaning of the Act.

Learned counsel for the petitioner contended that the promissory note on which the decree was passed represented a distinct debt consisting of the principal sum of Rs. 595-7-0 and the interest accruing thereon, and as this debt alone was the subject-matter of the proceeding for scaling down, the only relief the respondent could obtain was the scaling down of the interest payable on this debt. We are unable to accept this contention. It is true that, the debt having been incurred in 1937, it has to be scaled down in the manner mentioned in S. 9 of the Act. But, in view of the proviso to sub-s. (1) of that section, the promissory note which was admittedly taken for interest due on the mortgage bond of 1929 must be taken to be a renewal of the previous liability to pay such interest and therefore dealt with under S. 8. This section clearly provides that all interest outstanding on 1st October 1937 shall be deemed to be discharged, and we are unable to discover in the terms of the section any justification for the view that it is only the interest payable in respect of the debt which is made the subject-matter of the proceeding before the Court that can be scaled down and not the debt where such debt itself consists only of interest due on another debt. It is obvious that to apply the section in the manner suggested for the petitioner would render its provisions practically nugatory. For, a creditor could defeat the object of the section by the simple expedient of suing for the interest alone in the first instance and then suing for the principal, as in the case of most debts there is usually a distinct covenant to pay interest. Similary, the provisions of Ss. 9 and 13 dealing with other classes of loans could also be evaded by adopting the same device. We have therefore no hesitation in rejecting the contention which would thus have the effect of largely defeating the vital provisions of the Act. These sections clearly enact that interest due on the various classes of debts for which they respectively make provision should be dealt with in the manner mentioned therein, and it is the duty of the Court whenever a claim is made for interest on debts falling under one or other of these

classes to scale down the claim in accordance with these provisions whether or not the debt in respect of which such claim is made is the subject-matter of the proceeding; that is to say, *e. g.*, where a claim is made for interest on a debt incurred before 1st October 1932 the Court should apply sub-s. (1) of S. 8 and disallow the claim, although the creditor might not have put the debt itself in suit.

It was then argued that the execution of a promissory note for interest due on another debt amounted to a payment of interest on the debt and a fresh advance of the sum as principal under the note. It is however difficult to see how it can have that effect, at any rate in the absence of any special bargain between the parties of which there is no evidence in this case. In rejecting a similar contention advanced in support of assessment to income-tax of interest for which a promissory note had been taken from the debtor their Lordships of the Privy Council observed in 12 Pat 318[1] at page 336 :

> A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes.

It follows that the promissory note and the decree based thereon must be deemed to be discharged as interest outstanding on the mortgage debt on 1st October 1937. This is also the view taken by Abdur Rahman J., in C. R. P. No. 769 of 1940. The revision petition fails and is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

1. ('33) 20 AIR 1933 P C 108 : 142 I C 437:12 Pat 318 : 60 I A 146 (P C), Commissioner of Income-tax, B. & O. v. Maharajadhiraja of Dharbanga.

A. I. R. 1941 Madras 194

LEACH C. J. AND HORWILL J.

T. S. Rajan — Appellant

v.

Mrs. Pankajammal and another — Respondents.

Appeal No. 54 of 1939, Decided on 13th September 1940, against judgment and decree of Gentle J., in C. S. No. 171 of 1939, D/- 6th September 1939.

(a) Madras High Court (Original Side) Rules, O. 45—Proceedings pursuant to originating summons are suit.

Proceedings pursuant to the issue of an originating summons under O. 45 constitute a suit. [P 195 C 2]

(b) Letters Patent (Madras), Cl. 12 — Legacy comprising lands situate outside Madras City— Question whether proceedings pursuant to originating summons constitute "suit for land" under Cl. 12 involves substantial question of law.

The question whether the proceedings pursuant to an originating summons in respect of a legacy comprising lands situate outside the limits of the Madras City constitute a suit for land within the meaning of Cl. 12 involves a substantial question of law. [P 195 C 2]

(c) Madras High Court (Original Side) Rules, O. 45, R. 9 — Testator bequeathing his ancestral property to A and appointing A and B his nephews as executors—Owing to friction between executors and testator's widow and daughter, latter applying for letters of administration — A and B not opposing grant and renouncing claim as executors — Widow taking out originating summons for direction of Court — A in possession of testator's ancestral property opposing summons on various grounds —Questions involved held could not be disposed of in summary proceedings.

The testator appointed his nephews *A* and *B* as executors and bequeathed his ancestral property to *A*. Owing to a friction between the executors and the testator's widow and daughter, the latter applied for letters of administration with a copy of the will annexed. The executors, however, did not oppose the grant and renounced their claim as executors. The widow and daughter thereupon took out an originating summons for direction of the Court inasmuch as according to them *A* had lost his right to his legacy as a result of his renunciation. *A*, who was in possession of the testator's ancestral property, opposed the summons on various grounds one of them being that the proceedings constituted suit within the meaning of Clause 12 of the Letters Patent and the High Court had no jurisdiction since the properties comprised in the legacy were situate outside the limits of Madras City:

Held that the questions involved could not be disposed of in a summary proceeding and the parties must be referred to a suit in the ordinary Courts inasmuch as apart from the important question whether the proceeding was a suit for land the Court would have to go closely into the facts in order to decide whether the renunciation signed by *A* deprived him of the legacy. Moreover, the proceedings could not decide the matter finally since *A* was in possession of the ancestral properties of the testator, and the Court could not, in the proceedings, give the widow and her daughter possession if the case was decided in their favour: (1905) 2 Ch D 340, *Rel. on.* [P 195 C 2; P 196 C 1]

T. R. Venkatarama Sastriar, K. Krishnaswami Iyengar, A. Seshachariar and M. Sundaram — for Appellant.

Sir A. Krishnaswami Iyer (Advocate-General) and S. Srinivasaraghavan —for Respondents.

Leach C. J. — This appeal arises out of an order passed by Gentle J., on an originating summons taken out by the respondents under the provisions O. 45 of the Rules of the Original Side of this Court. The respondents are the widow and daughter respectively of one V. Rama Ayyangar, who died on 14th April 1937, leaving a will dated 25th April 1936. By his will the testator appointed the appellant and his brother, who are his nephews, to be his executors. To the appellant he left his ancestral properties situate in the village of Tirukurangudi in the Tinnevelly District. The executors did

not prove the will, although it has been said in these proceedings that they acted as the executors of the will for a period. It is alleged by the appellant that there was friction between the executors and the widow and the daughter as the result of which it was impossible for the executors to carry on with the administration of the estate. The appellant says that in consequence of this friction the respondents themselves applied for letters of administration with a copy of the will annexed, and on the advice of friends the executors decided not to oppose the grant. On 25th June 1937, while the respondents' application for letters was pending, the executors signed a statement in the following terms :

> Now, we, the said T.S.Rajan and T.S.Santhanam, do hereby declare that we have not intermeddled in the property and credits of the said deceased, and will not hereafter intermeddle therein and we do hereby renounce all our right and title to the probate and execution of the said will as we do not desire to be executors in the circumstances that have happened since the reading of the will. The will is filed herewith.

It is the appellant's case that in signing this statement he and his brother did so in order to preserve amity within the family. They were reluctant to renounce their executorship, but they did so as the result of advise that it would facilitate the administration of the estate, though their action was not intended to affect the appellant's legacy. Section 141, Succession Act, says that if a legacy is bequeathed to a person who is named as executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor. As the result of the renunciation embodied in the statement of 25th June 1937 the respondents contended that the appellant has forfeited the legacy of the testator's ancestral properties, and with a view to obtaining the directions of the Court the respondents took out this originating summons. Their right to do so was challenged by the appellant. He raised four grounds of objection, namely : (1) as the legacy comprised lands situate outside the limits of the Madras city, the proceedings constituted a suit for land outside the jurisdiction of the Court and therefore the proceedings could not be maintained in this Court; (2) the appellant was not a resident of Madras and therefore an originating summons could not be taken so far as he was concerned; (3) the appellant had manifested an intention to act as executor and having done so his right to the legacy had been established and (4) the questions in issue could not be decided with finality in summary proceedings and therefore the respondents should be relegated to a suit. The learned Judge decided all these contentions against the appellant.

In deciding the first contention, namely, that these proceedings comprised in effect a suit for land, the learned Judge did not consider the decided cases on the question, as they were not quoted to him. There are two decisions of the Calcutta High Court, 56 Cal 979[1] and 58 Cal 768,[2] which support the appellant's contention that this is in reality a suit for land, and there is another decision of the same High Court, 62 Cal 1062,[3] to the opposite effect. Proceedings pursuant to the issue of a summons under O. 45 constitute a suit. There is a plaint and a written statement. Rule 5 of the Order says that the plaint when accepted shall be filed and numbered as an ordinary suit and entered in the register of suits, but after the serial number the letter "O. S." shall be placed to distinguish it from plaints filed in ordinary suits. Clause 12 of the Letters Patent only gives the Court jurisdiction in the case of suits "for land" if the property is situated within the jurisdiction of the Court. There has been much controversy in the Courts in India as to what is meant by the words "suits of land". It is not necessary to refer in detail to the controversy, but it is manifest that here the question whether the present proceedings do constitute a suit for land within the meaning of the Letters Patent involves a substantial question of law.

We consider that the appellant's contention that this matter should not be decided in a summary procedure should prevail. Apart from the important question whether this is a suit for land, the Court will have to go closely into the facts in order to decide whether the renunciation signed by the appellant on 5th June 1937 deprives him of the legacy. It is not sufficient for the Court to say that the statement signed by the appellant amounts to a renunciation. The appellant must be given an opportunity of calling evidence with a view to proving what transpired before he signed the document, and when all the surrounding circumstances have been taken into consideration it will be for

1. ('30) 17 A I R 1930 Cal 258 : 122 I C 197 : 56 Cal 979, Provos Chandra v. Ashuthosh Mukherjee.
2. ('31) 18 A I R 1931 Cal 651 : 134 I C 436 : 58 Cal 768, Sewdayal Ramjeedass v. Official Trustee of Bengal.
3. ('35) 62 Cal 1062 : 39 C W N 1154, Vedabala Debee v. Official Trustee of Bengal.

the Court to decide upon the effect of the document.

There is a further factor. The present proceedings will not decide the matter finally. It is admitted that the appellant is in possession of the ancestral properties of the testator, and the Court cannot in these proceedings give the respondents possession should the case be decided in their favour. In (1905) 2 Ch D 340,[4] Warrington J. had to deal with similar proceedings under O.54-A, R. 1 of the English Rules, which says that a person claiming to be interested under a deed, will or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested. Warrington J. pointed out that this rule is only intended to enable the Court to decide a question of construction where the decision, whichever way it may go, will settle the litigation between the parties. It is certainly doubtful whether the present proceedings will settle the litigation between the parties. Moreover, O. 45, R. 9 of the Original Side Rules states that the Judge hearing an originating summons may, if it appears to him that the matters in respect of which relief is sought cannot be disposed of in a summary manner, refuse to pass an order on the summons and refer the parties to a suit in the ordinary Courts. We consider that that is what the learned Judge should have done in this case. We are firmly of the opinion that the questions here are of such a nature that they cannot be disposed of in a summary proceeding. The appeal will be allowed and the summons dismissed, the respondents being relegated to a regular suit. The costs of these proceedings will be made costs in the suit if one is filed. In order that there shall be no misunderstanding, we wish to emphasise that our judgment is intended to leave open all questions which can properly be raised in a suit. The case is an important one and there will be a certificate for two counsel.

C.R.K./G.N. *Appeal allowed.*

4. (1905) 2 Ch D 340 : 74 L J Ch 682 : 93 LT 303 : 54 W R 93, Lewis v. Green.

A. I. R. 1941 Madras 196

WADSWORTH AND PATANJALI SASTRI JJ.

Kolethoor Soolapani Moopil Variar

v.

Vayankare Thekke Veettil Veloor.

Civil Revn. Petn. No. 611 of 1939, Decided on 3rd September 1940.

Madras Agriculturists' Relief Act (4 of 1938), S. 15—Suit by jenmi against tarwad for redeeming kanom — Tarwad not agriculturist as paying land revenue over Rs. 500 — Tarwad partitioned and kanom right in suit assigned to tavazhi — Tavazhi paying land revenue less than Rs. 500 held agriculturist and entitled to apply under S. 15—Application of S. 15 to such case does not amount to repeal of Malabar Tenancy Act, S. 24.

The jenmi filed a suit against tarwad for redemption of the kanom right. The tarwad paid land-revenue over Rs. 500 and was not therefore an agriculturist within the meaning of S. 3 (ii), Proviso D of the Act. During the pendency of the suit, the tarwad was partitioned and the kanom right was assigned to the tavazhi, a lesser group of the tarwad which as a whole was liable to pay rent. The tavazhi admittedly paid land revenue less than Rs. 500 :

Held that the tavazhi on assignment of the kanom right and liabilities after partition was under liability to pay rent such as entitled it to the benefit of S. 15, and that the application of S. 15 to the case in question did not amount to repeal of S. 24, Malabar Tenancy Act : A I R 1939 Mad 186 and A I R 1941 Mad 44, *Rel. on.* [P 197 C 1]

P. Govinda Menon — for Petitioner.

A. P. Kuttisankara Menon — for Respondent.

Wadsworth J. — The petitioner here was the plaintiff in a suit to redeem a Malabar kanom. An application was filed in that suit by defendant 9 for relief under S. 15, Madras Act 4 of 1938. That application was granted and it is this order that the plaintiff-petitioner seeks to revise. The kanom in question was executed on 23rd March 1915 and it contained a provision that in case of default of payment of rent to the jenmi, the latter could adjust the arrears of rent due with interest thereon to the kanom amount. There was a default and on 10th September 1934, the plaintiff filed a suit for redemption appropriating the arrears towards the amount which was due under the kanom and claiming to redeem on payment of the balance Rs. 715 odd. At the time of this suit, the kanom right was held by the tarwad of the defendants which admittedly paid more than Rs. 500 as land revenue and was therefore not an agriculturist, having regard to the proviso D to S. 3 (ii) of Act 4 of 1938. On 5th July 1935, there was a partition in the defendants' tarwad and at this partition the kanom right in question was assigned to the tavazhi represented by defendant 9. This smaller group pays less than Rs. 500 as land revenue and it is therefore entitled to be regarded as an agriculturist under the definition. It is contended by the petitioner that since he filed his original suit against the tarwad as a whole, which was his tenant, it was the tarwad as a whole which was liable

to pay the rent and there was no liability on defendant 9's tavazhi such as would entitle it to apply under S. 15 of Act 4 of 1938. We find it very difficult to appreciate the force of this contention. Granted that at the time of the suit the rent was payable by the tarwad as a whole, even then, defendant 9 representing her tavazhi was one of the group by which the rent was payable. After the partition by which the kanom right and the liabilities thereunder were allotted to defendant 9's tavazhi, that tavazhi was certainly under a liability to pay the rent such as would entitle it to claim the benefits of S. 15. So much follows from the reasoning in the decision in I L R (1939) Mad 218.[1] A similar view is taken by King J. in C. M. S. A. No. 14 of 1939[2] in a case arising under S. 15 of Act 4 of 1938.

A further contention relates to the effect of S. 24, Malabar Tenancy Act, which provides that the tenant may obtain a renewal on deposit of all arrears with interest thereon at the contract rate, if any, upto the date of the order. The suggestion is that to apply the provisions of S. 15 of Act 4 of 1938 would amount to a repeal of the provisions of S. 24, Malabar Tenancy Act. We are unable to accept this contention. By applying the provisions of S. 15 of Madras Act, 4 of 1938, to this case, the amount of the arrears due from the tenant becomes liquidated by a deposit in accordance with the terms of that section. When the Court has to deal with an application under Ss. 22 to 24, Malabar Tenancy Act, it has to look to the arrears due at the time of its order and on deposit of those arrears it will order renewal in favour of the tenant. When ascertaining the amount of the arrears the Court will have regard to any payments made and may equally well have regard to any discharge by the process laid down in S. 15 of Act 4 of 1938. In this view, we dismiss the civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

1. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : I L R (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.
2. *Reported in* ('41) 28 AIR 1941 Mad 44 : (1940) 2 M L J 451, Puthanveettil Cheeru v. Chathu.

A. I. R. 1941 Madras 197

ABDUR RAHMAN J.

Srinivassa Ayyangar — Appellant

v.

Akayya Naidu and others — Respondents.

Second Appeal No. 209 of 1936, Decided on 25th August 1939, against decree of Dist. Court, North Arcot, in A. S. No. 277 of 1934.

Registration Act (1908), Ss. 17 (1) (b) and 17 (2) (xi) — Receipt by mortgagee relinquishing part of mortgage money must be registered.

There is obviously a distinction between a receipt of money and a relinquishment of a claim by a creditor. When a receipt does not purport to extinguish a mortgage deed but merely operates to do so, it may be admissible in evidence without registration on account of S. 17 (2) (xi). But when a document is not a receipt of money but a receipt by a mortgagee relinquishing a portion of the mortgage money, the same does not fall under S. 17 (2) (xi) and consequently is inadmissible in evidence when not registered under S. 17 (1) (b) : 35 All 202 and A I R 1918 Mad 331, *Rel. on* ; A I R 1920 Mad 742, *Disting.* [P 198 C 1, 2]

D. Ramaswamy Ayyangar — for Appellant.

V. T. Rangaswami Ayyangar, K. Ramaswami Ayyangar and P. S. Kothandapani — for Respondents.

Judgment. — The only question that I have been called upon to determine in this appeal is whether that portion of EX. 4 which waives a certain amount of debt due on a mortgage bond is not hit by the provisions contained in S. 17, Registration Act. How this receipt came into existence would be clear by the following facts. Certain properties were mortgaged by defendants 1 and 2 in August 1921 with defendant 3. This was followed by a partition between defendants 1 and 2 under which the properties mentioned in Sch. A attached to the plaint fell to the share of defendant 2 and those described in Sch. B were allotted to that of the first one.

The properties in Sch. A were sold by defendant 2 in April 1926 to defendant 5. On 26th February 1929, defendant 3, who was a mortgagee of the properties contained in Schs. A and B of the plaint, entered into an agreement with defendant 5 to the effect that the former would accept Rs. 1350 in full satisfaction of his claim from the latter in regard to the properties mentioned in the 'A' schedule and the balance of the sum due was 'waived' by the mortgagee 'out of grace'. In pursuance of this arrangement, a sum of Rs. 1100 was paid by defendant 5 who also agreed to pay the balance of Rs. 250, within a month. Defendant 3 then executed a receipt (EX. 4) in favour of defendant 5 in which the whole agreement, the terms of which have been briefly stated, was incorporated. The balance of Rs. 250 was not paid within the period mentioned in the receipt and defendant 3 assigned all his rights under the mortgage in October 1929 to defendant 4, who in his turn assigned them to the plaintiff. The equity of redemption in the 'B' schedule properties was sold by defendant 1 to the plaintiff who has brought the present

suit on the basis of the mortgage. Defendant 5 naturally pleaded the arrangement arrived at between him and the original mortgagee; and the receipt EX. 4 incorporating the relinquishment of the balance by the original mortgagee was produced by him in evidence. The plaintiff objected to its admissibility for want of registration but his contention was overruled by both the lower Courts. The plaintiff appeals. It may be stated in passing that a sum of Rs. 1854 was due to the original mortgagee on the date when EX. 4 was executed. A sum of Rs. 1100 was received by him in cash and he had agreed to receive Rs. 250 in full settlement. A sum of Rs. 304 was thus relinquished by him. In overruling the plaintiff's contention in regard to the admissibility of EX. 4 the learned District Judge remarked as follows:

> If a certain amount had been relinquished in a receipt, that receipt cannot be said to be inadmissible, simply because it has not been registered even if the payment of money as well as the relinquishment have the affect of relinquishing a mortgage right.

In view of the language used in S. 17 (1) (b), Registration Act, it is not easy to agree with this statement. There is obviously a distinction between a receipt of money and a relinquishment of a claim by a creditor. When a receipt does not purport to extinguish a mortgage deed but merely operates to do so, it may be admissible in evidence without registration on account of exception (xi) mentioned in S. 17, sub-cl. 2 of the Act. But when a document is not a receipt of money but something more and does not come within the ambit of exception (xi) it would require registration to be admissible in evidence for the simple reason that it is a document which purports or operates to limit or extinguish either in present or in future, a right, title or interest of the value of more than Rs. 100 to or in the mortgaged property. The distinction between a receipt and an agreement of relinquishment of rights in a mortgaged property has been pointed out by a Division Bench of the Allahabad High Court in 35 ALL 202[1] and has been followed by a Division Bench of this Court in 34 M L J 79.[2] Bearing the clear words of S. 17 (1) (b), Registration Act, in mind it seems to be unnecessary to cite any other cases in support of the proposition that the document, EX. 4, to the extent that it relinquished more than Rs. 300 was not admissible in evidence without registration.

The learned counsel for the respondent has placed his reliance on the case reported in 43 Mad 803[3] at page 806. That is however distinguishable as the learned Judges found in that case that the receipt given by the mortgagee did not expressly extinguish the mortgage interest, although it acknowledged the receipt of the mortgage debt. In view of the words used in exception (xi) of S. 17, sub-cl. 2, a distinction was drawn between a discharge of a debt and the extinguishment of a mortgage interest, though one might be the result of the other and it was pointed out that where a receipt in terms only discharged the debt, it did not require registration to be admissible in evidence. This case has therefore no bearing on the point which has to be decided here. It must therefore be held that the document on which reliance was placed by the defendant to show that the mortgagee had relinquished the sum of Rs. 304 is inadmissible in evidence. The result is rather unfortunate. But, in view of the mandatory provisions of the Registration Act, it cannot be helped. The plaintiff who is an assignee of the mortgagee would be entitled to recover the balance due under the mortgage from defendant 5, whose liability would be limited to the extent of the property purchased by him. The plaintiff would also be entitled to recover interest at the rate contained in the mortgage deed, i. e., 9 per cent. upto the date fixed by the lower Court for redemption on the balance of principal amount due under the mortgage and at 6 per cent. from the date of suit up to the date of realisation. The plaintiff will get his costs of the appeal and the order for costs passed by the lower Courts in favour of the defendants will be set aside. Leave refused.

C.R.K./G.N. *Appeal allowed.*

1. ('13) 35 All 202 : 19 I C 449 : 11 A L J 253, Gobardhan Sahi v. Jadunath Rai.
2. ('18) 5 A I R 1918 Mad 331 : 44 I C 132 : 34 M L J 79, Lakshmana Setti v. Chenchuramayya.
3. ('20) 7 A I R 1920 Mad 742 : 60 I C 255 : 43 Mad 803, Neelamani Patnaik v. Sukaduvu Beharu.

A. I. R. 1941 Madras 198

KING J.

A. R. L. S. V. L. Sevugan Chettiar — Appellant

v.

Revenue Divisional Officer, Devakottai —Respondent.

Appeal No. 216 of 1939, Decided on 8th August 1940, against decree of Sub-Judge, Devakottai, in O. P. No. 77 of 1937.

Land Acquisition Act (1 of 1894), Ss. 27 (1) and 53 — S. 27 (1) empowers Court to order cost

to be paid by any person whether party or not—Trustee of religious institution party to proceedings—Court has jurisdiction to order either trustee personally or religious institution to pay costs——S. 27 (1) does not limit S. 35, Civil P. C.

The language of S. 27 (1) is perfectly clear and very wide and on the face of it gives power to the Court to order costs to be paid by any person whether he be a party or not. There is nothing in the Land Acquisition Act or in S. 27 (1) which in any way conflicts with or limits or restricts the provisions of S. 35, Civil P. C., and therefore the Court under S. 27 (1) must be deemed to have jurisdiction to order a trustee of a religious institution which is a party to the proceedings before it to pay the costs personally or to order that the same shall be paid by the religious institution : A I R 1928 Mad 590 and A I R 1929 Mad 782, *Rel. on.* [P 199 C 2; P 200 C 1]

V. Ramaswami Ayyar—for Appellant.

Government Pleader—for Respondent.

Judgment. — This appeal arises out of land acquisition proceedings with regard to about 3½ acres of land acquired by the Karaikudy Municipality for purposes of a burning ground. The Collector awarded compensation at the rate of Rs. 100 per acre. The appellant, as the trustee of a Devasthanam, claimed before the learned subordinate Judge of Devakottai that the award ought to have been at the rate of Rs. 6000 an acre. The learned subordinate Judge held that the Collector's award was an adequate award and confirmed it; and, in deciding the question of costs, he held that it was the appellant himself personally, and not the Devasthanam which he represented, who ought to pay costs to the Collector. Against that order, the appellant has filed this appeal. There is no appeal against the decision of the subordinate Judge with regard to the amount awarded.

The main point taken in the appeal is that the subordinate Judge dealing with this matter under the Land Acquisition Act, had no jurisdiction to order costs to be paid by any person or institution which was not the actual party to the proceedings before him, that the trustee was not personally a party but merely represented the devasthanam and therefore it was the devasthanam alone which could be called upon to pay costs. The section of the Land Acquisition Act which confers power upon the Court to award costs in a case where the Collector's award is confirmed, is S. 27, cl. (1), which runs as follows :

> Every such award shall also state the amount of costs incurred in the proceedings under this part, and by what persons and in what proportions they are to be paid.

It is argued for the appellant that by the word 'persons' can be understood only persons who are parties to the proceedings. I find myself unable to accept this argument. The language of S. 27 (1) is perfectly clear and very wide and it must on the face of it give power to the Court to order costs to be paid by any person whether he be a party or not. No doubt there are certain well-known principles of law which prevent a Court from ordering costs to be paid by someone who is an utter stranger to the suit or proceedings. But such is not the state of facts with which I have to deal. The appellant was actually present before the Court although he had no personal interest in putting forward the claim. Section 53, Land Acquisition Act, says:

> Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act.

The section of the Civil Procedure Code which deals with costs is S. 35. This section is also drafted in very comprehensive language and it has not been argued that S. 27 (1) in any way conflicts with or limits or restricts the provisions of S. 35. There have been no direct cases cited before me dealing with the same facts as those found in the present appeal, but, it seems to me, on a consideration of Ss. 27 (1) and 53, Land Acquisition Act, and S. 35, Civil P. C., that I am entitled in disposing of this appeal to follow any decisions which have been given, not in land acquisition proceedings themselves, but in civil litigation generally, under the provisions of S. 35, Civil P. C. Two such decisions have been cited by the learned Government Pleader, A I R 1928 Mad 590[1] and AIR 1929 Mad 782.[2] These decisions, interpreting the language of S. 35, Civil P. C., hold that, although a guardian ad litem is not personally a party to a suit, S. 35 authorizes the Court to order such a guardian to pay costs. It seems to me that the principles governing the relationship between a guardian ad litem and a minor and the relationship between a trustee and a religious institution like the one in the case before me are precisely analogous. The question which the Court has to decide in both sets of cases is whether the actual party himself should be called upon to pay the costs for an act done by his representative, or whether the act of the representative is so reckless or ill-advised that it would be unjust to call upon the real party to meet the burden of costs. It seems to me therefore that the Court must be deemed to have

1. ('28) 15 AIR 1928 Mad 590 : 110 I C 310, Krishnayya v. Ramayya.
2. ('29) 16 AIR 1929 Mad 782, Yellamma v. Suryanarayanamurthi.

jurisdiction in cases like the present to say whether it shall be the Devasthanam or the trustee that should pay the costs. Such jurisdiction is given by the wide language of S. 35, Civil P. C., and there is nothing in the Land Acquisition Act to modify S. 35 in any way, in a case like the present, where the Collector's award has been confirmed.

The question next arises whether the order calling upon the appellant to pay costs should be confirmed. It seems to me that no reason has been put forward for differing from the learned subordinate Judge in this respect. The learned Judge has pointed out that the appellant actually claimed compensation at no less than sixty times the real value of the land. It is clear from the judgment that the land has always been used as a burial or burning ground and that this fact must have been well known to the appellant. In spite of that, he has claimed a most extravagant sum from the Government. There can be no excuse for such conduct and it is, I think, impossible to accept the appellant's argument that he acted bona fide in this matter. I accordingly see no reason at all to interfere with the order of the learned subordinate Judge and dismiss the appeal with costs.

C.R.K./G.N. *Appeal dismissed.*

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* A. I. R. 1941 Madras 200

WADSWORTH AND PATANJALI SASTRI JJ.

Punyam Rangaswami Reddi — Petitioner

v.

Gali Gopalakrishna Reddi — Respondent.

Civil Revn. Petn. No. 790 of 1939, Decided on 18th September 1940, to revise order of Special Deputy Collector, Chandragiri, D/- 6th January 1939.

* *Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii) Proviso D — Word "landholder" in S. 3 (ii) Proviso D contemplates ownership of zamin interest in estate rather than recognition by Collector—Landholder executing separate usufructuary mortgages of his zamin right in estate, but retaining ryoti lands and becoming tenant of his mortgagees in respect thereof — Collector recognising one of mortgagees as landholder —In spite of aforesaid recognition mortgagor as owner of estate must be deemed to be landholder within meaning of S. 3 (5), Madras Estates Land Act.*

The word "landholder" in S. 3 (ii) Proviso D contemplates the qualification of ownership of the zamin interest rather than the qualification of recognition by the Collector. [P 200 C 2]

Consequently, where a landholder executes separate usufructuary mortgages of his zamin right in the estate, retains ryoti land and becomes the tenant of his mortgagees in respect of those lands the mortgagor as owner of the estate also must be deemed to be the landholder within the meaning of S. 3 (5), Madras Estates Land Act, notwithstanding the recognition of one of the mortgagees as landholder by the Collector. [P 201 C 2]

T. L. Venkatarama Iyer — for Petitioner.

S. A. Seshadri Iyengar — for Respondent.

Wadsworth J. — The question in this civil revision petition is whether, having regard to the terms of Proviso D to S. 3 (ii), Madras Agriculturists' Relief Act, the petitioner is an agriculturist entitled to the benefits of S. 15 of the Act. The petitioner owns the kudivaram interest in certain lands in the village of Kolathur, which is an estate under the Madras Estates Land Act, paying a peishcush of Rs. 1200. Some years ago he purchased the zamin rights of the estate and in 1927 he was recognized by the Collector as the landholder. In 1934 he executed two usufructuary mortgages, each covering one moiety of the zamin right in the estate. He retained his ryoti lands and thus became the tenant of his mortgagees in respect of those lands. In 1935 the respondent (one of the mortgagees) applied to the Collector for recognition as the landholder of the estate. His application was opposed by the mortgagees of the other half of the zamin and the petitioner was also a party to the proceedings. The Collector recognized the respondent as the landholder, holding that the petitioner was no longer entitled to collect the rents and that the respondent was entitled to a larger share of the income than either of the mortgagees of the other half. The question is whether in view of this order, the petitioner can be deemed to be a landholder of an estate in respect of which a sum exceeding Rs. 500 is paid as peishcush. The lower Court held that he was a landholder and therefore disentitled to the benefits conferred on agriculturists by S. 15 of Act 4 of 1938. The question is by no means free from difficulty. Proviso D to S. 3 (ii) excludes from the category of agriculturists any person who

is a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof in respect of which estate, share or portion any sum exceeding Rs. 500 is paid as peishcush...

The exclusion of a landholder of a share or portion of an estate paying a peishcush exceeding Rs. 500 seems to indicate that the Legislature had in mind the qualification of ownership of the zamin interest rather than the qualification of recognition by the Collector. But the definition of a 'landholder' in the Estates Land Act as a person owning an

estate or a part thereof or entitled to collect the rents of a whole or any portion of the estate, has the following subsidiary clause:

> Where there is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of this Act or between two or more joint landholders as to which of them is entitled to proceed and be dealt with as such landholder, the person who shall be deemed to be the landholder for such purposes shall be the person whom the Collector subject to any decree or order of a competent civil Court may recognize or nominate as such landholder in accordance with rules to be framed by the Local Government in this behalf.

One of the rules framed under this section provides that where two landholders have equal claims to recognition, the Collector shall recognize the more competent. Under this provision of law, the respondent has been recognized by the Collector as the landholder for all the purposes of the Act. It is argued that by reason of this recognition, the other joint landholders (including the petitioner) ceased to be landholders for any of the purposes of the Act and that since the definition exists only for the purposes of the Act, they ceased to have the status of landholders at all. Now there can be no doubt that the acceptance of this view of the law would lead to serious anomalies. Take the case of an estate paying a peishcush of Rs. 2000, which is enjoyed in two equal moieties by A and B. The Collector would have to decide whether A was more competent than B and the result would be that the more competent man who was recognized as the landholder would not be an agriculturist, while the less competent man, though owning a portion of an estate paying a peishcush of Rs. 1000, would be entitled to the benefits of Act 4 of 1938 as an agriculturist, though it appears to have been intended that he should not be so entitled. In fact the result of this interpretation of proviso D would be practically to nullify the exclusion from the category of agriculturists of landholders of a share or portion of an estate paying a peishcush exceeding Rs. 500. At the same time there are serious difficulties in interpreting the word 'landholder' in this proviso in accordance with its dictionary sense as a proprietor or owner and without regard to the definition in the Madras Estates Land Act. The word 'landholder' is used in Ss. 3 (ii) (b), 3 (iv), 15, 16 and 17 of Act 4 of 1938 and in each of these sections it appears to be used in its technical sense as a landholder under the Estates Land Act. Moreover, in proviso D to S. 3 (ii), though the words "under the Madras Estates Land Act," appear grammatically to qualify 'estate' rather than 'landholder' the whole phrase seems to have reference to that Act and it is to be presumed that the Legislature had in mind the definition of the term 'landholder' in that Act rather than the dictionary meaning of the word.

The solution of the difficulty seems to us to lie in a more careful reading of cl. 2 of S. 3 (5) of the Estates Land Act. This clause seems to contemplate two classes of dispute. One is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of the Act, that is to say a dispute regarding title. The other is a dispute between two persons who are admittedly joint landholders as to which of them is entitled to proceed and be dealt with as the landholder, that is to say, it is a dispute not regarding title but regarding the right of management. In the latter class of cases, the proper order to be passed by the Collector is not one recognizing the successful party as the landholder for all purposes under the Act, but one recognizing him as entitled to proceed and be dealt with as the landholder. When such an order is passed, though the successful party would be solely entitled to conduct proceedings and to perform the functions of the landholder so long as the order is in force, it would not have the effect of taking the joint proprietor out of the definition of 'landholder' in cl. 1 of the sub-section. It is true that the Collector's order in the present case purported to recognize the respondent as the landholder for all purposes under the Act, but this order can have no larger effect than the recognition which the Collector was empowered to make. It follows that, notwithstanding the recognition of the respondent as the landholder, the petitioner as owner of the estate must also be deemed to be a landholder within the definition in S. 3 (5), Madras Estates Land Act. He is therefore not an agriculturist under Act 4 of 1938. The petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 201

WADSWORTH AND PATANJALI SASTRI JJ.

Amad Koya and another — Petitioners

v.

Appu and another—Respondents.

Civil Revision Petn. No. 1632 of 1938, Decided on 4th September 1940.

Madras Agriculturists Relief Act (4 of 1938), Ss. 15 (1), 16 and 17—S. 15 (1) being expropria-

tory its language cannot be extended — Terms "jenmi" or "intermediary" in Ss. 15 (1), 16 and 17 do not include assignee of right to collect rent.

Section 15 (1) being an expropriatory measure its language cannot be extended so as to expropriate more persons than those actually comprised within its terms and therefore the terms "jenmi" or " intermediary " in S. 15 (1) or Ss. 16 and 17 cannot be read as including an assignee of the right to collect rent. Section 15 consequently cannot be invoked in favour of a tenant whose rent is payable to an assignee of rent from a Malabar jenmi.

[P 202 C 2]

K. Kuttikrishna Menon—for Petitioners.

K. P. Raman Menon—for Respondents.

Wadsworth J. — This civil revision petition raises the question whether S. 15 of the Madras Act 4 of 1938, can be invoked in favour of a tenant whose rent is payable to an assignee of rent from a Malabar jenmi. The petitioners here were the applicants in the Court below and they were the judgment-debtors. The suit was brought by plaintiff 1 as assignee of the rent for the period from 1929-30 to 1936-37, his assignor being plaintiff 2, the jenmi. The assignment was dated 17th February 1937 and there was a decree dated 9th October 1939 in favour of plaintiff 1, the assignee, alone. Defendants applied under Ss. 19 and 15 of Act 4 of 1938 to scale down this decree. Section 15 (1) of the Act begins as follows:

> All rent payable by an agriculturist to a landholder or an under tenure-holder under the Madras Estates Land Act, 1908, or to a jenmi or intermediary under the Malabar Tenancy Act, 1929, which has accrued for the fasli year 1345 and prior faslis and which is outstanding on the date of the commencement of this Act shall be deemed to be discharged . . . .

Mr. Kuttikrishna Menon for the petitioners has contended that the effect of these words is to give to the tenant a right to scale down the rent, whether or not it is due to a jenmi or intermediary on the date of the commencement of the Act, provided that in its origin it partakes of the character of rent due to a jenmi or intermediary. It is quite clear that the definitions of the words "jenmi" and "intermediary" in Ss. 3 (k) and 3 (j), Malabar Tenancy Act, do not include an assignee of the right to collect rents, though under the corresponding provision, S. 3 (5), Madras Estates Land Act, the term "landholder" does include a person entitled to collect rent. It is not very apparent why an assignee of the right to collect rent in Malabar should have been treated differently from an assignee of the right to collect rent in other parts of the presidency; but the fact remains that the terms "jenmi" and "intermediary" used in this section and in the succeeding Ss. 16 and 17 are not extended by any words in the Act so as to include an assignee of the right to collect rents, and the definitions in the Malabar Tenancy Act do not cover such an assignee. It seems to us apparent that, reading S. 15 (1) in its plain terms there must be rent outstanding on the date of the commencement of the Act, which rent must be, as on that date, payable by an agriculturist to a landholder or an under tenure-holder or to a jenmi or intermediary. If these conditions are not satisfied, the section had no application. It may be that the omission of any provision relating to an assignee of a right to collect rent in the case of a Malabar tenancy is a lacuna due to the inadvertence of those who drafted the Act: but, even so, the remedy is the amendment of the Act. Dealing with an expropriatory measure we cannot extend the language so as to expropriate more persons than those actually comprised within its terms. In the present case it seems to us clear that as the arrears with which we are concerned were not outstanding as rent payable to a jenmi or intermediary on the date of the commencement of the Act, the petitioners are not entitled to the benefit of S. 15 of the Act.

We may add :that to read the term "jenmi" or "intermediary" in S. 15 (1) as including an assignee of the right to collect rent would lead to the difficulty that under S. 15 (4) there is no provision for notice to such an assignee, and in Ss. 16 and 17 the same terms are repeated with reference to safeguarding of certain rights of the landholder and with reference to limitation, which also have not been extended to cover an assignee. In the result, therefore, we dismiss the civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 202

WADSWORTH AND PATANJALI SASTRI JJ.

Peria Karuppan Chettiar — Petitioner

v.

Appaji Naidu and others — Respondents.

Civil Revn. Petn. No. 1186 of 1939, Decided on 28th August 1940, to revise order of Dist. Munsif, Chingleput, D/- 4th October 1938.

Madras Agriculturists Relief Act (4 of 1938), S.8, Expl.—Under S.8, Explanation renewal must be by same debtor—But parties to earlier and later debt need not be absolutely identical—Member of joint Hindu family executing pronote jointly with strangers for debt binding on family — Member executing fresh pronote along with his brothers in respect of amount due under earlier pronote — Later pronote is renewal within meaning of S. 8,

Expl.—Even if debt under earlier pronote be not binding on family, member executing same being common debtor can apply for scaling down debt due under later pronote.

Under S. 8, Explanation the renewal of a debt or its inclusion in a fresh document must be by the same debtor, but it is not necessary that the parties to the earlier and the later debts should be absolutely identical: A I R 1941 Mad 58 and A I R 1940 Mad 58, *Rel. on.* [P 203 C 2]

A member of a joint Hindu family executed a pronote jointly with strangers for a debt binding on the family and subsequently the member along with his brothers executed a fresh pronote for the amount due on the earlier pronote:

Held that the subsequent pronote amounted to a renewal within the meaning of S.8, Explanation. [P 203 C 2]

Held further that even if the earlier note was not executed for a debt binding on the family, its executant being debtor under both instruments was entitled to have debt under later pronote scaled down under S.8, Explanation, inasmuch as the later transaction though not a 'renewal' in the strict sense of the term, amounted to an inclusion of the pre-existing liability of the common debtor in the later document: A I R 1941 Mad 59, *Rel. on.* [P 203 C 2]

A. C. Sampath Iyengar — for Petitioner.

Patanjali Sastri J.—The petitioner obtained a decree against the respondents and other members of their undivided family in O. S. No. 265 of 1935 on the file of the District Munsif's Court of Chingleput for Rupees 2567-4-0 on a promissory note executed on 5th September 1932 by respondents 1 and 2 and the father of respondent 4 who were brothers. This promissory note was executed for Rs. 1484, being principal and interest due under an earlier promissory note executed by the father of respondent 4 with two others who were strangers to the family for Rs. 1000, in favour of the petitioner on 31st August 1929. The respondents applied under S.19, Madras Agriculturists' Relief Act, to scale down the decree and their contention has been that the promissory note of 1932 should be treated as a renewal of the earlier promissory note of 1929 within the meaning of the explanation to S. 8, notwithstanding that the makers of the two notes were different, and that therefore the decree has to be scaled down with reference to the principal advanced under the earlier note. The Court below accepted this contention but we are asked to say in this revision petition that it is incorrect.

We have held in C. R. P. No. 113 of 1939[1] approving the decision of Somayya J. in (1939) 2 M L J 609,[2] that under the explanation to S. 8, the renewal of a debt or its inclusion in a fresh document must be by the same debtor, and we have further held in C.R.P. No. 602 of 1939,[3] that when a member of a joint Hindu family executes a fresh document for a pre-existing liability binding on the family but incurred on its behalf by another member, such previous debt can be regarded as renewed or included in a fresh document within the meaning of the explanation to S. 8 of the Act, as the debtor in each case is the same person, namely, the joint family: *see* S. 3 (i) of the Act. If, therefore, the promissory note of 1929 executed by the father of respondent 4 jointly with two strangers was for a debt binding on the family, the case would fall under the explanation to S. 8 and the decree would have to be scaled down with reference to the principal advanced under the earlier note of 1929. This question, however, has been left undetermined by the Court below as it held that it was not necessary for the purpose of the explanation to S. 8 that the debtor should be the same, a view which we have held to be untenable.

If, on the other hand, it were found that the earlier note was not executed for a debt binding on the family, the question would arise whether so far at least as the liability of respondent 4 is concerned, the explanation is applicable, his father who died during the pendency of the suit having been a party to both promissory notes. We consider that it is not necessary for the application of S. 8 that the parties to the earlier and the later debts should be absolutely identical. As observed by us in C.R.P. No. 602 of 1939,[3] there may be cases in which a debt due jointly and severally from A and B is included in a fresh document executed by A alone or cases in which a debt solely due by A is included in a fresh document executed by A and B. There is no obvious reason why the explanation to S. 8 should not be applied to cases of that sort when the application for scaling down the debt is made by the person who is a debtor under both the instruments. Even if the later transaction in such cases cannot be deemed to be a 'renewal' in the strict sense of the term, it would amount to an inclusion of the pre-existing liability of the common debtor in the later document. Respondent 4 will thus be entitled in any case to the benefit of the explanation in scaling down the decree under S. 8. The order of the Court below is set aside and

1. *Reported in* ('41) 28 A I R 1941 Mad 58 : (1940) 2 M L J 517, Neelappa Reddiar v. Solaimuthu Udayar.
2. ('40) 27 AIR 1940 Mad 58: 186 I C 722 : (1939) 2 M L J 609, In re Ramasami Chettiar.
3. *Reported in* ('41) 28 A I R 1941 Mad 59 : (1940) 2 M L J 651, Dorai Kannu v. Veerasami.

the application under S. 19 is remitted to the lower Court for disposal in the light of this judgment. The costs of this revision petition will abide the result.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 204

WADSWORTH AND PATANJALI SASTRI JJ.

C. S. Ramier — Petitioner

v.

B. N. Srinivasiah — Respondent.

Civil Revn. Petn. No. 1574 of 1938, Decided on 18th September 1940, to revise order of Sub-Judge, Salem, D/- 10th October 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 19 and 7 — S. 19 is machinery section—S. 7 contains substantive provisions for scaling down debts — Mortgage one and indivisible — Mortgage decree payable by agriculturist as well as non-agriculturist—Mortgage decree can be scaled down —Mere fact that puisne mortgagee has sub-mortgaged his interest cannot deprive him of benefits under Act — Mode of scaling down explained.

It is true that the right of an agriculturist judgment-debtor to scale down a decree should not be allowed to enure for the benefit of a non-agriculturist judgment-debtor; nevertheless a mortgage decree which is payable by an agriculturist does not fall outside the purview of the Act merely because it is also payable by a non-agriculturist and the mere fact that the puisne mortgagee has submortgaged his interest to a non-agriculturist cannot deprive him of any benefits to which he may be entitled under the Act as a person liable to satisfy the decree on the prior mortgage notwithstanding the fact that the mortgage is one and indivisible : A I R 1941 Mad 113, *Disting.* [Mode of scaling down the mortgage decree in such case explained.]

[P 204 C 2; P 205 C 1]

M. S. Venkatarama Iyer — for Petitioner.

C. S. Venkatachariar and D. Ramaswami Iyengar — for Respondent.

Wadsworth J. — This petition raises questions under S. 19 of Madras Act 4 of 1938. The decree in question was passed on a mortgage executed in 1916 by the deceased father-in-law of defendant 1, who has not been proved to be an agriculturist. The applicant (petitioner here) was defendant 2 in the suit, he having taken an usufructuary mortgage over the same properties on 22nd May 1920, undertaking to discharge the prior mortgage. Defendant 3 (the District Board) has acquired the equity of redemption of certain items and is quite clearly not an agriculturist. On 15th January 1936 the applicant consented to the passing of a preliminary decree on the prior mortgage and on 6th March 1937 a final decree was passed. The puisne mortgage right of the applicant has been sub-mortgaged to one Appoji Naidu, who has deposited Rupees 2700 to the credit of the decree and it was contended in the lower Court by the plaintiff that this deposit satisfied the decree and that there was no longer any decree to be scaled down. This contention was repelled by the lower Court and it has not been contended before us that this view was wrong. The lower Court held, however, that the applicant was not entitled to the benefits of the Act because the scaling down of the decree in his favour would result in a benefit to other defendants who are not agriculturists.

We have already held in C. R. P. No. 653 of 1939[1] that the representative of a pusine mortgagee who was a judgment-debtor was entitled to be regarded as a debtor under S. 7 and to scale down the decree under S. 19 of the Act and we dissented from the decision of Newsam J. in (1939) 2 M L J 225.[2] But that was a case in which there was not the complication of the owner of the equity of redemption being a non-agriculturist, so that the decree could be scaled down as a whole. It is argued by Mr. Ramaswami Aiyangar for the decree-holder that the right of an agriculturist judgment-debtor to scale down a decree should not be allowed to enure for the benefit of a non-agriculturist judgment-debtor, a proposition with which we are in agreement. But we find it difficult to accede to the further contention that, the mortgage being one and indivisible, it is wrong in theory and difficult in practice to scale down the decree against the agriculturist judgment-debtor, while leaving it unamended as against the non-agriculturist judgment-debtors. The theoretical argument is based on the absence from S. 19 of any words excluding the application of the general law governing mortgages. But S. 19 is only the machinery section. The substantive provisions are contained in S. 7 which says :

> Notwithstanding any law . . . or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down. . . .

Having regard to our previous decisions, we must hold that the applicant is a judgment-debtor and that the decree debt is payable by him. It follows that this debt is to be scaled down, notwithstanding the decree and notwithstanding the provisions of the general law which prevent the person who acquires a partial interest in the hypotheca from denying the liability of his

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1. *Reported in* ('41) 28 AIR 1941 Mad 113 : (1940) 2 M L J 513.
2. ('40) 27 AIR 1940 Mad 61 : (1939) 2 M L J 225, Narayana Chari v. Annamalai Chettiar.

interest to satisfy the whole of the mortgage debt. We are unable to accept the contention that a debt which is payable by an agriculturist falls outside the purview of the Act merely because it is also payable by a non-agriculturist and it seems to us obvious that the mere fact that the applicant has submortgaged his interest to a non-agriculturist will not deprive the applicant of any benefits to which he may be entitled under the Act as a person liable to satisfy the decree. The practical difficulties on which Mr. Ramaswami Aiyangar has laid emphasis seem to us to be more apparent than real. It will, of course, be necessary to modify the form of decree, reciting separately the amount payable by the puisne mortgagee and declaring that on payment of this amount by him, the interest of the puisne mortgagee will not be liable to be sold or foreclosed and the hypotheca will be sold only subject to that interest; and that on failure of the puisne mortgagee to pay the amount declared to be due from him within the time allowed, the whole of the mortgaged property including the interest of the puisne mortgagee will be liable to be sold for the full amount of the decree. This procedure will give to the agriculturist judgment-debtor the full benefit of the relief to which he is entitled under the Act and will safeguard the rights of the decree-holder as against those judgment-debtors who are not entitled to the benefits of the Act. The petition is therefore allowed with costs and the application is remitted to the lower Court for disposal in the light of this judgment.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1941 Madras 205

WADSWORTH J.

Kumaraswami Reddiar — Petitioner

v.

Muthugopal Naicker and others — Respondents.

Civil Revn. Petns. Nos. 1588 and 1589 of 1939, Decided on 30th September 1940, to revise order of Sub-Judge, Ramnad, D/- 30th March 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), Ss. 23 and 7—S. 23 is extension of S. 7 —Remedy under S. 23 is not open to person not agriculturist on date of application.

Section 23 is really an extension of S. 7 in that it permits an agriculturist to attack a sale held in execution of a decree during the period when the Act was under consideration. The words "that the applicant is an agriculturist entitled to the benefits of this Act" in S. 23 contemplate a state of affairs in which the applicant has a saleable interest in agricultural land at the time when he makes his application and not at the time of the sale previously held. Consequently the remedy under S. 23 is not open to a person who is not an agriculturist at the time when he makes the application. [P 206 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 23, proviso and S. 19—Words "other persons interested in such sale" in S. 23, Proviso, refer to persons interested in upholding sale and do not include all persons who were parties to suit — Judgment-debtors wishing to set aside sale are not persons interested in upholding sale if they are agriculturists — Notice to non-agriculturist judgment-debtor is desirable where burden on his property is likely to increase by scaling down of decree.

The words "other persons interested in such sale" in S. 23 proviso do not include all persons who were parties to the suit but refer to all persons interested in upholding the sale. Judgment-debtors anxious to have the sale set aside cannot be said to be persons interested in upholding the sale and therefore no notice to them is necessary. [P 206 C 1]

Although S. 19 does not expressly require notice to a non-agriculturist judgment-debtor, it is desirable in a case where the result of the application under S. 19 may be to increase his burden that he should have notice. [P 206 C 2]

K. S. Ramabadhra Iyer and N. G. Krishnamachariar — for Petitioner.

Parasurama Iyer for T. V. Ramiah — for Respondents.

Order. — The first of these petitions arises out of an application under S. 23 of the Madras Act 4 of 1938, to set aside a sale. The second petition arises out of a connected application by the same judgment-debtors to amend the decree under S. 19 of the Act. The decree in question in both the petitions was passed on a mortgage executed by defendants 1 to 3. The applicants in the Court below were the legal representatives of defendant 1, together with defendants 2 and 3. Defendant 8 in the mortgage suit was impleaded as puisne mortgagee of items 3 to 9 and 12 out of the 13 items in the hypotheca. He did not prove his mortgage, and no decree was passed in his favour, except that the judgment contained a direction that in the sale the items in which he was not interested should be sold first and the other items subsequently in the same sale. Defendant 9 was impleaded in the mortgage suit on the ground that she claimed a charge for maintenance. On 17th April 1936, a receiver was appointed and he continued in possession right up to the time of the sale. A preliminary decree was passed on 28th August 1936 for a sum of Rs. 6869 odd. There was no personal remedy. After a final decree had been passed, a sale was held on 18th October 1937. At this sale, 12 out of the 13 items of property were sold, and realized a sum of Rs. 4900 odd.

Item 6, which is the family house, was not sold. Part satisfaction was recorded on 19th November 1937. Act 4 of 1938 came into force on 22nd March 1938, and the present applications were filed in April 1938. The only respondent impleaded was the plaintiff-decree-holder, who was also the purchaser at the sale. The only evidence as to the agriculturist status of the applicants appears to relate to the mortgage lands, and the objections seem to have been based on such irrelevant matters as the object for which the money was borrowed, the possession of the lands, etc. In the lower Court, it seems to have been assumed that, if the applicants had a saleable interest in agricultural lands at the time of the sale in October 1937, they were agriculturists entitled to the benefits of Ss. 19 and 23 of the Act. The lower Court does not discuss the evidence on this part of the case at all, and it appears to me probable that the learned Judge failed to realize the importance of proof that the applicants were agriculturists at the time when they made their application.

Section 23 of the Act starts with reference to a sale on or after 1st October 1937 of property in which an agriculturist had an interest, but it seems to me clearly to require in the later portion of the section that the applicant must be a judgment-debtor claiming to be an agriculturist entitled to the benefits of the Act, and that the Court has to be satisfied "that the applicant is an agriculturist entitled to the benefits of this Act." These words seem to me to contemplate a state of affairs in which the applicant has a saleable interest in agricultural land at the time when he makes his application. The same words are found in S. 19, "any judgment-debtor who is an agriculturist." In the definition of the term "agriculturist" in S. 3, we find that he is a person who has a saleable interest. Whatever time is contemplated in this definition, it cannot well be anterior to the commencement of the Act. Section 7 also contemplates the scaling down of debts payable by an agriculturist at the commencement of the Act. Section 23 is really an extension of S. 7 in that it permits an agriculturist to attack a sale held in execution of a decree during the period when the Act was under consideration. But I am not prepared to hold, having regard to the words of this section, that this remedy is open to a person who is not an agriculturist at the time when he makes the application. This is a view of the law which does not appear to have been present in the mind of the Court below, and it may be that the applicants could have proved that they were agriculturists, having regard to the facts existing at the time of their application, even though, so far as their interest in the properties sold is concerned, it cannot be said that they had a saleable interest in those properties at the time when they applied to set aside the sale.

A further difficulty is based on the fact that the applicants took out notice only to the decree-holder-auction-purchaser. The proviso to S. 23 requires that there should be notice to the decree-holder, the auction-purchaser and other persons interested in such sale. The words "other persons interested in such sale" would not, apparently include all persons who were parties to the suit. The intention appears to be that notice should go to all persons interested in upholding the sale. If there are judgment-debtors who are anxious that the sale should be set aside, they have the right to come in as applicants if they are agriculturists; they are not persons who are interested in upholding the sale.

But the position of defendant 8, the puisne mortgagee, seems rather dubious. It was alleged in the Court below that he was a non-agriculturist. I have not been able to find any evidence to this effect. If he was a non-agriculturist, it seems to follow, on the basis of the decision of the Bench to which I was a party, in C R P No. 1574 of 1938,[1] that he is not entitled to the benefit of any scaling down of the decree which may result from the application of the agriculturist judgment-debtors. If so much is conceded, it follows that if the decree is scaled down on the application of the present applicants, the whole of the burden of the balance of the decree amount after the scaling down will be thrown on item 6, the only item not sold, which is one of the items in which defendant 8 claims an interest. On such facts, if they be correct, it would appear that defendant 8 is interested in upholding the sale, although he does not claim any title under the court-auction-purchaser. I am of opinion that, if the facts are as alleged, he should have been given notice before the sale was set aside; and, although S. 19 does not expressly require notice to a non-agriculturist judgment-

1. *Reported in* ('41) 28 A I R 1941 Mad 204: (1940) 2 M L J 872, C. S. Ramier v. B. N. Srinivasiah.

debtor, it is, to my mind, obviously desirable in a case where the result of the application under S. 19 may be to increase the burden of another judgment-debtor, that he should have notice. In the result therefore I allow both these petitions, and remit both the cases to the trial Court which will dispose of the matters afresh in the light of this judgment, after giving notice to defendant 8 and after recording a finding on such fresh evidence as may be tendered on both sides on the question whether the applicants were agriculturists entitled to the benefits of the Act at the time when their applications were presented. Costs will abide by the result.

C.R.K./G.N. *Petitions allowed.*

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* A. I. R. 1941 Madras 207

PANDRANG ROW J.

C. Gopalachariar — Petitioner

v.

Deepchand Sowcar — Respondent.

Civil Revn. Petns. Nos. 751, 752, 753 and 771 of 1940, Decided on 25th September 1940, to revise orders of District Court, Chingleput, D/- 23rd February 1940.

* *Pensions Act (1871), S. 11 — Even commuted portion of pension is protected under S. 11.*

Although after commutation a pension or a portion thereof, ceases to be pension and becomes a capital sum, still the payment of the commutation amount being a payment on account of the pension, falls within the protection of S. 11 : A I R 1935 Mad 249, *Ref.* [P 207 C 2; P 208 C 1, 2]

S. Panchapakesa Sastri and M. E. Rajagopalachari — for Petitioner.

K. Bhashyam and T. R. Srinivasan — for Respondent.

Order. — In these connected civil revision petitions from the orders of the District Judge of Chingleput in appeals which were heard together, only one point arises for determination, namely whether the commuted portion of the pension due to the petitioner by the Government is liable to attachment at the instance of creditors of his in view of S. 11, Pensions Act (XXIII of 1871). The petitioner is a retired postal official and a portion of his pension was commuted sometime in March 1939 or thereabouts and the commuted portion of the pension amounted to Rs. 3500 and odd and a payment order for this amount was forwarded to the Postmaster, Conjeevaram, for delivery to the petitioner. As the learned District Judge observes the only act remaining to be done by the petitioner is to take delivery of the payment order and to cash it at the local treasury. Before he could do so attachments were made at the instance of certain money-lenders. On objection by the petitioner that the attachments were illegal in view of the provisions of S. 11, Pensions Act the Courts below have held that his contention is not well founded and have confirmed the attachments.

There is no doubt that in view of the Bench decision in 58 Mad 469[1] when a pension is commuted or a portion thereof, it ceases to be pension and becomes a capital sum. This decision is binding on me and I have to proceed on the basis that the commuted portion of the pension cannot be treated as pension after the commutation. It has been brought to my notice that a certain passage which was quoted and relied upon in 58 Mad 469[1] from *Crowe* v. *Price*,[2] is to be found no doubt in the Law Journal Reports (1889) 58 L J Q B 215[2] but is not to be found in the report of the same case in (1889) 22 Q B D 429.[2] It would seem indeed that the latter report gives a revised version of the judgment of Lord Coleridge C. J. Nothing however turns on this, because apart from this passage which is relied on in 58 Mad 469[1] the Bench has clearly laid down that after commutation the portion of the pension that was commuted ceases to be pension. The point for determination is however not concluded by the decision in 58 Mad 469[1] for that was a case in which the question was whether the commuted portion of the pension was 'income' for the purpose of assessing profession-tax in a municipality. In the present case it was urged in the Courts below, and the same contention is repeated in this Court, that the commuted portion of the pension is not attachable by reason of the provisions of S. 11, Pensions Act, which runs as follows :

> No pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court.

Reliance is specially placed on the clause "and no money due or to become due on account of any such pension or allowance," because in view of the Bench decision in

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1. ('35) 22 A I R 1935 Mad 249 : 157 I C 608 : 58 Mad 469 : 68 M L J 118, Municipal Council, Salem v. Gururaja Rao.
2. (1889) 58 L J Q B 215 : 22 Q B D 429 : 53 J P 389 : 37 W R 424 : 60 L T 915.

58 Mad 469[1] it is not really possible for the petitioner to contend successfully that the commuted portion of the pension is still pension so as to bring these cases under the first portion of the section. The question therefore is whether the commuted portion of the pension—I am using these words; "commuted portion of the pension" as they are the words employed in the rule relating to this subject which defines the legal effect of an order of commutation, namely R. 6 (2) of Civil Pensions (Commutation) Rules—is "money due or to become due on account of pension."

The point is not covered by any authority; in any case no authority bearing on it has been quoted before me and no judicial interpretation of the words "on account of" has been brought to my notice. The phrase is a phrase used in ordinary parlance and it is certainly not a term of art which has acquired a definite or precise meaning in law. The ordinary dictionary meaning of the phrase has to be ascertained and applied to the facts of the present cases. The meaning given in the New English Dictionary as well as in Webster's Dictionary is 'for the sake of' 'by reason of' or 'because of.' Now can it be said that the commuted portion of the pension is not money due on account of the pension? Though the pension has been commuted, still can it be said that money due because of, or by reason of such commutation is not money due on account of the pension? It is brought to my notice by the learned advocate for the petitioner that S. 10 which relates to commutation of pension is part of Chap. III which is headed "Mode of Payment." In other words, the commutation of pension is regarded as a mode of payment of pension. If so, can it be reasonably urged that payment of the commutation amount is not payment on account of the pension, though not of the pension itself, because after commutation it ceases to be pension? I see no good reason why it should be deemed to be otherwise. No doubt money is due immediately under the commutation order, but the commutation order itself is on account of a pension which was commuted or a portion of the pension which was commuted. The intention behind the provisions of S. 11, Pensions Act, is applicable to the commuted portion as well as to the uncommuted portion of the pension and the language of S. 11 does not appear to exclude from its protection the money that is due under a commutation order commuting a part of the pension. I am therefore of opinion that in these cases that attachments were contrary to the provisions of S. 11, Pensions Act, and it follows therefore that these petitions must be allowed and the attachments must be set aside with costs in all the Courts.

C.R.K./G.N. *Petitions allowed.*

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* A. I. R. 1941 Madras 208

PANDRANG ROW AND ABDUR RAHMAN JJ.

K. M. Sr. K. Lankaram — Appellant

v.

O. K. S. Sundaragopala Aiyar and others — Respondents.

Appeal No. 245 of 1938, Decided on 3rd September 1940, against decree of Principal, Sub-Judge, Madura, D/- 15th January 1938.

(a) Civil P. C. (1908), O. 21, R. 83 — R. 83 contemplates application by judgment-debtor before sale is actually held — Application after sale though before confirmation cannot be made within terms of R. 83.

Rule 83 contemplates an application by a judgment-debtor after an order for the sale of immovable property is made but before a sale is actually held. The order that can be passed on an application under that rule is for the postponement of the sale of the property comprised in the order for sale and not one for the postponement of the confirmation of sale. Consequently when a sale has already been held although not actually confirmed an application cannot be made to the Court within the terms of R. 83. [P 211 C 1, 2]

**(b) Civil P. C. (1908), O. 21, R. 83—Mortgage or lease under R. 83 can be executed by judgment-debtor alone and not by Court — Mortgage or lease cannot be said to be under or by reason of attachment.*

The modes of alienation, *i. e.*, by way of mortgage or lease under R. 83 can be available only to an owner of the property (*i. e.*, to the judgment-debtor) and not to a Court. This method of dealing with the property cannot be held to be under or by reason of the attachment. [P 211 C 2; P 212 C 1]

(c) Civil P. C. (1908), O. 21, R. 83 and S. 64—Sale under R. 83 is private and not by or under order of Court — Mere grant of certificate cannot make it on behalf of Court — Nor can mere resemblance of language of R. 83 (2), proviso 2 to that of O. 21, R. 92, Civil P. C., make sale under R. 83 one under orders of Court — Private sale under R. 83 does not fall under S. 64—Mortgage under R. 83 and subsequent sale of same property under R. 83 — Mortgage is not void against purchaser on account of its execution after attachment of property covered thereby — Nor is it void against the purchaser by reason of S. 52, T. P. Act.

The sale contemplated in R. 83 is a private sale and not one by the Court. The Court's sanction is only sought to stay its hands so that the property which was ordered to be sold may not be put to sale and the operation of S. 64, Civil P. C., avoided. The sale, mortgage or lease under R. 83 must be taken to have been authorised by the Court not in pursuance of an attachment but in spite of the

attachment and despite a possible opposition by the decree-holder. The mere fact that a certificate is granted cannot be taken as showing that the judgment-debtor when alienating his own property was doing so on behalf of the Court. Nor merely because the alienation authorised by the Court under R. 83 does not become absolute until it is confirmed by the Court and the provision in O. 21, R. 92, Civil P. C., in regard to the confirmation of sales held by Courts is similar to the one in R. 83 (2), proviso 2 can the sales authorised by R. 83 also be held to be made under the orders of Court : A I R 1934 Mad 727, *Expl., and Rel. on;* 30 Bom 337, *Rel. on.* [P 212 C 1 ; P 213 C 1]

Consequently a private purchaser under O. 21, R. 83, cannot be brought within the ambit of S. 64 and held to have a claim enforceable under the attachment. Therefore, a mortgage under R. 83 is not void on account of its execution after the attachment of the property covered thereby, against a subsequent purchaser of the same property under a sale under R. 83. [P 213 C 2]

The subsequent purchaser cannot be regarded as the decree-holder's representative by reason of his purchase and both the mortgagee and the subsequent purchaser must be deemed to be standing in the shoes of the judgment-debtor alone who mortgaged the property first to the former and sold it subsequently to the latter and consequently S. 52, T. P. Act, cannot apply and the mortgage therefore cannot be said to be void against the purchaser by reason of the doctrine of lis pendens as having been executed during the pendency of the execution proceedings : A I R 1929 All 846; 14 C W N 677 and A I R 1921 Mad 30, *Ref.*; 5 Cal 148 (PC) ; A I R 1933 P C 134 and A I R 1932 Mad 86, *Disting.*; A I R 1934 Mad 40, *Expl.* [P 214 C 1, 2]

**(d) Lien — Salvage—Principle of salvage lien applies to India—Person making payment for his own benefit to save his property or under personal covenant binding on him — Principle of salvage lien does not apply.*

The principle of salvage lien is applicable to India : 11 M I A 241 (P C) and 21 Cal 142 (P C), *Rel. on.* [P 216 C 2]

But that principle cannot apply to cases where a person makes a payment for his own benefit to save a property which belongs to him or when he was under a personal covenant which he was bound to carry out. [P 216 C 2]

**(e) Civil P. C. (1908), O. 21, R. 83—Mortgage and subsequent sale of same property by judgment-debtor under R. 83—Purchaser undertaking to discharge mortgage — Judgment-debtor satisfying decree by deposit of sale proceeds in Court—Mortgagee has prior title against purchaser.*

The judgment-debtor executed under R. 83 a mortgage of the property ordered to be sold but the money raised being insufficient to satisfy the decree he subsequently sold the same property and satisfied the decree in full by depositing the sale proceeds into Court. In the suit by the mortgagee to enforce his mortgage, the purchaser claimed a priority over the mortgagee on the ground of an equitable charge or lien in his favour ;

Held that the plaintiff was a bona fide mortgagee for value and though if the attachment had continued and sale confirmed, his mortgage would have been infructuous as against the attaching creditor, yet he had a prior title as against the subsequent purchaser who did, not only appear on the scene much later but who knew of the plaintiff's mortgage and had entered into an agreement to discharge the same and therefore the contention that the purchaser was entitled to priority over the mortgagee's claim by reason of an equitable charge in his favour could not be upheld : 26 Mad 686 (FB) ; A I R 1936 Mad 752 ; 21 Cal 142 (P C) and A I R 1925 Mad 95, *Disting.*; A I R 1932 Mad 189, *Ref.* [P 217 C 1]

(f) Transfer of Property Act (1882), S. 52 — Attachment—Right to property is not directly and specifically in question.

The right to a property cannot be said to be 'directly and specifically in question' after its attachment in execution of a money decree, particularly where the attachment remains undisputed by a judgment-debtor or any other person : A I R 1929 All 846 and 14 C W N 677, *Rel. on.* [P 213 C 2 ; P 214 C 1]

B. Sitarama Rao and A. Narasimhachariar — for Appellant.

O. V. Baluswami, C. Venugopalachari and W. S. Krishnaswami Naidu—for Respondents.

Abdur Rahman J. — This appeal arises out of a suit instituted in the Court of the subordinate Judge at Madura on the basis of a mortgage deed (EX. A) executed by or on behalf of defendants 1 to 4 on 29th July 1921, in the plaintiffs' favour. The only points for decision in this appeal relate to the enforceability of this mortgage deed and to the lien claimed by the appellant, who was defendant 5 in the suit, on account of a payment made by his father in satisfaction of a money decree passed in O. S. No. 135 of 1920 against defendants 1 to 4.

The facts which have led to this litigation may be briefly stated. A decree for a sum of Rs. 14,130-11-2 was passed against defendants 1 to 4 on 11th November 1920, in O. S. No. 135 of 1920. The decree-holder made an application for execution and attached various items of property including the one (item 3 in those proceedings and item 1 in the present suit) with which we are concerned in this appeal. The attachment was made on 13th December 1920. During the continuance of this attachment, seven items of property including item 1, were mortgaged by the judgment-debtors with the plaintiffs for a sum of Rupees 9000 on 29th July 1921 (EX. A). Out of this money, a sum of Rs. 5000 was deposited by the judgment-debtors on 1st August 1920, towards the decree passed in O. S. No. 135 of 1920 and an application EX. V, was made by them at the same time for the grant of a month's time for paying the balance of the decretal amount by alienating the properties under attachment. This application was accepted and in accordance with this undertaking contained in the mortgage deed, EX. A the plaintiffs deposited two more sums of

Rs. 1050 and Rs. 1450 on the two following days (that is, on 2nd and 3rd August 1921). The lodgment schedules on the record show that all these three items of Rs. 7500 were deposited in Court towards the amount of the decree passed in O. S. No. 135 of 1920. The balance was partly deducted by the plaintiffs towards their own dues and partly paid by them on behalf of the judgment-debtors. The decree was not wholly satisfied, and the Court, after the lapse of the time granted by it in pursuance of Ex. V, proceeded to execute the decree. The proclamation of sale is not in evidence and we are not, for that reason, in a position to know the amount for which the sale was ordered. But having regard to the fact that Rs. 7500 were paid towards the decree passed in O. S. No. 135 of 1920, we must presume that this sum must have been duly credited in partial satisfaction of that decree. Anyhow the execution took its course and item 3 of that suit was sold in auction on 25th October 1921, for a sum exceeding Rs. 16,000. Before the sale was confirmed, the judgment-debtors applied to the Court on 25th November 1921 for permission under O. 21, R. 83, Civil P. C., to sell item 3 privately and also to alienate three more properties (items 4 to 6, Ex. IV) in the same manner. This was granted on the same day but the Court imposed a condition, as required by that rule on the judgment-debtors that the whole of the sale proceeds or other amounts raised by creating an incumbrance should be deposited by them in Court.

A certificate was granted under the provisions of the same R. 83 (2) and the judgment-debtors executed a sale deed of item 3 of property on the very next day in favour of Kuppuswami, the father of defendants 5 and 6, for a sum of Rs. 22,500 (Ex. I). Out of this amount a sum of Rs. 17,200 had been deposited by Kuppuswami in Court along with the judgment-debtors' application, Ex. IV, on 25th November 1921, i. e., a day before the sale deed was executed and the balance of Rs. 5300 was deposited on 10th December 1921. Exhibit 3 which is a copy of the lodgment schedule, however, shows that this latter sum of Rupees 5300 was paid towards the decree passed against the same judgment-debtors in another suit (O. S. No. 40 of 1921). Since item 3 of property which defendant 5's father had purchased under Ex. 1 had been auctioned in execution of the decree in O. S. No. 135 of 1920, it may be fairly presumed that the sum of Rs. 17,200 was deposited by him in the execution of that decree. On payment of this money into Court the decree in O. S. No. 135 of 1920 was completely satisfied, the sale by the Court was set aside and the attachment made on 13th December 1920 deemed to be withdrawn. The sale in Kuppuswami's favour was subsequently confirmed by the Court under the provisions of O. 21, R. 83, Civil P. C. It may be mentioned here that on the same date on which the sale deed in Kuppuswami's favour was executed, i. e. on 26th November 1921, the judgment-debtors executed another agreement Ex. H in Kuppuswami's favour under which they agreed to mortgage certain other properties with him in consideration of his paying a few other debts including the one which they had taken from the plaintiffs under the mortgage deed Ex. A. The original of this document has not been produced but the lower Court has found that it must have been in the possession of defendant 5 and this finding has not been challenged before us.

No money was paid in pursuance of Ex. H to the plaintiffs and they brought the present suit on the basis of their mortgage deed Ex. A. This was resisted by the appellant and his sister, (defendants 5 and 6 in the suit) on several grounds. The validity of the mortgage deed Ex. A was first of all questioned for the reason that it was executed by the judgment-debtors during the pendency of the attachment. It was contended that although the properties attached in this execution were not sold through Court, yet the private sale effected by the judgment-debtors after a certificate had been granted by the Court under O. 21, R. 83 (2) and after it was duly confirmed under the provisions of that section must be regarded to be a substitute for a sale through Court and the attachment effected before the mortgage Ex. A must enure to the benefit of the person who purchased the property with the sanction of the Court. It was conceded by Mr. Sitarama Rao that an alienation of a property effected by a judgment-debtor even after it was attached is not void against the whole world; but it would be so, he said, against any person who dealt with the property under the orders of the Court, meaning thereby that as the sale of item 3 of property to his client was made by reason of the attachment under what he calls to be the Court's order, it would be void as against him.

The second objection raised by the learned counsel for the appellant against the validity of the mortgage deed, Ex. A was that of lis pendens. It was urged that in so far as the

mortgage EX. A was effected after attachment and during the continuance of the execution proceedings in which the appellant's father purchased the property, it fell within the mischief of S. 52, T. P. Act. The third and the last point raised on behalf of the appellant was in regard to an equitable lien which he claimed on the property (item 3 in those proceedings) as the auction sale of this item was set aside in consequence of the payment made by his father and this would, it was argued, give a priority to the appellant over the plaintiffs. This contention was supported by the learned counsel for the appellant on more or less the same principle as on which salvage liens are granted or recognized by Courts in maritime cases or immovable property of one person is, by operation of law, made security for the payment of another. The last of these points was not raised specifically in the pleadings or before the lower Court. Nor was any specific ground taken when the appeal was preferred to this Court; but as it raised a point of law, and the objection on behalf of the respondents was raised almost when the arguments on this point were being concluded by the learned counsel for the appellant, we permitted the arguments to be continued.

The objections raised by the appellant and his sister were overruled by the trial Court and a decree was passed in favour of the plaintiffs. Aggrieved by this decree, defendant 5 appeals. From what has been said it would be clear that the mortgage deed EX. A came into existence after the third item of property had been attached and put to sale by the Court although it (i. e., the sale) was not confirmed and eventually set aside. There can also be no doubt that the sale to the appellant's father was made with the permission of the Court under O. 21, R. 83, Civil P. C., and all the formalities mentioned in that rule were complied with. The points for determination in regard to the first objection of the appellant are : (1) What was the nature of the sale to the appellant's father ? (2) Is the claim in respect of the sale to the appellant's father covered by the expression "claims enforceable under the attachment" used in S. 64, Civil P. C.? (3) Was the mortgage to the plaintiffs consequently void as against the appellant's father ?

To decide the first point it would be necessary to examine the provisions of O.21, R. 83, Civil P. C. It contemplates an application by a judgment-debtor after an order for the sale of immovable property is made but before a sale is actually held. This is so because the order that can be passed on an application under that rule is for the postponement of the sale of the property comprised in the order for sale and not one for the postponement of the confirmation of sale. But the sale had in execution of O. S. No. 135 of 1920 been, as pointed out before, already held, although not actually confirmed. How could then an application be made to the Court within the terms of this rule? An application under O. 21, R. 89 was competent but this could not have helped the appellant's case. Let us suppose however that the application under R. 83 was entertained, as it seems to have been done, how could the Court agree to sell the property to defendant 5's father when it had been actually sold to someone else and the sale was not set aside? Another sale by the Court was, in the circumstances, out of question. Was the sale to the appellant's father then being made, as contended, under the orders of the Court ? Or was it simply being done with the sanction of the Court ? That there is a great deal of difference between the two is obvious. The Court is not, in the latter case, being approached to order any sale of the property. It could not have done so. It simply authorized the judgment-debtors at their request to deal with the property privately, if they could. But the judgment-debtors were not compelled to alienate the property privately. They might have, in spite of the sanction, done nothing or might not have been able to find a suitable purchaser or alienee.

In view of what we have said, the answer to the first question is quite clear ; but let us examine the provisions of O. 21, R. 83 even if they are supposed to be applicable to the facts of this case. The terms of sub-clause 1 indicate clearly that it would apply only when the judgment-debtor wishes to pay off the decree passed against him " by the mortgage or lease or private sale of such property" as has been ordered to be sold by the Court. The first two modes of alienation, i. e., the mortgage or lease, can be available only to an owner of the property (i. e. to the judgment-debtor) and not to a Court. If a judgment-debtor does not wish to part with his property permanently and is willing and able to alienate it temporarily and is desirous of raising the money in that manner, he may be allowed to do so by a mortgage or lease of his property. This method of dealing with the property cannot be held to be under or by reason of

the attachment. When we come to the third mode, i. e. to the sale by which the money could be raised, we find the word 'private' prefixed, thereby leaving no room for doubt that the contemplated sale is a private sale and not one by the Court. Moreover the language of the sub-clause which shows that the judgment-debtor's power is not restricted to sell or otherwise alienate his property which was under attachment or ordered to be sold, but he may satisfy the decree by the alienation of a property which is wholly different from the one that was being sold by the Court would also show that the alienation contemplated by this clause is one by a private treaty only and the Court's sanction is only sought to stay its hands so that the property which was ordered to be sold may not be put to sale and the operation of S. 64, Civil P. C., avoided.

During the course of his argument Mr. Sitarama Rao placed his reliance on sub-cl. (2) of R. 83. It provides for the grant of a certificate to a judgment-debtor authorizing him to make the aforesaid mortgage, lease or sale and this in spite of the provisions contained in S. 64, Civil P. C. Under that section any private alienation of the property attached by a Court would be void as against all claims enforceable under the attachment. But sub-cl. (2) of R. 83 provides that the certificate granted by the Court would authorize a judgment-debtor to make the alienation in spite of that provision. In other words, the sale, mortgage or lease, as the case may be, would be taken to have been authorized by the Court not in pursuance of an attachment but in spite of the attachment and this despite a possible opposition by the decree-holder. The mere fact that a certificate is granted cannot be taken as showing that the judgment-debtor when alienating his own property was doing so on behalf of the Court. The attachment cannot be said to have divested the judgment-debtor of his title to the property or to have vested any title in the Court. It only restrains the judgment-debtor from alienating his property and that is all. The grant of certificate to the judgment-debtor removes the bar or impediment and he becomes authorized to alienate it on the condition that all moneys in respect of such an alienation are deposited into Court and not retained by the judgment-debtor. The condition of deposit is thus substituted in place of the absolute prohibition and the rigidity of the order of attachment released. A subsequent alienation by the judgment-debter could not be held to have been made either under or by reason of the attachment.

It was next contended that in so far as the alienation authorized by the Court under R. 83 could not become absolute until it was confirmed by the Court and as the provision contained in O. 21, R. 92 in regard to the confirmation of sales held by Courts is similar to the one found in proviso 2 to sub-cl. (2) of R. 83, it must be held that the sales authorized by this section are also made under the orders of Court. The language of proviso 2 to sub-cl. (2) in R. 83 does, it is true, bear a close resemblance to that employed in R. 92; but this is simply because the Court has to satisfy itself in either case that the proceeds of alienation made either through the Court or privately have been deposited in Court. Since the result to be achieved in either case is the same, there is nothing surprising that the language of the two sections is also similar in that respect but this does not show that the acts by which the same result is proposed to be achieved are necessarily similar in character themselves. A sale by the Court in pursuance of an attachment cannot be said to be the same thing as a sale by a judgment-debtor independent or in spite of the attachment. Title in the first case is conveyed by operation of law and any alienation by the judgment-debtor, if contrary to the attachment is void against all claims enforceable under the attachment, while title in the other is conveyed by the judgment-debtor himself, who cannot derogate from his grant even if made after the attachment. The correctness of the decision by the Division Bench of this Court in 58 Mad 392[1] was not questioned by the learned counsel for the appellant, but it was attempted to be distinguished on the ground that the sale in that case was not actually confirmed by the Court. The actual reason for the decision given by our learned brother King J. was, we take it, contained in the following sentence :

> We entirely fail to see how the sub-section (sub-cl. 2, O. 21, R. 83) can possibly refer to an attachment made subsequent to the issue of the certificate or affect any claims enforceable under that subsequent attachment.

Other observations in regard to the effect of a want of confirmation on "a hypothetical mortgagee," as our learned brother King J. puts it, must be in the nature of an

1. ('34) 21 A I R 1934 Mad 727 : 153 I C 819 : 58 Mad 392 : 67 M L J 741, Narayana Goundan v. Appavu Goundan.

obiter. What the decision in that case would have been if the sale was actually confirmed by the Court under O. 21, R. 83, Civil P. C., in spite of an attachment of the same property by another Court, it is unnecessary to guess. The Division Bench was not called upon to answer that question and any general observations cannot be, although entitled to great respect, regarded as authoritative. A Division Bench of the Bombay High Court in 30 Bom 337,[2] has taken the view which has appealed to us and we find ourselves in respectful agreement with the same. We have, for the above reasons, no hesitation in holding that the sale under O. 21, R. 83 is a private one and cannot be held to be a sale either by or under the orders of the Court.

Having decided the nature of the sale made to defendant 5's father, the answer to the second point does not present any difficulty. The plaintiffs' mortgage shall be, to use the language of S. 64, Civil P. C., void only when the sale to defendant 5's father can be said to be a claim enforceable under the attachment made on 13th December 1920. The point to decide is if it is so. Can the claim by defendant 5 be said to be enforceable under the attachment if the sale to his father was a private sale made by the judgment-debtors not in pursuance of, but in spite of, the attachment. It cannot be so as defendant 5's father acquired the judgment-debtor's rights only by means of a contract and not independently of the judgment-debtors' will as he would have done if he had purchased the property after it was attached and sold by the Court. It cannot be denied that if the decree-holder were otherwise satisfied and the attachment had, in consequence, become ineffectual, any private alienation by the judgment-debtor would have been, even if made during the continuance of the attachment, valid and binding. This is only because an alienation by a judgment-debtor is not, after attachment, wholly void but only voidable at the option of those at whose instance the attachment was effected or in whose interest it was continued and that also to the extent that those claims were enforceable under the attachment and no further. On account of attachment, an auction-purchaser of a property in a sale in invitum has a superior title and may have a better one than the judgment-debtors possessed on the date of the sale but this is the result of the provisions contained in S. 64, Civil P. C. A private purchaser under O. 21, R. 83 could not be brought within the ambit of S. 64, Civil P. C., and held to have a claim enforceable under the attachment. An attachment and a subsequent order for sale may have been the cause of the alienation in favour of a private purchaser but inasmuch as a private sale with the Court's sanction is absolute against all claims enforceable under the attachment it cannot itself be regarded as a claim enforceable under the attachment. In fact the moment the whole of the decretal amount is paid and the decree satisfied, the attachment ceases to exist under O. 21, R. 55, Civil P. C., not because the object of the attachment has been achieved by its exercise but because the subsistence of the attachment has been rendered unnecessary. It is impossible for us to extend the scope of S. 64 and to hold the same to be applicable to private sales as well. We must for the above reasons hold that the expression "claims enforceable under the attachment" does not cover the claim in respect of the sale made by the judgment-debtors to the appellant's father. In view of our decision on the first two points, it necessarily follows that the plaintiffs' mortgage cannot be in our opinion held to be void on account of the attachment in December 1920.

The next objection raised to the validity of the mortgage deed Ex. A is that of lis pendens. The appellant's contention is that a 'lis' came into existence as soon as the third item of property was attached in proceedings in execution of the decree and in so far as the whole of this item of property became liable to be sold in these proceedings it could not have been otherwise 'transferred' or 'dealt with' except under the authority of the Court 'so as to affect the right of any other party' such as, according to the learned counsel for the appellant, his client is. By accepting the mortgage from the judgment-debtors, the plaintiffs, according to Mr. Sitarama Rao, stood in their shoes and by purchasing the whole of the attached property with the sanction of the Court, his client's father stood in those of the decree-holder. It was urged that the order of the Court sanctioning the sale was binding on the judgment-debtors and their alienees, the present plaintiffs, and since the mortgage was executed by the judgment-debtors during the pendency of the proceedings in execution, the rights of the appellant's father remained unaffected.

The right to a property cannot be said to

2. ('06) 30 Bom 337:8 Bom L R 16, Shivlingappa v. Chanbasappa.

be 'directly and specifically in question' after its attachment in execution of a money decree : *see* decisions in A I R 1929 ALL 846[3] and 14 C W N 677.[4] This would be particularly so in cases where the attachment remains undisputed by a judgment-debtor or any other person. But, if an attachment can be said to give rise to a lis at all, it could only be in respect of the liability of the property to be sold in execution and for nothing else. This is not the point that arises for consideration in this case. The question here is whether a lis can be said to have come into existence simply because the judgment-debtors made an application under O. 21, R. 83, Civil P. C., and if so what that lis was. The only order that could be passed on that application was either to grant time to the judgment-debtor for the purposes stated in that rule or not so to do. The Court could not grant permission to the judgment-debtors to mortgage, sell or lease the attached property free of any subsequent encumbrance, which they might have created after the attachment and in the absence of any such order, it would be incorrect for the appellant to contend that he purchased the property free of the encumbrance created by the judgment-debtors in favour of the plaintiffs. Since the essence of S. 52, T. P. Act, is that a transaction entered into during the pendency of a suit or proceeding cannot prejudice the interests of a party to the suit or proceeding who is not a party to the transaction, let us ascertain whether the mortgage to the plaintiffs affected the rights of "any other party" within the meaning of the expression used in that section.

It has been already held by us that the sale by the judgment-debtors in favour of the appellant's father in spite of a certificate and subsequent confirmation by the Court was of a private nature. We are unable to see how the appellant's father can be said to be standing in the decree-holder's shoes. It may be that the necessity for a certificate and subsequent confirmation arose on account of the attachment made at the decree-holder's instance; but this would not make the private vendee a representative of the decree-holder. The contention, therefore, that the appellant's father was the decree-holder's representative is untenable and both the plaintiffs and the appellant's father must be held to be standing in the shoes of the judgment-debtors alone who mortgaged the property first to the former and sold it subsequently to the latter. If that be the correct position and we take it to be so, S. 52, T. P. Act, would have no application to the facts of this case. The alienation mentioned in S. 52 must be such as "to affect the rights of any other party thereto" and not the rights of the person who dealt with the property or of those who stand in his shoes. The judgment-debtors are, it cannot be denied, bound by the mortgage which they created in the plaintiffs' favour. Having mortgaged the property to the plaintiffs, it was no longer in their power to derogate from the grant which had been made to the plaintiffs and they could not, in the circumstances, alienate anything more than the equity of redemption. The decree-holder's right in execution was only to bring the property to sale and had the property been sold through Court, the purchaser would have bought the judgment-debtor's right, title and interest as it existed on the date of the attachment regardless of any alienations that might have been made during the continuance of the attachment. But this would be so in virtue of the provisions contained in S. 64, Civil P. C., and not on account of any doctrine of lis pendens. The contention that every alienation by a judgment-debtor during the pendency of an execution application would be hit by the provisions of S. 52, T. P. Act, was repelled by Sir John Wallis in 40 M L J 65[5] in the following words:

> If this contention were well founded, an attachment would be unnecessary as the mere filing of the execution petition would be sufficient to prevent alienation.

With great respect to the learned Chief Justice, as he then was, we find ourselves in complete agreement with his observation and feel that the observation by Pakenham Walsh J. in 57 Mad 426[6] was too general and, in view of the fact that the properties although sold as free of encumbrance were found to be subject to a prior mortgage, perhaps unnecessary. Reference was made in the course of his arguments by the learned counsel for the appellant to the decisions of their Lordships of the Privy

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3. ('29) 16 A I R 1929 All 846: 122 I C 679, Saroop Singh v. Nar Singh.

4. ('10) 14 C W N 677 : 6 I C 40 : 11 C L J 528, Mahadeo Saran Sahu v. Thakur Pershad Singh.

5. ('21) 8 A I R 1921 Mad 30 : 62 I C 121 : 44 Mad 232 : 40 M L J 65, Chamiyappa Tharagan v. Rama Iyer.

6. ('34) 21 A I R 1934 Mad 40 : 148 I C 1098 : 57 Mad 426 : 66 M L J 90, Velayuda Mudali v. Co-operative Rural Credit Society.

Council in 5 Cal 148[7] and 56 Mad 405,[8] but it is unnecessary in this case to decide the question whether a charge was created by the attachment in favour of the attaching creditor or whether the judgment-debtors' interest had been brought by attachment under the control of the Court for the purpose of executing the same so as to preclude the accrual of title by survivorship in the event of the judgment-debtor's death. Even if a charge is assumed to have been created in favour of the attaching creditor, it could not possibly help the appellant as long as he is not found to be a representative of the attaching creditor and the property is not found to have been sold in pursuance of the attachment. We have already found that the appellant's father was not a representative of the decree-holder and know for a fact that the property was not sold by the Court in pursuance of the attachment. Indeed, the attachment must be deemed to have come to an end as soon as the decree was satisfied and the moment the attachment ceased to exist, the private alienation of the property during the continuance of the attachment would take effect and have priority over the subsequent alienee when both the alienations were made by the same persons. The decision in 62 M L J 802[9] does not help the appellant as the attachment was found to have been effected in that case before a stranger had purchased the property pending execution and it was held that he was bound by the decision of the Court regarding the subsistence of attachment although he was not a party to the same. Since the orders passed in the course of execution proceedings adjudicating on the rights of the parties are res judicata and could not be called in question by the parties or their representatives, the ground on which the decision was based can be well understood but this would not advance the appellant's case. We must, for the above reasons, hold that there is no merit in the contention that the alienation to the plaintiffs was void on account of lis pendens.

The third and the last question which awaits to be decided is that of the equitable lien or charge claimed by the appellant on the ground that it was his father's money which had satisfied the attaching creditor's decree, that but for this payment, the sale of the property held by the Court would have been confirmed and the mortgage in favour of the plaintiff-respondent would have had no effect at least so far as item 3 of the property was concerned. An equitable charge or lien is therefore claimed to have come into existence by operation of law and this, it is urged, would rank higher than the mortgage in favour of the plaintiff-respondents. In order to appreciate this contention, we must not lose sight of the facts of this case. It would be recalled that the appellant's father, when he purchased the property, was cognizant of the mortgage in favour of the plaintiffs and had in fact agreed to discharge the same on execution of another mortgage in his favour (Ex. H). It is true that the property was attached at the time when it came to be mortgaged with the plaintiffs, but the money paid by them had, as we have already pointed out in the beginning, gone to discharge the attaching creditor's claim to some extent at least. It would thus be clear that the appellant's father was to become a complete owner of the third item of property not only when he paid the price of the property purchased by him into Court, but after he discharged the plaintiffs' mortgage. Had he carried out the terms of both of his contracts, he would have got the whole of the property free from attachment and of the plaintiffs' mortgage. But he failed to carry out his contract contained in Ex. H and the question for decision now is whether the appellant is entitled to a prior charge or security on the property purchased by his father in preference to the plaintiffs' prior mortgage.

In view of the fact that the appellant's father had purchased the property from the judgment-debtors who had obtained the Court's sanction under O. 21, R. 83, Civil P. C., to sell it privately on the condition mentioned in the rule, it was incumbent on him to deposit the entire sale proceeds into Court and he did so. Did he then make that payment for the benefit of the plaintiffs or did he do so to discharge the liability which he had undertaken in consideration of the sale deed to be executed by the judgment debtors in his favour and for his own benefit? By getting the auction sale set aside and by procuring the withdrawal of the attachment, was the property being saved by the appellant's father for the plaintiffs or for himself? The answer to these questions can

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7. ('80) 5 Cal 148 : 6 I A 88 : 4 C L R 226 : 4 Sar 1 (PC), Suraj Bansi Koer v. Sheo Prasad Singh.

8. ('33) 20 A I R 1933 P C 134 : 142 I C 552 : 56 Mad 405 : 60 I A 167 (P C), Anantapadmanabhaswami v. Official Receiver of Secunderabad.

9. ('32) 19 A I R 1932 Mad 86 : 136 I C 806 : 55 Mad 495 : 62 M L J 302, Venkatachalapathi Rao v. Venkatappayya.

only be that he had done all this for his own benefit and not for that of the plaintiffs. How can the plaintiffs then be held liable for the payment or payments made by the appellant's father? As it is difficult to conceive an equitable charge in favour of the appellant's father in the absence of a personal right of reimbursement, let us cast a glance in passing, at the provisions of Contract Act. Section 69 of the Act would have no application as the plaintiffs were not bound to pay the balance of the attaching creditor's claim which he could realize by the sale of the property. Section 70 cannot be held to apply as the appellant's father did not pay the decretal amount into Court for the plaintiffs but for the judgment-debtors who were liable to discharge the decree passed against them and were not free to alienate the third item of property on account of the attachment unless they complied with the condition as to deposit of the sale proceeds into Court. Let us now go to the Transfer of Property Act and see if the third item of property could be, by operation of law, held to be security for the payment made by the appellant's father.

Reliance was placed by learned counsel for the appellant in this connexion on the line of cases where it was held that if one of two or more cosharers owning an estate subject to the payment of revenue to Government paid the whole revenue in order to save, and so did save, the estate from liability to be sold by the Government for realizing the arrears of revenue, he would be, by operation of law, entitled to a charge upon the share of each of his cosharers for the realization of the latter's share of revenue as between the cosharers : *vide* 26 Mad 686[10] and AIR 1936 Mad 752.[11] But it must be remembered that the payments in those cases were not made by persons who were under any obligation to discharge their liabilities under personal covenants while the appellant's father was, in the present case, under the terms of his sale deed liable to do so. Varadachariar J., in the latter case observed at page 760 as follows :

> If we had come to the conclusion that the plaintiff's agent made the deposit in pursuance of an enforceable contract of loan between the plaintiff and defendant 2, it might be doubtful if the plaintiff could have sustained her claim for a charge on the properties, on the analogy of the doctrine of salvage or on equitable grounds : *cf.* (1918) A C 372[12] at pp. 390, 391, 394 and 401.

This would show that according to the learned Judge the appellant's father could not, in view of his undertaking to deposit the price into Court, claim a charge or lien. Salvage lien can be claimed by a person if he incurs any expense or makes any payment for saving a ship or its cargo from loss by wreck, fire or capture. Due to the exigencies of the situation that may arise on the high seas when it was impossible to communicate with the owner of the ship or its cargoes, this exception was engrafted in maritime law on the general principle which was to the effect that a person is not ordinarily entitled to recover any payment voluntarily made or expense voluntarily incurred by him on behalf of another unless a request to do so could be, from the circumstances, inferred or some other principle such as contained in Ss. 69 and 70, Contract Act, attracted. This principle was held by their Lordships of the Judicial Committee in 11 M I A 241 [13] and 21 Cal 142[14] to be applicable to India and although having regard to the decision in (1887) 34 Ch D 234,[15] several High Courts in India have latterly taken a different view, yet so far as this Court is concerned, it has stuck to the view that this principle is still applicable to this country. We have been able to find no authority, however, and none was cited to us at the Bar that this principle would be applicable to cases where a person makes a payment for his own benefit to save a property which belongs to him or when he was under a personal covenant which he was bound to carry out. The appellant's father cannot be said to have paid any money with the object of getting any priority over the plaintiffs but in order to get the property which belonged to his vendors at the time of the sale. Since they (i. e., the judgment-debtors) had already executed a mortgage in favour of the plaintiffs of which the appellant's father had full knowledge, he can only be taken to have purchased the right, title and interest which was owned by his vendors at the time of sale. This sale still holds the field

10. ('08) 26 Mad 686 (FB), Rajah of Vizianagaram v. Raja Sethrucherla Somasekharaz.
11. ('36) 23 AIR 1936 Mad 752 : 167 I C 980 : 71 M L J Sup 1, Chengalroya Reddi v. Udai Kovour.
12. (1918) 1918 A C 372 : 87 L J P C 1 : 117 L T 729, Yourell v. Hibernian Bank.
13. ('66-67) 11 M I A 241 : 8 W R 17 : 2 Suth 77 : 2 Sar 275 (PC), Nugendrachunder Ghose v. Seemutty Kaminee Dossee.
14. ('94) 21 Cal 142 : 20 I A 160 : 6 Sar 366 (PC), Dakhina Mohan Roy v. Saroda Mohan Roy.
15. (1887) 34 Ch D 234 : 56 L J Ch 707 : 56 L T 220 : 35 W R 148, Falcke v. Scottish Imperial Insurance Co.

and the plaintiffs do not challenge it or want it to be set aside although it is true that if the plaintiffs' claim happens to exceed the value of the property, the appellant or his sister may lose the entire property or not be able to recover anything out of its sale proceeds. This is, however, a different matter. The decisions in 21 Cal 142[14] and 47 M L J 622[16] have no application as the payments in those cases were made by persons who were not the owners of the estate or were adjudged not to have been so finally and not for their own benefit. Moreover, the charge on a property, as held in 55 Mad 468,[17] "which springs into existence" on a certain date in consequence of payment can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgagees and others who have in good faith or without any suspicion that such a charge may come into future existence advanced money on the property.

There is not the slightest doubt in our minds that the plaintiffs were bona fide mortgagees for value and though if the attachment had continued and the sale confirmed, their mortgage would have been infructuous as against the attaching creditor, yet they have a prior title as against the appellant's father, who did not only appear on the scene much later but who knew of the plaintiffs' mortgage and had entered into an agreement to discharge the same. The appellant's contention that an equitable charge be declared in his favour cannot be, for the above reasons, upheld. The result is that the appeal fails and is dismissed with costs of plaintiffs-respondents.

C.R.K./G.N. *Appeal dismissed.*

16. ('25) 12 A I R 1925 Mad 95 : 85 I C 855 : 47 M L J 622, Mollayya Padayachi v. Krishnasami Iyer.

17. ('32) 19 A I R 1932 Mad 189 : 135 I C 609 : 55 Mad 468 : 62 M L J 31, Vyamperumal Mudaliar v. Alagappa Maniagarar.

A. I. R. 1941 Madras 217

PANDRANG ROW AND ABDUR RAHMAN JJ.

N. Adinarayana Chetty — Appellant

v.

T. T. K. K. Appan Srirangachariar and others — Respondents.

Appeal No. 290 of 1936, and Civil Misc. Petn. No. 154 of 1939, Decided on 16th March 1939, against decree of Sub-Judge, Chittoor, D/- 14th August 1936.

(a) Civil P. C. (1908), O. 33, R. 7 — Pauper application ought not to be disposed of by judgment in suit on merits—Such method condemned.

A petition to dispauper the plaintiff ought to be dealt with and decided finally before further proceedings in the suit are taken, because the result of dispaupering would be to require the plaintiff to pay court-fee within the time fixed by the Court, and if court-fee is paid, to proceed with the suit, and if it is not paid, to reject the plaint. Hence, an order dispaupering the plaintiff should not be made on the same day as the judgment in the suit itself. The method of disposing of an application to dispauper the plaintiff by the judgment in the suit ought to be condemned. [P 219 C 2]

(b) Civil P. C. (1908), O. 34, Rr. 7 and 8 (in force in 1919) — Right to redeem is extinguished by final decree only and not by preliminary decree.

The actual extinction of the right to redeem is to be effected only by the final decree, the preliminary decree merely stating the consequences in case a certain payment as fixed by the Court is not made within the time allowed. Hence, unless a decree has been passed under sub-r. (2) of R. 8, the mortgage debt is not discharged nor is the right of redemption actually lost or extinguished : A I R 1934 P C 205, *Rel. on.* [P 220 C 2; P 221 C 1]

(c) Civil P. C. (1908), S. 11—Redemption suit — Preliminary decree—Amount due not fixed nor date for payment fixed—Default in paying Commissioner's fees may entail dismissal of suit but would not extinguish right of redemption—Decree held could not operate as res judicata.

Unless there is an extinction of the mortgage right or of the right to redeem, there can be no question of a bar by way of res judicata to a second suit for redemption. [P 221 C 2]

In a redemption suit, the preliminary decree after providing that an account should be taken of what would be due to the defendant on the mortgage and for costs, and that a commission should be issued for taking the accounts upon the plaintiff's application by 10th December 1919, provided in the last clause that if the amount so due, that is to say, after taking the account and declared by the Court, is not paid within the period fixed by the Court the plaintiff shall be debarred from all rights to redeem the property :

Held that there had been no determination of the amount by the Court, nor any date fixed for payment thereof. The default in payment of the Commissioner's fee could not be regarded as bringing into effect what was only foreshadowed as a contingency in the last clause of the decree. The default might lay the plaintiff open to some other penalty, for instance the dismissal of his suit, but the default in paying the Commissioner's fee would not extinguish the right of redemption altogether. The decree could not therefore operate as res judicata. [P 221 C 2]

(d) Grant — Inam — Nature of grant of long antiquity — Evidence of manner in which late grant was viewed by temple authorities or inamdars or by anyone else is of no assistance.

In construing the nature of a grant of long antiquity (1611 A. D.) evidence of the manner in which the grant was viewed, either by the temple authorities or by the inamdars or by anyone else is of no assistance. [P 222 C 1]

(e) Grant—Inam—Shrotriem — Inam granted for support of officers performing services in temple—Grant is to family and not to temple and is inalienable.

The lands which are granted as shrotriem inam for the support of officers performing services, such as that of Acharyapurusha, though liable to be resumed for the non-performance of the service, are not held by the grantees on trust for the temple in which the services are to be performed, and the mere fact that the grantee spent a portion of the income derived from the grant for performing certain festivals in the temple does not show that the original grant was made for the benefit of the grantee as well as of the temple. The grant is to the family and is in no way an endowment of the temple and being a grant burdened with service is inalienable: A I R 1929 P C 115; A I R 1916 Mad 331 and A I R 1922 Mad 197 (F B), *Rel. on.*

[P 222 C 2; P 223 C 1]

(f) Grant—Inam—Shrotriem—Mortgage of — Declaratory suit that mortgage is not binding does not fall under Limitation Act, Art. 134-B.

A suit for a declaration that the mortgage of a shortriem inam land is not binding on the plaintiff does not fall within the purview of Art. 134-B, Limitation Act. [P 223 C 1]

(g) Grant—Inam—Description of inamdar or his predecessors long after grant as office-holder in temple is no proof that office came into existence before grant or at time of grant.

The mere fact that the inamdar or his predecessor was described a long time after the grant as an office-holder in the temple would not necessarily show that the office came into existence either before the original grant or at the time of the original grant. [P 223 C 2]

(h) Grant—Inam — Fact that certain services were required to be performed does not show that inam is emolument attached to office.

The fact that certain services were required to be performed does not mean that the land granted as inam is to be regarded as an emolument attached to an office. [P 224 C 1]

(i) Grant — Inam — Temple service inam—Adverse possession—Principles applicable to village service inams do not apply to temple service inams—In case of temple service inam transfer is void from date of transfer — Possession of alienee must be deemed to be adverse from that date—Adverse possession which has once begun to run does not cease to affect transferor's successor until transferor's death.

No doubt the alienation of a village service inam which is prohibited by the special law relating to such service inams, does not avail as against the succeeding office-holder in the sense that the possession of the alienee will not be adverse to the latter till he succeeds to the office; the same reasoning cannot be applied to ordinary temple service inams. [P 224 C 1]

Public policy requires that even the transferor should not divest himself of the income from the land granted to him as inam subject to the condition of performing services of a public character, and therefore in cases of alienations of temple service inams which are void as being opposed to public policy and also to the provisions of S. 6 (h), T. P. Act, the transfer must be regarded as being void from the date of the transfer; and the possession of the alienee must be deemed to be adverse from that date and it must continue to be adverse. The person who succeeds on the death of the alienor in such a case cannot be said to have acquired then only for the first time a right to the property. Even though he may not claim directly under the transferor, the property is one which was granted to his family, and there is that unity of title which disables the successor from claiming that adverse possession which has once begun to run ceases to affect him till the death of the transferor. Consequently, a usufructuary mortgagee of temple service inam land can acquire by adverse possession a prescriptive right under the mortgage though it was void when it was executed.

[P 224 C 2]

K. Raja Ayyar and V. Seshadhiri — for Appellant.

A. C. Sampath Ayyangar and T. K. Srinivasathathachariar — for Respondents.

Pandrang Row J. — This is an appeal from the decree of the subordinate Judge of Chittoor dated 14th August 1936 in O. S. No. 6 of 1934 on his file. The suit was one for recovery of the plaint property with past mesne profits after declaring that the usufructuary mortgage executed by the plaintiff's deceased paternal uncle Srirangachari in favour of defendant 1's adoptive father for Rs. 4440 on 17th July 1895 is void and not binding on the plaintiff. In the alternative, the plaintiff sued for redemption of that mortgage after taking an account of what was due to defendant 1, the mortgagee. The remaining two defendants are the natural father and brother of defendant 1 and they merely adopted the contentions of defendant 1. The plaint, which does not appear to have been carefully drafted, proceeds on the basis that the plaintiff and his paternal uncle were hereditary office-holders in the Thirumalai Tirupathi Devasthanams, the office being the office of Acharyapurusha, and that the plaint property was granted to the family of the plaintiff as a service inam for their maintenance and upkeep in lieu of the emoluments appertaining to the office referred to above and that the said grant was confirmed by the British Government at the time of the Inam Commission and was to continue so long as the services were performed. The plaint further alleged that for the purpose of convenient enjoyment the inam village was allotted to the share of the plaintiff's uncle, who died in or about May 1932, whereupon his estate reverted to the plaintiff as his nearest heir and reversioner. The plaint proceeded on to allege that after the death of the plaintiff's uncle, when the plaintiff attempted to take possession of the village, he was obstructed by respondent 1 who set up the mortgage of 1895 of which the plaintiff came to know for the first time then, and that the mortgage is not valid as being opposed to public policy. The plaint claimed the alternative relief for redemption of the

mortgage in question, if it was found to be binding on the plaintiff and defendant 1 was held entitled to the mortgage right conferred on him by the mortgage of 1895.

The plaint allegations were denied almost in toto in a long written statement filed by defendant 1 which, as observed already, was adopted by the other two defendants. A number of issues were framed in the Court below, as many as thirteen. The learned subordinate Judge did not decide some of those issues, namely issues 1, 2 and 13 and it must be said that the treatment of the other issues has not been as full as it ought to have been in view of the circumstances of this case, with the result that the hearing of the appeal took more time than it would otherwise have taken. Issues 1 and 2 raised the question of the nature of the grant of the plaint village. They ran as follows : (1) Is the suit inam a service inam as claimed by the plaintiff? (2) Or is it only an inam burdened with service and is therefore alienable? Issue 13 raised the question whether the plaintiff had ceased to be an Acharyapurusha. The main issues that were decided by the Court below were that the present suit for declaring that the mortgage of 1895 is void is barred by limitation as well as by res judicata, the Court below holding that though the mortgage was void as being contrary to public policy, nevertheless the mortgagee had acquired by prescription the mortgage right over the property, he having prescribed only for a mortgage right and not for absolute ownership of the property. The lower Court also found that as the plaintiff claimed under his uncle, the mortgagor, the finding in a previous suit for redemption, namely O. S. No. 118 of 1916, that the mortgage was true and valid is res judicata for the purpose of the present suit and is binding upon the present plaintiff also. On the other important question as to whether the present suit for redemption was maintainable in view of the previous suit for redemption in 1916 and the decrees therein, the lower Court following the Privy Council decision in 56 ALL 561,[1] held that the present suit for redemption was not barred by res judicata and was maintainable. The Sub-Judge accordingly made a preliminary decree for redemption and directed the appointment of a commissioner to take accounts. He further directed that the commissioner should proceed on the basis that the accounts between the mortgagor and the mortgagee had been settled till 28th July 1905, as shown in the endorsement on the suit mortgage EX. I, and also on the basis of certain accounts filed by defendant 1 in the prior suit. In other words, the plaintiff was denied the opportunity to question these accounts before the commissioner. Defendant 1 is the appellant in the appeal and the plaintiff has filed a memorandum of cross-objections.

A preliminary question has been raised in this appeal on behalf of the appellant which has to be dealt with before going into the merits. The point is that the Court below made an order dispaupering the plaintiff who had been permitted to sue in forma pauperis. This order dispaupering him was made on the same day as the judgment in the suit itself, and it would appear from the language employed in the order dispaupering the plaintiff, that it was actually delivered after the judgment in the suit had been delivered : *vide* para. 6 of the order printed on pp. 30 to 33. In this paragraph the lower Court observed as follows :

> I hold that the plaintiff is not a pauper and direct him to pay the court-fee due to Government on the plaint and other records in the suit. This order however is not necessary to be enforced separately as the suit itself has been tried and disposed of today and provision will be made in the decree directing the plaintiff to pay the court-fee due on the plaint and other papers.

This method of disposing a petition for dispaupering the plaintiff is one that ought to be condemned. *Ex necessitate rei*, a petition like this ought to be dealt with and decided finally before further proceedings in the suit are taken, because the result of dispaupering would be to require the plaintiff to pay court-fee within the time fixed by the Court, and if court-fee is paid, to proceed with the suit, and if it is not paid, to reject the plaint. The decree passed by the Court below is one which it would not be easy to support if it is found that the order dispaupering the plaintiff was the proper order to make in the circumstances; but, if the order was one which was not proper, any preliminary objection to the decree must disappear. We have considered the merits of the application for dispaupering the plaintiff and looked into the reasons given by the Court below for allowing that petition, and we are satisfied that the order allowing the petition is wrong. The main ground on which the Court below proceeds is that a certain inam village Upparapaliem could have been alienated by the plaintiff

1. ('34) 21 A I R 1934 P C 205: 151 I C 37: 56 All 561: 61 I A 362 (P C), Raghunath Singh v. Hansraj Kunwar.

subject to the mortgage and that the plaintiff could have thereby got money to pay court-fee in the present suit. That village is an inam granted for performance of services in the same temple and any attempt to obtain money by selling or mortgaging further this village would have been in vain, for, it is not to be presumed that anyone would be prepared to part with money for property the alienation of which is not permitted by law. In these circumstances, it must be held that there was no ground for coming to the conclusion that the plaintiff was in a position to find money for the purpose of paying the court-fee payable in the present suit on the plaint. The view of the Court below that it was possible for the plaintiff to raise money by alienating the Upparalapaliem village is obviously not tenable in view of its own opinion expressed in the judgment in the suit that an alienation of an inam of this kind would be opposed to public policy. We therefore set aside the order dated 14th August 1936 in I. A. No. 253 of 1935, and the result will be that the plaintiff would have been entitled to continue the suit in forma pauperis. We may mention in this connexion that it was on this very ground that the cross-objections filed by the plaintiff-respondent were allowed to be filed in forma pauperis.

The only point which is agitated in this appeal is that the present suit, regarding it as one for redemption is not maintainable in view of the previous suit for redemption and the decrees made therein. There was a preliminary decree made on 3rd December 1919 (vide Ex. II-a) and the final decree was dated 26th September 1921. Apparently, in drawing up the preliminary decree, it was forgotten that the mortgage in question was a usufructuary mortgage and the preliminary decree after providing that an account should be taken of what would be due to the defendant on the mortgage and for costs, and that a commission should be issued for taking the accounts upon the plaintiff's application by 10th December 1919, provided in the last clause that if the amount so due, that is to say, after taking the account and declared by the Court, is not paid within the period fixed by the Court the plaintiff shall be debarred from all rights to redeem the property. It is on this clause of the preliminary decree that reliance is placed by the appellant's advocate in support of his contention that the present suit is not maintainable. The final decree, however, was to the effect that the plaintiff not having deposited the fee to be paid to the Commissioner, the suit be dismissed, the parties bearing their own costs. The question therefore is whether taking the preliminary and the final decrees together, this is a case in which the mortgage right has been declared to be extinguished or has become extinguished by operation of law. It is conceded on both sides that the law as stated by their Lordships of the Judicial Committee in 56 ALL 561,[1] applies to the present case. The following observations of their Lordships at pp. 566 and 567 apply to the present case also:

> The issues decided in the former suit were (1) whether the mortgagors were then entitled to redeem; and (2) the amount then to be paid if redemption then took place. The issues in the present suit are '(1) whether the right to redeem now exists, and (2) the amount now to be paid if redemption now takes place. If it could be said that the old decree involved a decision that the mortgagor's right to redeem was extinguished, that matter would indeed be res judicata, but this very question of the meaning and effect of the old decree arises for consideration under the third point.'—(The third point being that as no payment was made under the old decree, the former suit stood dismissed with the result that the mortgagor's right to redeem became extinguished under S. 60, T. P. Act, 1882,)—To that extent the second and third points overlap. It is sufficient to say in regard to the second point (of res judicata), that if the appellants fail to establish under their third point that the old decree extinguished the right to redeem, there is, in their Lordships' opinion, no grounds for saying that the old decree operated by way of res judicata so as to prevent the Courts, under S. 11, Civil P. C., from trying the present suits.

The important question therefore is whether in this case the right to redeem was extinguished by the decrees in the former suit of 1916. It is obvious, and the contrary is not urged before us, that the final decree does not either in terms or by implication extinguish the right of redemption. So far as we understand, the last clause of the preliminary decree which is relied upon, we do not take it to mean that there was a present extinction of the right to redeem. That clause merely means that in a certain contingency the right of redemption shall be lost or that the plaintiff shall be barred from redemption. It is more in the nature of a warning than of an actual bar; the provisions of O. 34, Rr. 7 and 8, Civil P. C., as they were in 1919, and which were more or less a reproduction of what was contained in Ss. 92 and 93, T. P. Act, 1882, require that apart from what is stated in the preliminary decree about debarring the plaintiff from redemption, the final decree also should provide and declare definitely that the plaintiff is so debarred. In other words, the actual

extinction of the right to redeem is to be effected only by the final decree, the preliminary decree merely stating the consequences in case a certain payment as fixed by the Court is not made within the time allowed.

As observed by their Lordships of the Judicial Committee in 56 ALL 561[1] at p. 568, the Transfer of Property Act by S. 93 provides a further opportunity for the defendant to obtain this relief, that is to say the relief in regard to the plaintiff's right of redemption. It provides that if payment is not made, the defendant may apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, and that if he so applies the Court shall pass an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property. The section further enacts:

> On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished.

In O. 34, R. 8 which was in force in 1919, the language used is different, but the effect is the same. So far as sub-r. 2 of R. 8 is concerned, it is more or less in the same terms, but instead of saying that the right to redeem and the security shall be extinguished sub-r. 3 of R. 8 provides that on the passing of the decree under sub-r. (2) the debt secured by the mortgage shall be deemed to be discharged. It is clear therefore that unless a decree has been passed under sub-r. (2) of R. 8, it cannot be said that the mortgage debt was discharged or that the right of redemption was actually lost or extinguished.

There has been no such decree in the present case, that is to say, in the previous suit of 1916. We are unable to regard the last clause of the preliminary decree as having the same effect as the final decree contemplated by sub-r. 2 of O. 34, R. 8. It is however argued on behalf of the appellant that as the plaintiff in the previous suit failed to deposit the commissioner's fee he cannot be allowed to take advantage of his own default. This is not the real question however, viz., whether the plaintiff in the former suit is to be allowed any advantage by reason of his own default. The question rather is whether this default makes the last clause of the preliminary decree an effective decision to the effect that the plaintiff is debarred from all rights to redeem the property. It must be remembered that this last clause provides that such effect should follow, namely that the right to redeem the property should be lost, only if a certain payment is not made on or before the date fixed by the Court. In this case there has been no determination of the amount by the Court nor any date fixed for payment thereof. It may be that this was not done because the plaintiff in that suit did not deposit the commissioner's fee though we are not prepared to hold that the Court was powerless to have the accounts taken even if the plaintiff in the suit was not prepared to pay the commissioner's fee. We are of opinion that the default in payment of the commissioner's fee cannot be regarded as bringing into effect what was only foreshadowed as a contingency in the last clause of the decree. The default may lay the plaintiff open to some other penalty, for instance, the dismissal of his suit as in this case, but, it is impossible to accept the argument that the default in paying the commissioner's fee would extinguish the right of redemption altogether. This is an inference which we are not prepared to draw in view of the inveterate tendency of Courts of equity to favour the right of redemption. It is clear from what their Lordships of the Judicial Committee have said that unless there is an extinction of the mortgage right or of the right to redeem, there can be no question of a bar by way of res judicata to a second suit for redemption. We therefore accept the finding of the Court below on this point and hold that the right to redeem has not been lost by reason of the decree in the previous suit and that the present suit for redemption is not barred as res judicata. There is no other point arising in the appeal and the appeal is accordingly dismissed with costs.

In the memorandum of cross-objections the main point argued is that the plaintiff is entitled to have a declaration to the effect that the mortgage of 1895 is not valid and binding on him and to recover the property free of that mortgage with mesne profits. The contention is that while the alienation of the property is void as being opposed to public policy, nevertheless it was valid as against the mortgagor and became void only after the death of the mortgagor, the plaintiff's paternal uncle in 1932; unless the latter part of the contention is also accepted, it is obvious that defendant 1 has long ago obtained a right by prescription to the mortgage in question. A large number of cases

have been quoted as having some bearing on this point. But before dealing with the legal aspect it is desirable that we should ascertain exactly the facts to which the law is to be applied. It is in this connexion that the failure of the Court below to record findings on issues 1 and 2 assumes importance. We have to decide whether in the present case the suit property was a service inam in the sense that the property was attached to a certain office in the temple as emoluments thereof, or whether it was a grant to the ancestor of the plaintiff burdened with the condition that certain services were to be performed. The evidence on this point is furnished by Exs. A, B and C, Exs. B and C being more or less of the same character. A suggestion was made in the course of argument that further opportunity might be given to adduce evidence especially with reference to this point. We are not prepared to accept the suggestion partly because the plaintiff had sufficient and reasonable opportunity of adducing evidence in the case and partly because it is not likely that giving a further opportunity will assist us in coming to a correct decision. It is not complained that any evidence was shut out by the Court below. All that is alleged is that arguments were not fully heard in the sense that some of the issues were not argued. That defect has been amply rectified in this Court, and we do not think that the plaintiff-respondent has suffered in consequence of any omission to argue his case as fully as was necessary in the Court below. After all, in deciding the nature of the grant, one has to rely on the evidence regarding the original grant, and that is before us.

Documentary and oral evidence relating to periods long subsequent to the original grant are not likely to be of much use in ascertaining the nature of the original grant. It must be remembered in this connexion that the original grant was made so long ago as 1611 A. D., that is to say over three centuries ago. In construing the nature of a grant of this antiquity it is vain to expect useful assistance from evidence of the manner in which the grant was viewed, say, in the present century, either by the temple authorities or by the inamdars or by anyone else, and that is all the evidence that one can possibly expect in this case over and above the evidence which we have already in the case. Exhibit B which relates to the suit village itself describes the inam as a shrotriem and it purports to have been granted "for serving as Acharyapurusha in the Tirumalai Tirupathi Devasthanam." The original grantee is said to have been one Srirangacharlu, the grantor being Rayulu Virapratapa Venkatapathi Maharayalu, Rajah of Chandragiri. The inam was confirmed by the inam commissioner in 1865 on service tenure, that is to say, so long as the service is rendered in the devasthanam. It was confirmed in the name of the great-grandson's great-grandson of the original grantee, who bore the same name as the original grantee, namely Sriranga Charlu. It would appear that a claim was made on behalf of the inamdar for the continuance of the inam as a personal grant, but this was disallowed by the inam commissioner. The description of the inam as a shrotriem itself shows the nature of the grant. Reference may be made in this connexion to 52 Mad 453,[2] in which their Lordships of the Judicial Committee adopted in part the description of "shrotriem" in Wilson's Glossary as

> a grant of lands or a village held at favourable rate, properly an assignment of land or revenue to a Brahmin learned in the Vedas, but latterly applied to similar assignments to native servants of Government, civil or military, and both Hindus and Mohamedans, as a reward for past services.

Even otherwise, it is clear from Ex. B that the grant was to the family of the original grantee to be held by that family with hereditary rights subject to the performance of service in the temple. In short, the grant was to the family and the family was entitled to the village subject only to the performance of service. It does not appear that the temple had any interest or was intended to be given any interest in the property. It was certainly not in any sense of the term an endowment of the temple. We find, the same view was taken of this very grant in 1915 M W N 531[3] a case to which the present parties were admittedly parties, the present plaintiff being the plaintiff and the present defendant 1 being one of the defendants. That was no doubt a suit instituted under S. 92, Civil P. C., but it related to this very Acharyapurusha office in the same devasthanam and the grant that was considered in that case was the very grant which is now relied on. It was held in that case by Sir John Wallis C. J., and Srinivasa Ayyangar J., that the lands in question which were granted as inam for the support of officers performing services, such as that of Acharyapurusha, though liable to be re-

2. ('29) 16 AIR 1929 P C 115 : 117 I C 507 : 52 Mad 453 : 56 I A 146 (P C), Seethayya v. Somayajulu.
3. ('16) 3 A I R 1916 Mad 331 : 30 I C 74 : 1915 M W N 531, Srirangachariar v. Pranatharthiharachariar.

sumed for the non-performance of the service, are not held by the grantees on trust for the temple in which the services are to be performed, and that the mere fact that the grantee spent a portion of the income derived from the grant for performing certain festivals in the temple does not show that the original grant was made for the benefit of the grantee as well as of the temple. We have no hesitation in taking the same view of the grant, namely that the grant was to the family and was in no way an endowment of the temple. This is clearly a case of a grant burdened with service. It has been held in 45 Mad 620[4] which related to a somewhat similar service in a temple, namely swasthivachaka, that an alienation of lands held on this kind of tenure, that is to say, subject to the condition of performing service in a temple, is opposed to public policy and to the nature of the interest affected, that, in other words, the transfer of such inams is opposed not only to public policy but also to the provisions of S. 6 (h), T. P. Act. There is no serious dispute so far between the parties.

The question remains whether the transfer by means of the mortgage of 1895 in this case was void from its very inception and adverse possession began to run from the date of the alienation not only against the mortgagor but also against the plaintiff. What we have said above as regards the nature of the grant is sufficient to dispose of the contention on behalf of the plaintiff-respondent that his suit so far as it relates to avoiding the mortgage of 1895 is governed by Art. 134-B, Limitation Act. This is not a case in which either the plaintiff or his paternal uncle who executed the mortgage can be regarded as manager of the property; nor can the property be regarded as a religious or temple endowment. We are of opinion therefore that Art. 134-B does not govern the present suit so far as it relates to a declaration that the mortgage of 1895 is not binding on the plaintiff. The other article that may be said to govern the present suit is Art. 144, which according to the appellant is the article applicable, and which is the article relied upon on behalf of the plaintiff-respondent also, in case his contention that Art. 134-B, applies is not accepted. This point has been argued from a two-fold aspect, first treating the grant as a grant of emoluments and attaching them to an existing office or to an office created at the same time as the grant of the emoluments, and secondly as being given as inam to the family burdened only with the condition of performing services in the temple, there being no office in existence at the time or brought into existence at the time. It is possible that there may be some theoretical justification for dealing with the question from these two different aspects, but for the purpose of this case it is not necessary to consider the first aspect because we find, so far as the present case is concerned, that this is not a case in which it has been shown that any office was in existence or was brought into existence at the time of the original grant. It is not possible for us to proceed on mere speculation in dealing with this aspect of the case. The mere fact that the plaintiff or his predecessor was described a long time after the grant as an office-holder in the temple would not necessarily show that the office came into existence either before the original grant or at the time of the original grant.

There is no reason to suppose that at the time of the original grant, more than three centuries ago, the grantor came to some arrangement with the authorities in charge of the temple in order to create an office of this kind, or, if the Rajah was himself the authority in charge of the temple, that he brought into existence the office of Acharyapurusha. In those days it is not likely that the grantor would have taken care to bear the present possibilities in mind, namely the possibilities of litigation like this, or would have perceived the difference between the grant of land burdened with performance of service in a temple and the creation of an office and annexing certain land as emoluments thereof. These nice, sharp quillets of the law are of comparatively recent origin, and we are not prepared to hold that considerations of this kind were present to the mind of the original grantor at the time of the grant in 1611 A. D. So far as the material before us goes, it shows that the Rajah made a grant of the village to a certain pious Brahmin to be held by him and his descendants subject only to the performance of certain services in the temple, namely of Acharyapurusha. This does not mean that the office of Acharyapurusha was already in existence or was then brought into existence. The description in Ex. A, which is of the year 1801, that is to say nearly two centuries after the original grant, is not of much use

4. ('22) 9 A I R 1922 Mad 197 : 70 I C 466 : 45 Mad 620 : 42 M L J 477 (FB), Anjaneyalu v. Sri Venugopala Rice Mills Ltd.

in ascertaining whether the original grant was of an office or of an emolument to an existing office. Ex. A merely purports to be a statement of the services to be done in the devasthanam by various persons such as Archakas, Jiyyangarlu, Acharyapurushas, etc. It is possible that these were the actual services done at the time the statement was prepared, that is to say in 1801, but we are not prepared to say that all these services were required when the original grant itself was made in 1611 A. D. It is, however, not necessary for us to decide exactly what services were performed.

The point for decision is whether the land was made an appendage, so to say, of the holder of an office. We are unable to say that it was so because we are unable to decide on the material before us whether the office was in existence or was brought into existence at the time of the grant, and did not come into existence till a long time afterwards. The fact that certain services were required to be performed does not mean that the land granted as inam is to be regarded as an emolument attached to an office. No doubt in the case of village service inams it has been held that alienation of such inams, which is prohibited by the special law relating to such service inams, will not avail as against the succeeding office holder in the sense that the possession of the alienee will not be adverse to the latter till he succeeds to the office. The same reasoning cannot be applied to ordinary temple service inams of the present kind. The reasoning is quite different in the case of village service inams. As observed by Varadachariar J., in 59 Mad 51,[5] S. 28, Limitation Act, will not apply to village service inams, and therefore there is no question of the extinction of a right by prescription. The law relating to village service inams is moreover to be found in special laws such as Madras Hereditary Village Offices Act, 1895, and it would not be justifiable to import those laws when dealing with temple service inams in which the grantee or the holder of the inam is a Hindu joint family and alienation is prohibited on the ground that it is opposed to public policy and contrary to the nature of the interest effected by the transfer. In these cases, the violation of public policy as well as the injury to the interest affected by the transfer are brought about by the transfer itself, and there is no reason why the invalidity should attach itself to the transfer only after the death of the transferor. The transferor himself requires nearly as much protection as his future successor.

Public policy requires that even the transferor should not divest himself of the income from the land granted to him as inam subject to the condition of performing services of a public character, and we do not see why in cases of alienations to temple service inams which are void as being opposed to public policy and also to the provisions of S. 6 (h), T. P. Act, the transfer should not be regarded as being void from the date of the transfer; so regarded, the possession of the alienee must be deemed to be adverse from that date and it must continue to be adverse. The person who succeeds on the death of the alienor in such a case cannot be said to have acquired then only for the first time a right to the property. Even though he may not claim directly under the transferor, the property is one which was granted to his family, and there is that unity of title which disables the successor from claiming that adverse possession which has once begun to run ceases to affect him till the death of the transferor. We cannot proceed on the assumption that there was an office, and that the plaintiff succeeded to the office which was formerly held by his paternal uncle. The statements in the plaint do not themselves clearly show that this was the case set up by the plaintiff. He describes himself and his uncle as being hereditary office holders in the temple, which appears to show that both were at some time or other holding the office. It follows therefore that the finding of the Court below on this point must be affirmed, namely that defendant 1 has acquired by adverse possession for over 12 years a prescriptive right under the mortgage of 1895, though it was void when it was executed.

The only other point raised in the memorandum of cross-objections is that the lower Court ought not to have debarred the plaintiff from having accounts taken from the date of the execution of the mortgage by deciding that the accounts should be taken as settled as endorsed on the suit mortgage and also declaring that an account should be taken on the basis of the yearly accounts filed by defendant 1 in the former suit. These directions apparently were made by the Court below in view of its opinion that the finding in the previous suit that the

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5. ('35) 22 A I R 1935 Mad 914 : 161 I C 447 : 59 Mad 51 : 69 M L J 890, Ramalingam v. Veerabhadradu.

mortgage was valid and binding is res judicata for the purpose of the present suit. We have, however, expressed the opinion already that the decree in the previous suit does in no way constitute res judicata so far as the present suit is concerned, because the previous suit related to the right of redemption at the time and the amount due at the time under the mortgage, whereas the present suit for redemption has reference to the right of redemption at the present time and the amount due at present. These directions will therefore be deleted and the accounts will be taken by the Commissioner from the date of the mortgage, subject to all just exceptions. Clause 1 of the preliminary decree will be amended accordingly, and the decree will be drawn up in FORM NO. 7-A of APP. D, Civil P. C. In other respects, the memorandum of cross-objections is dismissed with costs. The plaintiff shall pay the court-fee payable on the plaint and on the memorandum of cross-objections.

C. M. P. No. 154 of 1939. — The application of the plaintiff-respondent under S. 19 of Madras Act, 4 of 1938 to scale down the mortgage debt will be remitted to the Court below for disposal according to law and the final decree to be passed by the Court below in the suit will be subject to the final orders on the application.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 225

LAKSHMANA RAO AND HORWILL JJ.

In re Boya Polamma — Accused.

Criminal Revn. No. 561 and Referred case No. 25 of 1940, Decided on 25th October 1940, referred for orders by Sess. Judge, Kurnool Division, D/- 1st August 1940.

Criminal P. C. (1898), Ss. 341 and 537 — Accused confessing before Magistrate that she killed deceased and producing jewels worn by deceased — Accused seen leaving deceased's house on night of murder — Accused understanding proceedings upto stage of questioning under S. 342, Criminal P. C., but pleading deafness afterwards—Conviction for murder held justified — Inability of Sessions Judge to further question accused with regard to evidence against her held did not vitiate conviction.

The accused made a confession before the Magistrate that she killed the deceased with whom she was staying by smashing her head with a large stone. She also produced the jewels which were worn by deceased just prior to her death. The accused was also proved to have been seen going away from the deceased's house on the night of murder. The accused was able to understand the proceedings upto the stage of questioning under S. 342, Criminal P. C., but pleaded deafness subsequently :

Held that the conviction for murder was justified and that the conviction was not vitiated by the fact that the Sessions Judge felt himself unable to question the accused with regard to the evidence appearing against her inasmuch as there had been no miscarriage of justice. [P 226 C 1]

Public Prosecutor — for the Crown.

Horwill J. — Boya Polamma has been convicted by the Sessions Judge of Kurnool of the offence of murder punishable under S. 302, Penal Code, but as the Judge felt towards the end of the trial that she was unable to understand the proceedings, he has referred this case to us under S. 341, Criminal P. C. It has since been reported that there is no likelihood of her hearing improving. There is no doubt in our minds that the learned Sessions Judge was right in convicting Boya Polamma of the offence with which she was charged. The prosecution story is that Boya Polamma was married to P. W. 8 and that just before this murder took place, P. W. 8 took her and her children away to another village, and that he there renewed his intimacy with one Lakshmi, whom he was keeping as his concubine before he married Boya Polamma. She seems to have quarrelled with her husband for having resumed his relationship with Lakshmi in spite of his assurance that he would give up Lakshmi, and she came back with two of her children to the deceased Subbamma, who was her aunt. It was Subbamma who had arranged her marriage with P. W. 8 and it was apparently to her that the accused looked for comfort and sympathy. Subbamma,however, seems not to have given her the sympathy she expected and even refused to give her food; and the consequence, according to the prosecution, was that Boya Polamma murdered Subbamma by smashing her head with a large stone. Only one witness (P. W. 5) claimed to have witnessed the murder, and her evidence has been rejected by the learned Sessions Judge. Apart from her evidence, however, there is very strong evidence against Boya Polamma. The most important of all is the confession (EX. C) made to the Sub-Magistrate (P W. 3). In the course of that statement she said :

In the night I begged food and I slept at the house of Subbamma only. Being unable to put up with my misery and hardship I picked up a slab of stone and threw it on the head of Subbamma.

She also told the Magistrate about the jewels which she had taken from the body of Subbamma. In addition to this statement, there is reliable evidence that Boya Polamma took the police and certain panchayatdars to a rat hole in Subbamma's house and from it took out some jewels which undoubtedly were worn by Sub-

bamma just prior to her death. The further evidence against Boya Polamma is that of P. Ws. 4 and 6. P. W. 5 is a daughter of Boya Polamma and P. W. 4 and P. W. 6 say that they saw Boya Polamma going away from Subbamma's house in the night with P. W. 5. On account of information about this offence, Boya Polamma was detained by P. W. 4 and handed over to the village Munsif. From all this evidence we are satisfied beyond reasonable doubt that Boya Polamma was rightly convicted of the offence with which she was charged. Her answers to the questions put to her by the Judge show that she understood the nature of the proceedings even in the Sessions Court. The learned Judge first asked her if she heard her statement in the committing Court, which had just been read out to her, and she replied that it was correct. She was then asked if she wished to say anything in answer to the prosecution evidence and she replied:

My husband took away Rs. 5 from me. When I asked him for it, he and his concubine murdered Subbamma and foisted this case on me. I know nothing.

It was only after the accused was asked "P. W. 4 says he saw you the night Subbamma died. Do you wish to say anything?" that Polamma pleaded that she was unable to hear anything. The Judge thereupon desisted from asking her further questions. As is seen, she must have understood the proceedings upto then. She was represented by a vakil appointed by the Crown and she put forward the defence that this case was foisted on her. We are satisfied that no injustice has resulted from the fact that the Sessions Judge felt himself unable to question her further with regard to the evidence appearing against her. The magisterial confession which was recorded after all the ordinary precautions had been taken, and the fact that she herself produced the jewels which were on the dead woman's body satisfy us that there could have been no miscarriage of justice. We therefore confirm the conviction by the learned Sessions Judge and under S. 341, Criminal P. C., sentence Boya Polamma to transportation for life.

C.R.K./G.N. *Conviction confirmed.*

A. I. R. 1941 Madras 226

WADSWORTH AND PATANJALI SASTRI JJ.

Itikala Suryanarayanamurthy — Petitioner

v.

Redi Viramma — Respondent.

Civil Revn. Petn. No. 1602 of 1938, Decided on 20th August 1940.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 (1) and (4), 19 and 7—Appropriations made after 1st October 1937 and before Act came into force must be deemed to be available for readjustment—Mode of scaling down debt stated.

Payments made and appropriated after 1st October 1937, and before the Act came into force must be deemed to be available for reappropriation and readjustment under the Act. In the case of aforesaid appropriations the debt should be scaled down by cancelling the interest payable on 1st October 1937 adjusting the payments made firstly to costs as decreed; secondly, to the amount outstanding towards interest as on the dates of payments after cancelling the interest outstanding on 1st October 1937 and thirdly adjusting any balance towards the principal debt. There is nothing in S. 8 (4) which justifies the interpretation of it as giving sanctity to appropriations made after 1st October 1937 and before 22nd March 1938. Nor can S. 7 be interpreted to mean that all that can be scaled down is the debt payable at the commencement of the Act and therefore to the extent to which there have been appropriations before the commencement of the Act there is no debt payable.

[P 227 C 1, 2]

K. Bhimasankaran — for Petitioner.

Ch. Raghava Rao — for Respondent.

Wadsworth J. — This civil revision petition raises the question of the way in which S. 8 of Madras Act 4 of 1938 should be interpreted in a case in which there have been payments made and appropriated after 1st October 1937, and before the Act came into force. The essential facts are that there was a debt anterior to 1st October 1932 which resulted in a decree dated 30th September 1936. The decree was for a sum of Rupees 1761-8-0 with interest at six per cent. and for costs amounting to Rs. 437-6-3 with interest thereon. After the decree had been passed, there were three payments (1) Rs. 500 on 25th January 1938, (2) Rs. 200 on 23rd February 1938 and (3) Rs. 300 on 2nd March 1938. It is found by the Court below that these payments were all appropriated towards costs and interest. The question is whether these appropriations are liable to be undone with reference to Ss. 8 and 19 of the Act.

The petitioner contends that the plain way of working out the provisions of the Act in a case of this kind is as follows: Firstly you appropriate payments under S. 19 to costs as originally decreed, that is to say excluding interest on costs. Then you look to the state of affairs as on 1st October 1937, and you cancel so much of the debt as represents interest payable on that date, disregarding the fact that some of that interest is embodied in the decree for a fixed sum. Next you take the principal and work out the interest at the rate of the decree, six per cent. which is less than the maximum prescribed in S. 12 and appropriate the pay-

ments as on the date on which they were made, firstly, to the amount due for costs already mentioned, secondly to the amount due for interest after 1st October 1937. Any balance will be credited towards the principal. This interpretation of the Act gives full force to the provisions of cl. 1 of S. 8. It is however contended for the respondent that the interpretation ignores the provisions of S. 7 and cl. 4 of S. 8. The argument is that under S. 7 all that can be scaled down is the debt payable at the commencement of the Act, and therefore to the extent to which there have been appropriations before the commencement of the Act there is no debt payable and the process contemplated in cl. 1 of S. 8 cannot be applied. It seems to us that this is placing upon S. 7 an interpretation which is inconsistent with the provisions of S. 8 and the proviso to S. 19. The proviso to S. 19 quite clearly contemplates a re-appropriation and re-adjustment in respect of payments actually made either before or after the commencement of the Act. That is to say the debt to be scaled down is not the debt less payments made before the Act, but the debt having regard to the payments made before the Act which have to be readjusted in accordance with its provisions. Similarly, cl. 1 of S. 8 does not say interest outstanding on 1st October 1937 less any amounts appropriated thereto before the commencement of the Act. The section seems to contemplate the cancellation of all the interest as it stood on 1st October 1937 without regard to the subsequent appropriations.

A further contention is that cl. 4 of S. 8 protects the creditor from re-appropriation of any amount appropriated already. This seems to us to be an interpretation which is not in accordance with the plain meaning of this clause. Clause 4 appears to us to contemplate cases in which the literal application of the scaling down provisions would result in an obligation by the creditor to pay back in cash to his debtor something which the latter has voluntarily paid towards the debt. This, according to the clause, need not be done. If the debtor has paid something over and above that which would be due from him after the application of the Act the creditor keeps the excess. There is nothing in this clause which to our mind justifies the interpretation of it as giving sanctity to appropriations made after 1st October 1937 and before 22nd March 1938. In our view therefore the debt has to be scaled down in the manner for which the petitioner here contends, that is to say, by cancelling the interest payable on 1st October 1937 adjusting the payments made firstly to costs as decreed; secondly to the amount outstanding towards interest as on the dates of payments after cancelling the interest outstanding on 1st October 1937, and thirdly adjusting any balance towards the principal debt. The revision petition is therefore allowed and the application is remitted to the trial Court which will dispose of the matter in the light of this judgment. The respondent will pay the petitioner's costs.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1941 Madras 227

PANDRANG ROW AND
VENKATARAMANA RAO JJ.

P. R. N. S. M. Chokkalingam Chetti — Petitioner

v.

Official Assignee, Madras—Respondent.

Civil Misc. Petn. No. 2156 of 1940, Decided on 3rd May 1940, for leave to appeal to His Majesty in Council against judgment of High Court, *Reported in A I R 1940 Mad 837.*

Civil P. C. (1908), S. 110 (3) — Two cross appeals from decree of lower Court—Appellate Court by issuing one decree dismissing one of them while allowing the other — No appeal lies to Privy Council from order dismissing lower Court's decree.

Where there had been two cross appeals against the decree of the Court of first instance, and the Appellate Court has by issuing one decree allowed one of them and dismissed the other, there are in effect two orders of the Court one dismissing one cross appeal and affirming the decree of the lower Court and the other allowing the appeal and modifying the decree of the lower Court. So far as the decree affirming the decree of the lower Court is concerned, no appeal would lie to the Privy Council: AIR 1926 Mad 1024, *Rel. on*; AIR 1936 Mad 881, *Expl.*; A I R 1932 Mad 46, *Dist.* [P 228 C 1]

N. Srinivasa Ayyangar for N. T. Shamanna — for Petitioner.

T. M. Krishnaswamy Iyer for T. V. Ramiah — for Respondent.

Venkataramana Rao J. — This is an application for leave to appeal to the Privy Council against the decree passed by us in O. S. A. No. 68 of 1937.[1] This appeal was preferred by the petitioner against the decision of our learned brother Wadsworth J., disallowing the claim to priority of the petitioner in regard to the amount claimed by him. We affirmed the decision of our learned brother Wadsworth J., and dismissed the appeal. The decree passed by us is a

1. *Reported in* ('40) 27 AIR 1940 Mad 837 : (1940) 2 M L J 621, Chokkalingam Chettiar v. Official Assignee, Madras.

decree of affirmance within the meaning of S. 110, cl. 3, Civil P. C. It is contended by Mr. Srinivasa Iyengar that there is one decree issued in this case and, when leave to appeal is granted in regard to the question of interest, his client is entitled as a matter of right to leave to appeal also in regard to the question of priority, because the claim is one composite claim and the decree is one decree. We are not inclined to agree with this contention. Though one decree was issued in this case, it is, in essence a document which embodies two decrees. Against the decision of our learned brother Wadsworth J., two appeals were preferred, one by the official assignee in so far as the decision went against him and the other by the petitioner herein in so far as the decision went against him. Therefore, in effect, we passed two decrees.

In 51 M L J 295[2] the question which we have now to decide arose for consideration. In that case an appeal and a memorandum of objections were preferred against the decree of the lower Court and the High Court passed one decree by which the appeal was dismissed and the memorandum of objections was partly allowed. The question was whether the appellant in that case was entitled to leave to appeal to the Privy Council on the ground that the memorandum of objections was partly allowed and, as one decree was issued in the case, it must be taken that there was a modification of the decree as a whole and that it was not a decree of affirmance. This contention was negatived. In dealing with this contention, Phillips J. observes at p. 297 :

> Does the mere fact of an order on the memorandum of objections modifying the decree of the lower Court give the plaintiff the right to reopen the whole of the case? It was held in 16 A L J 864[3] that when there had been two cross appeals against the decree of the Court of first instance and one cross appeal had been allowed and the other dismissed, there was no right of appeal against the decree dismissing the appeal, whereas an appeal lay against the decree allowing the appeal. The Court proceeded on the view that in cross appeals the decree in each was a separate one. . . . . In effect there are two orders of this Court, one dismissing the appeal and affirming the decree of the lower Court and the other allowing the memorandum of objections or cross appeal and modifying the decree of the lower Court. So far, then, as the decree affirming the decree of the lower Court is concerned, no appeal would lie to the Privy Council.

We entirely concur in this view because it is in consonance with the plain language of S. 110, Civil P. C. Reliance was placed by Mr. Srinivasa Iyengar on the decision in 71 M L J 580,[4] but that decision does not help him. On the other hand, we find the following observation of Venkatasubba Rao J. on p. 583 which is not in his favour :

> As a question of construction, we fail to see why, when there are several decisions in respect of several subject-matters, the decree embodying those decisions should, by some fiction, be regarded as one and entire.

Again reliance was placed by Mr. Srinivasa Iyengar on the decision in 35 M L W 206[5] of Reilly and Ananthakrishna Ayyar JJ. That decision gave a very wide interpretation to the decision of the Privy Council in 51 Cal 969,[6] but that decision, if we may say so with respect, was rightly dissented from in 71 M L J 580.[4] Lastly Mr. Srinivasa Iyengar submitted that, even if we take the view that the decree is one of affirmance, leave may be granted on the ground that there is a substantial question of law involved in the appeal. It will be seen from a perusal of our judgment that we came to a decision on a question of fact, namely, that under the compromise entered into with the official assignee by the petitioner, the petitioner is entitled only to a pro rata distribution whatever be the nature of the assets held by the official assignee, whether the assets be taken to be those of the father or those of the son. That was enough to dispose of the appeal; but, as the question of law, viz., that apart from the compromise the petitioner is entitled to claim priority, was also argued, we proceeded to deal with it. We therefore cannot say that a substantial question of law is involved in the appeal in order to enable us to exercise our discretion and grant leave under S. 110. We therefore see no reason to grant leave to appeal in this case and the application is therefore dismissed with costs of the respondent, which we fix at Rs. 100.

C.R.K./D.S. *Application dismissed.*

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2. ('26) 13 A I R 1926 Mad 1024 : 97 I C 592 : 51 M L J 295, Ramanathan Chetti v. Subramanian Chetti.
3. ('18) 5 A I R 1918 All 245 : 48 I C 124 : 16 A L J 864, Chiranji Lal v. Behari Lal.
4. ('36) 23 A I R 1936 Mad 881 : 166 I C 251 : 71 M L J 580 : I L R (1937) Mad 121, Venkitasami Chettiar v. Sakkutti Pillai.
5. ('32) 19 A I R 1932 Mad 46 : 139 I C 54 : 35 M L W 206, Perichiappan Chettiar v. Nachiappan.
6. ('25) 12 A I R 1925 P C 60 : 86 I C 504 : 51 I A 319 : 51 Cal 969 (P C), Annapurna Bai v. Ruprao.

* A. I. R. 1941 Madras 229

Special Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

S. V. P. Sudalaimani Nadar — Petitioner

v.

Commissioner of Income-tax, Madras— Respondent.

O. P. No. 203 of 1939, Decided on 24th September 1940.

* *Income-tax — Animals purchased in British India exported to foreign country for sale — Profits derived from sale in foreign country are not assessable to income-tax when profits are not brought into British India.*

An assessee through his agents purchased animals in British India and exported them to foreign country for sale :

Held that the profits made by the assessee could only be calculated on what the animals actually cost him and the amounts at which they were actually sold in foreign country. The figures in the invoices, whether inflated or deflated, would not matter. [P 229 C 2]

Held further that profits derived from the sale in a foreign country of animals purchased in British India were not assessable to income-tax when the profits had not been received or brought into British India : AIR 1923 Mad 422 and A I R 1929 Lah 609 (FB), *Rel. on*; A I R 1938 P C 232, *Expl.* [P 230 C 1]

K. Bhashyam Ayyangar — for Petitioner.

K. V. Sesha Ayyangar — for Respondent.

Leach C. J.—The assessee in this case is the manager of a joint Hindu family which export goats and sheep from this country to Colombo and sells them there at a profit. For the year 1936-37, the assessee was assessed to income-tax by the Income-tax Officer, Tuticorin Circle, on a total income of Rupees 16,412 which included a sum of Rupees 15,139 found to be the profits made in Colombo and remitted to British India. The Income-tax Officer's order of assessment was revised by the Commissioner of Income-tax, who assessed the income at Rs. 31,384. Included in this amount was the figure of Rs. 9000 which the Commissioner said was the amount of profit which had accrued to the assessee in British India from this business. The Commissioner considered that the assessee had bought the animals at lower prices than those disclosed in his invoices when shipping them to Colombo. The assessee objected to an assessment on this basis and asked the Commissioner to state a case to this Court. The Commissioner refused, but was compelled to do so by an order of this Court, dated 17th October 1939. In pursuance of this Court's direction the Commissioner has referred the following question :

Are the income-tax authorities entitled in law to increase the petitioner's assessment by Rs. 9000 as being profits made in British India for the year 1936-37 ?

In his order revising the assessment the Commissioner gave the following reasons for holding that the assessee had made profits in British India : (i) the assessee had agents for the purchase of goats and sheep within the presidency but he himself had exercised "a certain amount of supervision" and this had its value; and (ii) there was usually an element of profit involved in F. O. B. prices and in this case the profit had not been included in the profit shown by the Colombo books. These are the only two reasons which the Commissioner gave for holding that the assessee had made a profit of Rs. 9000 in British India in the year of assessment. The reasons for the inclusion of this sum of Rs. 9000 given by the Commissioner in making the reference are of a nebulous character and what it comes to is that the Commissioner considered that the assessee had made more profit than he had shown and he formed in his own mind an estimate of what that profit was. The Commissioner was not called upon in this case to exercise his best judgment within the meaning of S. 23 (4). To say that the goats and sheep shipped from this country to Colombo left it with an increased value because the assessee had supervised his agents is going too far. The second reason given by the Commissioner is also fallacious. Because exporters, when they sell at F. O. B. prices, include in those prices their profit does not mean that in a case like the present one profit is included. When this case is examined it is manifest that the prices at which the animals were invoiced to Colombo would make no difference in the calculation of the profits made by the assessee. There is no evidence for the year of assessment that the assessee charged his Colombo office greater amounts than the cost to put the animals on board the steamers, but assuming that the invoices had been inflated that would not make any difference. The profit made by the assessee could only be calculated on what the goats and sheep actually cost him and the amounts at which they were actually sold in Colombo. The figures in the invoices, whether inflated or deflated, would not matter. We can see no justification whatsoever for the Commissioner for increasing the assessment by this figure of Rs. 9000, or by any figure as estimated profits made in British India.

When a business of this simple nature—the business we have here is the buying in one place of animals for human consumption and the selling of them in another place—the profit arises only at the place of sale. This was the effect of the decision in 46 Mad 360 : 1 I T C 194[1] and there is an express ruling by the Lahore High Court in 10 Lah 657 : 4 I T C 40[2] that profits derived from the sale in a foreign country of goods purchased in British India are not assessable to income-tax when the profits have not been received or brought into British India. Mr. Sesha Ayyangar, on behalf of the Commissioner of Income-tax, has suggested that this can no longer be regarded as the true position in law by reason of the decision of the Privy Council in 6 I T R 521 : I L R (1938) Bom 752[3] but it is clear that this is not the effect of the judgment of the Judicial Committee. There the question was whether a person who was carrying on business in Bombay and dealing in cotton in Europe and America could be assessed to income-tax on his profits made abroad. There is a vast difference between that case and the case now before us, and the cases which do apply are 46 Mad 360[1] and 10 Lah 657.[2] For these reasons I would answer the question referred in the negative and award costs to the assessee in the sum of Rs. 250. The assessee is also entitled to the refund of his deposit.

It is necessary to draw attention to another matter connected with this reference. When the case came before this Court on the question whether the Commissioner should be compelled to state a case it appeared that the income-tax authorities were contending that the assessee's assessment might be increased by the Rupees 9000 on the ground that it represented profits remitted to British India as well as on the ground that the amount represented profits which had accrued in British India. The figure at which the assessee had been assessed included the profits remitted from Colombo, and the Court asked Mr. Sesha Ayyangar to make it clear whether his real contention was that the Rs. 9000 should be included as profit made in British India. He said that this was his contention and as the Court was not prepared in the circumstances of this case to allow the alternative argument to be put forward it directed that the statement of the case should be confined to that question alone. Instead of obeying the direction of the Court, which he was bound to do, the Commissioner in the last paragraph of the reference has said that the main question to be decided is whether the amount was assessable to tax or not and the question whether it comes under the one basis or the other is really of no consequence so long as it comes under one of them. Consequently he asked the Court to consider the other ground. Although we agree with Mr. Sesha Ayyangar that the Commissioner meant no disrespect, his failure to follow the directions of this Court can only be described as improper.

King J.—I agree.

Patanjali Sastri J.—I agree.

C.R.K./D.S. *Answer in negative.*

1. ('23) 10 A I R 1923 Mad 422 : 71 I C 756 : 46 Mad 360 : 44 M L J 290 : 1 I T C 194, Secretary, Board of Revenue (Income-tax) Madras v. Madras Export Co.
2. ('29) 16 A I R 1929 Lah 609 : 117 I C 657 : 10 Lah 657 : 30 P L R 489 : 4 I T C 40 (FB), Jiwan Das v. Commissioner of Income-tax, Lahore.
3. ('38) 25 A I R 1938 P C 232 : 176 I C 15 : ILR (1938) Bom 752 : 65 I A 332 : 32 S L R 862 : 6 I T R 521 (P C), Commissioner of Income-tax, Bombay Presidency & Aden v. Chunnilal B. Mehta.

** A. I. R. 1941 Madras 230

Special Bench

LEACH C. J., KRISHNASWAMI AYYANGAR AND HAPPELL JJ.

In re K, Advocate, Madura.

Referred Case No. 28 of 1940, Decided on 25th November 1940.

** * Legal Practitioner — Professional misconduct — Letter by advocate addressed to clerk in Magistrate's office asking that application filed by him should be dealt with urgently is improper.*

It is improper for an advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently. The proper course for the advocate is, if there was any delay, to bring the matter to the notice of the Magistrate himself. [P 231 C 1]

Advocate-General — In support of notice.

S. Krishnamurthi—for Respondent (Advocate).

Leach C. J.—The respondent is an advocate practising in the Madura District. He has been charged with professional misconduct in that he wrote a letter to a clerk of the Sub-Magistrate of Manapparai in the Trichinopoly District asking in effect that the return of money, jewels and a wrist watch to his clients should be dealt with urgently. They were entitled to the return of the money and the articles. In fact an application had been made to the District Magistrate for an order directing their return and this order had been passed. The letter complained of is dated 18th May 1938 and is in these terms :

My dear brother,

I pray that you will be blessed with welfare, riches and good luck. I have herewith enclosed a memo. Yesterday, I have sent a memo. You should immediately send the documents referred to in these two memos to the Treasury Office at Kulittalai (for reference and return); further, I request you much to send me immediately the order directing the return of money to the petitioners. You must excuse me for the trouble. I feel very grateful for the help rendered by you till now and for the same to be rendered in future. I pray that God will bless you with long life and prosperity.

The Sub-Magistrate opened the cover and it was in this way that the letter came to light. The inquiry into the respondent's conduct was conducted by the District Judge of Trichinopoly and he has submitted a report in which he has expressed the opinion that the respondent has not been guilty of professional misconduct. The District Judge has gone so far as to say that there was nothing improper on the part of the advocate in requesting the clerk to expedite the despatch of the refund order to enable his clients "to get a refund of the money which they were legitimately entitled to get." It is manifest that it is improper for an advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently. The proper course for the respondent was, if there was any delay, to bring the matter to the notice of the Sub-Magistrate himself. If such letters were allowed there is no knowing to what it might lead. We will assume that the respondent did not intend anything improper, but he must have realized that what he was doing was improper. He has apologised and therefore we consider that the case will be met by censuring him for his conduct. It must be clearly understood that in future a case of this nature will not be so leniently dealt with.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1941 Madras 231

WADSWORTH AND PATANJALI SASTRI JJ.

Periyatan Katanhipalli Kannan Nambiar — Petitioner

v.

Ullannur Madhathil Subramania Pattar and others — Respondents.

Civil Revn. Petns. Nos. 257 and 691 of 1939, Decided on 10th September 1940, to revise orders of the District Court, North Malabar, D/- 26th August 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 and 9 — Act applies to compromise decree—A *and* B *members of tarwad executing mortgage in favour of* C *on behalf of tarwad*—*Suit on mortgage*—A *and* B *admitting mortgage but* D, E *and* F *other members of tarwad impleaded as defendants contesting tarwad's liability for debt — On* C *agreeing to accept smaller sum in full satisfaction of his claim and* D, E *and* F *withdrawing their opposition and agreeing to pay sum personally compromise decree passed — Compromise decree held could be scaled down.*

The mere fact that a decree is based on a compromise does not exempt it from the operation of the Act and to the extent to which a compromise can be said to be a renewal of the debt upon which the suit was laid, it is liable to be scaled down with reference to the principal sums originally or subsequently advanced. [P 232 C 2]

In the suit by *C* upon a mortgage executed in his favour by *A* and *B* on behalf of the tarwad of which they were members *A* and *B* admitted the execution of the mortgage bond and pleaded that the interest claimed was penal while *D*, *E* and *F* the other members of the tarwad who got themselves impleaded as defendants contested the liability of the tarwad for the debt. The suit was eventually compromised, the plaintiff agreeing to accept payment of a smaller sum in five instalments in full satisfaction of the claim and *D*, *E* and *F* withdrawing their opposition and agreeing to pay the sum personally, and a decree in accordance with the compromise was passed. On the application of the judgment-debtors to scale down the decree:

Held that the compromise decree was a renewal of the liability under the mortgage and could be scaled down under S. 8: A I R 1941 Mad 56, *Expl. and Rel. on.* [P 233 C 1; P 234 C 1]

Held further that the liability of *D*, *E* and *F* who did not join in the execution of the mortgage could not be taken to have arisen only on the date of the compromise decree inasmuch as though they disputed the liability of their shares in the mortgaged tarwad properties the compromise obviously proceeded on the basis that the mortgage was binding on the entire properties mortgaged thereunder and therefore the compromise must be regarded as a renewal or at any rate the inclusion in a fresh document of the antecedent liability of *D*, *E* and *F* in respect of their shares of the mortgaged properties under S. 8 : 33 All 356 (PC); A I R 1939 Mad 186 and A I R 1941 Mad 59, *Rel. on.* [P 233 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 and 9 — Kuri transaction — Under terms of kuriwari successful bidder executing mortgage for due payment of remaining instalments—Liability under mortgage is incurred on date of its execution.

In a kuri transaction the liability under a mortgage bond executed by the successful bidder at the auction in accordance with the terms of the kuriwari for the due payment of the future instalments of the subscription to the kuri chit, is a *debitum in præsenti solvendum in futuro* incurred on the date of the bond itself. The mortgage bond cannot be regarded as only affirming the pre-existing liability of the successful bidders as subscribers to the kuri chit to pay their subscriptions according to the instalments fixed in the kuriwari : C R P No. 1483 of 1939 ; A I R 1935 Mad 385 and A I R 1933 Mad 252, *Rel. on*; A I R 1936 Mad 985, *Expl.* [P 233 C 2]

(c) Contract—Kuri transaction—Provision entitling stakeholder to recover from benefited subscriber

amount of all instalments on default in payment of any one of them is not penal.

A provision in a kuri entitling the stakeholder to recover from the benefited subscriber the amount of all the instalments immediately on default in the payment of any one of them is not penal and is enforceable. [P 234 C 1]

P. Govinda Menon — for Petitioner.

K. Kuttikrishna Menon and O. T. G. Nambiar — for Respondents.

Patanjali Sastri J. — These revision petitions arise out of applications made by defendants 1 and 2 (judgment-debtors and respondents in C. R. P. No. 691 of 1939) under S. 19, Madras Agriculturists' Relief Act for scaling down the compromise decree in O. S. No. 1 of 1936 on the file of the lower Court. The suit was brought on a mortgage bond executed on 16th July 1923 for the payment of Rs. 9000 in eighteen instalments of Rs. 500 each payable every eight months commencing from 7th February 1924. The decree-holder (the petitioner in C. R. P. No. 691 of 1939) started a kuri chit as stakeholder with 20 subscribers each contributing Rs. 10,000 in twenty equal instalments on the terms and conditions set out in what is called the kurivari. According to these terms, the amount collected from the subscribers in respect of each instalment was to be put up for auction among them and allotted to the bidder who offered the highest discount, such discount being distributed among the subscribers as 'profits.' Defendants 1 and 2 who had together subscribed for one "ticket" in the kuri chit on behalf of their tarwad were the successful bidders at the second auction held on 7th June 1923, and they were paid Rs. 5800 being the balance after deducting the discount of Rs. 4200 offered by them. Having already paid two instalments, they executed the mortgage bond (Ex. I), according to the stipulation in the kurivari for the due payment of the remaining eighteen instalments amounting to Rupees 9000. The respondents thereafter paid ten instalments but failed to pay the remaining eight instalments, and O. S. No. 1 of 1936 was brought for the recovery of these instalments with interest amounting in all to Rs. 7640. Defendants 1 and 2 admitted the execution of the bond and pleaded that the interest claimed was penal while the other members of the tarwad who got themselves impleaded as defendants 3 to 6 contested the liability of the tarwad for the debt. The suit was eventually compromised, the plaintiff agreeing to accept payment of a smaller sum in five instalments in full satisfaction of the claim and defendants 3 to 6 withdrawing their opposition and agreeing to pay the sum personally, and the decree now sought to be scaled down was passed on 14th April 1936 in accordance with the compromise.

Various contentions were raised on either side in the Court below on a consideration of which the Court held that (1) the applicants for relief were 'agriculturists' as defined in the Act, (2) that S. 4 (f) of the Act had no application as the judgment-debtors could not, in any view, be regarded as trustees, (3) that the provisions of the Act were applicable to compromise decrees also and (4) that for purposes of scaling down the decree the liability of the debtors must be taken to have accrued on the several dates fixed for payment of the instalments in the security bond, Ex. I. On these findings, the learned Judge directed the decree to be scaled down in accordance with S. 8 of the Act in respect of the instalments which fell due prior to 1st October 1932, and in accordance with S. 9 in respect of the instalments which fell due subsequently. From this decision the decree-holder has preferred C. R. P. No. 691 of 1939 contending that the compromise decree cannot properly be regarded as a renewal of the liability under Ex. I, and defendant 1 has preferred C. R. P. No. 257 of 1939 raising the contention that in respect of the entire amount decreed, the liability of the debtors must be held to have been incurred on the date of the security bond and not on the dates fixed for payment of the instalments thereunder, and that the entire debt has therefore to be scaled down under S. 8 of the Act.

As regards C. R. P. No. 691 of 1939, we have already held in 52 M L W 262[1] that the mere fact that a decree is based on a compromise does not exempt it from the operation of Act 4 of 1938, that to the extent to which the compromise can be said to be a renewal of the debt upon which the suit was laid, it is liable to be scaled down with reference to the principal sums originally or subsequently advanced. Learned counsel for the decree-holder however laid stress on the observation at page 264:

> It is not necessary for the purpose of this case to decide what would be the position in a more complicated case when the compromise is the result of mutual concessions and advantages which together make up an agreement from which it would be extremely difficult to disentangle that part which is a renewal of the original debt,

1. ('41) 28 A I R 1941 Mad 56 : I L R (1940) Mad 947 : (1940) 2 M L J 293 : 52 M L W 262, Ramamurthi v. Sitaramayya.

and urged that having regard to the concessions made on either side under the compromise here in question, the liability thereunder could not be regarded as a renewal in whole or in part of the liability under the security bond. We are unable to agree with this contention. The observation relied on had no reference to cases like the one now before us involving an abatement of a portion of the claim by one side and the withdrawal of opposition and offer of additional security for the due payment of the reduced claim by the other, but envisaged cases, where, for instance, by some property being offered and accepted in full or part satisfaction of the claim, it becomes impossible to regard the transaction in any sense as a renewal of the original debt. No such difficulty arises here, and the decision referred to above applies equally to the facts of the present case.

Learned counsel next urged that, in any case, the liability of defendants 3 to 6 who did not join in the execution of EX. I could be taken to have arisen only on the date of the compromise decree, namely 14th April 1936 and should accordingly be scaled down under S. 9 of the Act. It is true that these defendants disputed the liability of their shares in the tarwad properties mortgaged under EX. I, but the compromise obviously proceeds on the basis that EX. I was binding on the entire properties mortgaged thereunder as contended by the decree-holder. In such circumstances, the correct view, it seems to us, is to regard the compromise as acknowledging and defining the antecedent liability of these defendants in respect of their shares of the properties mortgaged under EX. I : *see* 33 ALL 356[2] at p. 357. In this view, the liability of these defendants was, according to the decision in I L R (1939) Mad 218[3] a debt liable to be scaled down under the Act and must further be regarded as renewed or, at all events, included in a fresh document, under the compromise on which the decree was based : *see* our decision in C. R. P. No. 602 of 1939.[4]

Turning now to C. R. P. No. 257 of 1939, the only question we have to decide relates to the date on which the liability of the judgment-debtors can properly be said to have been incurred. The contention for the decree-holder is that the security bond (EX. I) only affirmed the pre-existing liability of the judgment-debtors as subscribers to the kuri chit to pay their subscriptions according to the instalments fixed in the kurivari, and did not change the character of such liability, that the liability to pay the future instalments of subscription could not be deemed to have been incurred before such instalments fell due, and that the position under the security bond was in no way different. Learned counsel for the judgment-debtors, on the other hand, contends that whatever might be the position with regard to the liability of a subscriber to pay the instalments of his subscription to the kuri before he bids for and receives the amount at an auction, he can thereafter be regarded only as a borrower of the sum received less the instalments already paid by him, undertaking to repay the loan in instalments that still remain to be paid, and the liability under the security bond which he executes for the due payment of such instalments is a *debitum in præsenti solvendum in futuro*, incurred on the date of the bond itself. The question is one of some difficulty not the least part of which arises from the somewhat conflicting decisions dealing with these peculiar kuri transactions which are so common in some parts of this presidency. On the whole however we are of opinion that the judgment-debtors' contention is supported by a preponderance of authority and must be accepted. It will be observed that the kurivari makes a distinction between the liability of a subscriber who has bid for and received the amount at an auction and the liability of one who has not yet been thus benefited. In the latter case, para. 5 provides that if the instalment is not paid on the date fixed for an auction, the subscriber will have no right to participate in the discount realised from the successful bidder at the auction, and further, if it remains unpaid even after one month from the date of the auction, the stakeholder shall be at liberty to remove the name of the subscriber and admit another in his place, while, in the former, if the benefited subscriber commits default in paying any instalment remaining due, it is provided that

> the money due for such instalment or the entire amount due for all the future instalments till the termination of the chit fund, shall be realized by the stakeholder together with profit at eight annas per day from the date of default,

a provision which also finds a place in the security bond, EX. I. It is thus clear that

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2. ('11) 33 All 356: 10 I C 477: 38 I A 87 : 8 A L J 552 (PC), Khunni Lal v. Gobind Kishna Narain.

3. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : I L R (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.

4. *Reported in* ('41) 28 AIR 1941 Mad 59 : (1940) 2 M L J 651, Doraikannu Odayar v. Veeraswami Padayachi.

the liability of a successful bidder at an auction held under the kuri is placed on a different footing from that of an ordinary subscriber, and it will not therefore be correct to say that the security bond merely affirmed the pre-existing liability to pay the instalments of the contribution to the kuri fund. It has been repeatedly held by this Court—and it must now be taken as settled —that a provision in a kuri entitling the stakeholder to recover from the benefited subscriber the amount of all the instalments immediately on default in the payment of any one of them is not penal and is enforceable, although there has been some difference of opinion as to the ground on which such decision is to be based. In 42 M L J 551,[5] the learned Judges seem to have viewed the advance to the successful bidder at an auction as a loan to him, for they observed:

> The subscription at each of these intermediate instalments was available for loan to the successful bidder at the auction, which was held every six months, the successful bidder being the bidder who offered to accept the lowest proportion of the total subscription.

Relying upon this and the earlier decisions of this Court, Ananthakrishna Ayyar J. held in 65 M L J 29[6] that the transaction was in essence a loan of a common fund to one member and that it was

> a debt *in præsenti* to be paid by particular instalments if certain conditions be duly observed, but otherwise to be paid up at once irrespective of the benefit of time and instalments.

The learned Judge pointed out that it had been so viewed in this presidency since 1 M H C R 448.[7] In A I R 1928 Mad 245,[8] Srinivasa Ayyangar J. held that a provision for acceleration of payment of the future instalments was penal and unenforceable as there was no *debitum in præsenti* in such cases, but this decision was reversed on appeal in 65 M L J 302.[9] In 68 M L J 283[10] another Bench took the view that the successful bidder at an auction was a purchaser of the sum, and the contract thus being one of sale and not of borrowing, no question of penalty could arise. They approved the decision of Ananthakrishna Ayyar J. in 65 M L J 29,[6] though it was based on a different ground. It is however worthy of note that even in this view the liability for the 'purchase money' must be held to have been incurred on the date of the security bond taken from the 'purchaser'. The decree-holder strongly relied upon the decision in (1937) 2 M L J 17[11] as showing that there is no present debt in such cases until the instalments actually fall due. That was a case where the stakeholder assigned to the plaintiff the security bond executed by a successful bidder who had received the kuri fund at an auction. The kuri however had to be closed down owing to the inability of the subscribers to pay their subscriptions. In rejecting the contention of the plaintiff's counsel before this Court that the plaintiff was entitled to recover the amount due under the security bond as the assignee thereof, unaffected by the discontinuance of the kuri as payments under the bond were not conditioned on its continuance, Varadachariar J. observed:

> It seems to me only reasonable to hold that in cases like the present the security bond must be interpreted in the light of the rules, and the obligation undertaken by it is not repayment of the benefit already received—as if it were a debt—but the payment of future subscriptions. Whether the continuance of the chit was a condition precedent or not, will not depend merely on the terms of the bond but must be decided with reference to the surrounding circumstances, including the rules of the chit fund.

Though this passage strikes a somewhat different note as to the nature of the obligation undertaken by a successful bidder at an auction under a kuri chit, it cannot be said that the learned Judge was making a definite pronouncement on the question whether or not such obligation was a *debitum in præsenti solvendum in futuro*, as that question did not arise for consideration. All that the learned Judge had to consider was whether such a bond could be enforced without reference to the obligation of the stakeholder under the rules of the kuri to continue it to the end. Mockett J., the other learned Judge who took part in the decision made no reference to this aspect. We are therefore of opinion that in view of the several decisions of this Court referred to above, the liability of the judgment-debtors must be considered to have been incurred on the date of the mortgage bond, namely 16th July 1923, and the decree must be scaled down under S. 8 of the Act. The same view was taken by one of us in C. R. P. NO. 1483

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5. ('22) 9 A I R 1922 Mad 67 : 67 I C 995 : 42 M L J 551, Vaithinatha Iyer v. Govindasami Odayar.
6. ('33) 20 A I R 1933 Mad 252 : 140 I C 838 : 65 M L J 29, Kunju Nair v. Narayanan Nair.
7. (1863) 1 M H C R 448, Kamakshi Achari v. Appavu Pillai.
8. ('28) 15 A I R 1928 Mad 245: 108 I C 319, Subbiah v. Shanmugam Pillai.
9. ('33) 20 A I R 1933 Mad 657: 146 I C 1026: 65 M L J 302, Subbiah Pillai v. Muthiah Pillai.
10. ('35) 22 A I R 1935 Mad 885: 158 I C 1037: 68 M L J 283, Raghavan Pattar v. Arumugham.
11. ('36) 23 A I R 1936 Mad 985 : 168 I C 402 : (1937) 2 M L J 17, Marudakonar v. Veerammal.

of 1939. In the result, C. R. P. No. 257 of 1939 is allowed and the order of the Court below will be modified accordingly. The petitioner will have the costs of this revision petition. Cri. Rev. P. No. 691 of 1939 is dismissed with costs. The case will be remanded to the Court below for disposal in the light of this judgment.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 235

Full Bench

LEACH C. J., GENTLE AND KRISHNASWAMI AYYANGAR JJ.

A. S. Nagappa Chettiar and another — Appellants

v.

Annapoorani Achi and another — Respondents.

Appeal No. 501 of 1939, Decided on 5th December 1940, against order of Sub-Judge, Devakottai, D/- 5th August 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 28, Rules under, R. 8 — R. 8 is ultra vires.

To read either into sub-s. (1) or into clause (c) of sub-section (2) of S. 28 a power for the Provincial Government to constitute an appellate tribunal would be to read something which is not there. Hence R. 8 framed under S. 28 is ultra vires the power of the Provincial Government. [P 237 C 2]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 19—Order under S. 19 is not appealable under S. 47, Civil P. C.

Proceedings under S. 19, Madras Agriculturists' Relief Act, cannot be regarded as proceedings in execution and therefore S. 47, Civil P. C., can have no application. Hence an order under S. 19, Madras Agriculturists' Relief Act, is not appealable under S. 47, Civil P. C. : A I R 1940 Mad 418, *Approved* ; A I R 1940 Mad 131, *Expl. and Not Approved.* [P 238 C 2]

K. Rajah Ayyar, V. Seshadri, P. J. Kuppanna Rao and V. C. Viraraghavan—for Appellants.

R. Kesava Iyengar and R. Ramaswami Iyer — for Respondents.

ORDER OF REFERENCE

Wadsworth and Patanjali Sastri JJ. —This appeal is preferred against the dismissal of an application under S. 19 of Madras Act, 4 of 1938 and a preliminary objection has been taken that no appeal lies. The order under appeal was passed on 5th August 1939. On this date there was no right of appeal against the order, unless it could be said to be one falling under S. 47, Civil P. C. The appellant therefore filed a civil revision petition against the order. On 27th October 1939, a notification was issued in the Fort Saint George Gazette under S. 28 of the Act promulgating a new R. 8, which prescribes that :

> Appeals shall lie from any of the following orders passed by a Court under the Act, namely . . . . . (b) an order under S. 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree ; . . . . as if the order related to the execution, discharge or satisfaction of the decree within the meaning of S. 47, Civil P. C., 1908.

After the publication of this rule, the appellant on 2nd November 1939 filed the present appeal and his pending civil revision petition was withdrawn and dismissed. It is contended for the respondent that the new R. 8 is not retrospective, *vide* (1940) 1 M L J 317,[1] that the order when passed was final, and that the subsequent creation of a right of appeal cannot take away the vested right of the respondent in that final order. Alternatively it is contended that the new rule is ultra vires, as it purports to create a new remedy and goes beyond the power given in S. 28 (c) to make rules "for removing any difficulty in giving effect to the provisions of this Act." The appellant contends that the right of appeal under the rule enures to the benefit of any party aggrieved by an order, an appeal against which was not barred by limitation on the date of the promulgation of the rule. He also contends that the new R. 8 is intra vires and that it should be read not so much as creating a new right of appeal, as declaring the nature of the specified orders to be such as to fall within S. 47, Civil P. C., so as automatically to attract to them the right of appeal given under the ordinary law. It is also suggested that if it be held that there is no right of appeal under the rules, it will be necessary to resolve the conflict between two bench decisions, (1939) 2 M L J 853[2] and (1940) 1 M L J 422[3] and to decide whether or not the order is appealable apart from the rules.

We are of opinion that these contentions raise questions of such importance that it is desirable to refer them to a Full Bench. That being so, we do not wish to express any opinion on the merits of those contentions. The respondent has quoted the decision of the Privy Council, (1905) A C 369,[4] and also the Full Bench decisions in 50 Mad

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1. ('40) 27 A I R 1940 Mad 417 : (1940) 1 M L J 317, Chidambaram Chettiar v. Muthukumaraswami Chettiar.
2. ('40) 27 AIR 1940 Mad 131: 186 I C 862: (1939) 2 M L J 853, J. Venkatappadu v. K. Ramamurthi.
3. ('40) 27 A I R 1940 Mad 418 : (1940) 1 M L J 422, Muhammad Tharaganar v. U. T. Syed Sahib.
4. (1905) 1905 A C 369 : 74 L J P C 77 : 92 L T 738 : 21 T L R 513, Colonial Sugar Refining Co., Ltd. v. Irving.

857[5] and 52 Mad 361[6] in support of his main contention. The appellant has referred us to a passage at p. 199 of Maxwell's Interpretation of Statutes (Edn. 8) which is based on the case in (1855-59) 166 E R 580.[7] We refer the following questions to a Full Bench : (1) When a statutory rule giving a right of appeal is promulgated after a final order has been passed, will an appeal lie under that rule against that order ? (2) Is R. 8 of the rules framed under Madras Act 4 of 1938 ultra vires ? If so, (3) Is the decision in (1940) 1 M L J 422[3] right in holding that an order under S. 19, Madras Act, 4 of 1938 is not appealable as falling under S. 47, Civil P. C.?

Opinion of the Full Bench

Three questions arising out of the Madras Agriculturists' Relief Act (Act 4 of 1938) have been referred for decision by a Full Bench and this Bench has been constituted for the purpose. The questions read as follows :

(1) When a statutory rule giving a right of appeal is promulgated after a final order has been passed, will an appeal lie under that rule against that order ? (2) Is R. 8 of the rules framed under Madras Act, 4 of 1938 ultra vires ? If so, (3) Is the decision in (1940) 1 M L J 422[3] right in holding that an order under S. 19, Madras Act, 4 of 1938 is not appealable as falling under S. 47, Civil P. C.?

It will be convenient to take the second question first, because if it is answered in the affirmative the first question will not call for an answer. The Act itself does not directly provide for an appeal against an order passed in exercise of jurisdiction conferred by the Act, but the Provincial Government has assumed that S. 28, which confers upon it power to make rules under the Act, is sufficiently widely drawn to enable it to provide for appeals. Section 28 reads as follows :

(1) The Provincial Government may make rules for carrying into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the Provincial Government may make rules : (a) in regard to any matter which is required to be prescribed by this Act ; (b) prescribing the form of, and the fees to be paid in respect of, applications under this Act; and (c) for removing any difficulty in giving effect to the provisions of this Act.

(3) All the rules made under this section shall be consistent with the provisions of this Act. They shall be published in the Official Gazette and upon such publication shall have effect as if enacted in this Act.

Relying on sub-s. (1) and cl. (c) of sub-s. (2) of S. 28, the Provincial Government, by a notification dated 27th October 1939 added the following rule to those already framed.

8. Appeals shall lie from any of the following orders passed by a Court under the Act, namely : (a) an order under S. 18 (1) amending or refusing to amend a decree; (b) an order under S. 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree; (c) an order under S. 20 staying or refusing to stay proceedings in execution of a decree ; (d) an order under S. 22 directing or refusing to direct the refund of any sum realized in execution of a decree; (e) an order under S. 23 setting aside or refusing to set aside any sale or foreclosure of immovable property ; and (f) an order under S. 24 directing or refusing to direct the repayment of any purchase money realized in execution of a decree ;

as if the order related to the execution, discharge or satisfaction of the decree within the meaning of S. 47, Civil P. C., 1908.

Before discussing the nature of the provisions to be found in sub-s. (1) and cl. (c) of sub-s. (2) of S. 28 it will be advantageous to refer to certain of the cases in which the governing principle that an appeal does not lie as of right, but must be conferred by express enactment, has been applied. The first of the cases which I have in mind is that in (1864) 10 H L C 704.[8] By S. 26, Queen's Remembrancer's Act, 1859, the Barons of the Court of Exchequer were given authority to make rules with regard to the process, practice, and mode of pleading in revenue cases in their Court. By virtue of this section, the Barons of the Exchequer made rules in which they purported to grant an appeal to the Exchequer Chamber and to the House of Lords. It was held by the House of Lords that the section did not authorize them to do this. Lord Westbury L. C. in the course of his judgment in that case said :

The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given, must both be bound, and that must be the act of some higher power. . . In making the orders now in question, the Barons of the Court of Exchequer have assumed that a discretionary power to exercise this legislative authority or not, and thereby to confer or to withhold, this important benefit of new rights of appeal, has been given to them by S. 26 of the Act of 1859. If the Legislature has done this, it has done a thing which is very irregular, and which antecedently would seem to be very improbable.

It is not reasonable to suppose that in matters affecting the taxation of the subject, the Legislature would abdicate its own functions and delegate to the Barons of the Exchequer the power of deter-

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5. ('27) 14 A I R 1927 Mad 977 : 106 I C 616 : 50 Mad 857 : 53 M L J 637 (F B), Deivanayaka Reddiar v. Renukambal.
6. ('29) 16 A I R 1929 Mad 381 : 115 I C 811 : 52 Mad 361 : 56 M L J 369 (S B), In re Vasudeva Samiar.
7. (1855-59) 166 E R 580, The Alexander.
8. (1864) 10 H L C 704 : 10 Jur (N S) 446 : 10 L T (N S) 484 : 4 N R 29 : 12 W R 641, Attorney-General v. Sillem.

mining at their pleasure whether, in certain cases, there should or should not be a right of appeal as between subject and the Crown.

In (1877) 1 Ex D 404,[9] the question was whether the Court of appeal from inferior Courts was empowered by S. 6, County Courts Act, 1875 to hear an appeal from a decision of a County Court upon a question of fact arising in a suit brought within its jurisdiction as a Court of common law. Grove J. observed that if the Legislature had intended to allow an appeal on such a question clear language would have been employed. In (1877) 3 Q B D 1,[10] Bramwell L. J. in considering the question whether the Court had jurisdiction over the master's taxation on a motion to review, answered it in the negative. He said that an appeal did not exist in the nature of things and a right to appeal from any decision of any tribunal must be given by express enactment. The Privy Council has also considered this question. In 11 Mad 26,[11] the Judicial Committee was called upon to say whether the High Court had jurisdiction to hear an appeal from an order of a District Judge made by him in a proceeding under the Religious Endowments Act, 1863, appointing a member to fill a vacancy in a committee. The Act gave no right of appeal. It was held that neither the Act, nor the general law, gave any right of appeal. In the course of the judgment it was observed :

In approaching the consideration of this question, their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such a right must be given by statute, or by some authority equivalent to a statute.

In 40 Cal 21[12] the Privy Council dealt with the question whether there was an appeal to His Majesty in Council from a decision of the Chief Court of Lower Burma on a reference to that Court by the Collector of Rangoon in proceedings under the Land Acquisition Act. It was held that there was no such right. Delivering the judgment of the Board, Lord Macnaghten referred to the observations of Bramwell L. J. in (1877) 3 Q B D 1[10] and said that the right of appeal could not be implied. In view of these observations it is manifest that what we have to consider is whether there is anything in S. 28, Madras Agriculturists' Relief Act, which can reasonably be read as conferring authority on the Provincial Government to make rules providing for appeals from orders passed under the Act. Only sub-s. (1) and cl. (c) of sub-s. (2) are relied upon in support of the contention that R. 8 is intra vires the powers of the Provincial Government. Sub-section (1) merely says that the Provincial Government may make rules for carrying into effect the purpose of this Act. In making a rule providing for appeals, the Provincial Government is not making a rule for carrying into effect the purposes of the Act. It is adding something to the Act. The object of the Act is to grant relief to agriculturists by providing machinery for the scaling down of their debts. The Court of first instance decides whether a case falls within or without the Act. If a case falls within the Act the Court must scale down the debt in accordance with the directions embodied in the Act. An order of the Court must be taken to be a correct order unless it is shown to be wrong by an appellate tribunal which has power to entertain an appeal.

Clause (c) of sub-s. (2) does not carry the matter any further. By providing for an appeal, the Provincial Government is not removing any difficulty in giving effect to the provisions of the Act. The Courts of first instance are there for the purpose and, as I indicated, their orders must be assumed to be correct. To read either into sub-s. (1) or into clause (c) of sub-s. (2) a power for the Provincial Government to constitute an appellate tribunal would be to read something which is not there, and incidentally be ignoring a well-settled principle. Therefore, the answer I would give to the second question is that R. 8 is ultra vires the power of the Provincial Government. As my learned brothers agree in this answer it is not necessary to discuss the first question.

The third question has arisen as the result of a conflict in the decisions of this Court. In (1939) 2 M L J 609,[13] Burn and Stodart JJ. held that an order passed on an application filed under S. 19, Madras Agriculturists' Relief Act, while no proceedings in execution are pending is not appealable. In the opinion of the learned Judges, it could not be considered to be a question under S. 47, Civil P. C., in the absence of execution proceedings. Section 19 provides that where before the commencement of the Act, a Court has passed a decree for the repayment of

9. (1877) 1 Ex D 404 : 45 L J Ex 573 : 35 LT 484 : 25 W R 116, Cousins v. Lombard Deposit Bank.
10. (1877) 3 Q B D 1 : 47 L J Q B 10 : 37 L T 391 : 26 W R 229, In re Sandbach Charity Trustees and North Staffordshire Ry. Co.
11. ('88) 11 Mad 26 : 14 I A 160 : 5 Sar 54 (PC), Minakshi Naidu v. Subramanya Sastri.
12. ('13) 40 Cal 21 : 16 I C 188 : 39 I A 197 : 16 C L J 245 : 16 C W N 961 (PC), Rangoon Botatoong Co., Ltd. v. Collector of Rangoon.
13. ('39) 1939-2 M L J 609, In re Subbaraidu.

a debt, it shall, on the application of a judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of the Act to the decree and shall, notwithstanding anything contained in the Civil Procedure Code, 1908, amend the decree or enter satisfaction as the case may be. In (1939) 2 M L J 853[2] Pandrang Row and Abdur Rahman JJ., without giving any reasons, stated that they had no doubt that petitions filed under S. 19 must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of a decree and therefore come within the matters covered by S. 47, Civil P. C. In (1940) 1 M L J 422,[3] Burn and Lakshmana Rao JJ. had to consider the effect of the decision in (1939) 2 M L J 609[13] the argument being that if at the time when an order is made under S. 19, Madras Agriculturists' Relief Act, there is pending an execution petition, the order would be appealable as one falling under S. 47, Civil P. C. The learned Judges directly negatived this contention. They held that the pendency of execution proceedings did not make an application under S. 19, Madras Agriculturists' Relief Act, a matter relating to the execution of the decree in any sense. The learned Judges regarded the observations of Pandrang Row and Abdur Rahman JJ., in (1939) 2 M L J 853[2] as being merely an obiter dictum which it was.

I have no hesitation in preferring the view expressed in (1940) 1 M L J 422[3] on this question to that expressed in (1939) 2 M L J 853.[2] When dealing with applications under S. 19, Madras Agriculturists' Relief Act, the Court is not acting in execution. Its function is to apply the provisions of the Act to decrees against persons who are entitled to relief under the Act. If relief is applied for and the Court considers that the applicant is entitled to have the provisions of the Act applied the Court must apply them. If the scaling down does not wipe out the decretal amount then an amended decree is passed which can only be enforced in execution proceedings separately instituted under the Civil Procedure Code. If the scaling down wipes out the decretal amount the Court cannot pass an amended decree. It must then declare that the decree has been satisfied. But here again, the entering up of satisfaction is not in execution proceedings, but in proceedings under the Agriculturists' Relief Act which are of an independent nature. Unless proceedings under S. 19 can be regarded as proceedings in execution and I think I have said sufficient to indicate that in my opinion they are not—S. 47, Civil P. C., can have no application. It follows that in my judgment the answer to the third question is that the decision in (1940) 1 M L J 422[3] in holding that an order under S. 19, Madras Agriculturists' Relief Act, is not appealable under S. 47, Civil P. C., is right. In giving this answer I do not intend, however, to express any opinion on the statement to be found at the end of the judgment in that case to the effect that if the decree is scaled down an appeal will lie from the new decree. This statement was no doubt made on the opinion of this Court previously expressed that an appeal will lie from an order amending a decree. That question is not before us and therefore in holding that (1940) 1 M L J 422[3] was rightly decided the answer is confined merely to the applicability of S. 47, Civil P. C. I may also add that in answering the third question the Court is only concerned with cases falling within S. 19, Madras Agriculturists' Relief Act, and not with applications under S. 20. The consideration of the position with regard to S. 20 must be left until the question arises. I would make the costs of this reference costs in the cause.

C.R.K./D.S. *Answer accordingly.*

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* A. I. R. 1941 Madras 238

BURN AND MOCKETT JJ.

In re Pullannagari Rami Reddi and others — Appellants.

Referred Trial No. 121 and Criminal Appeals Nos. 533, 535 and 565 of 1939, Decided on 24th November 1939, referred by Sess. Court, Chittoor Division, D/- 13th September 1939.

* *(a) Evidence Act (1872), Ss. 27 and 30 — Confession under S. 27 falls under S. 30 — Co-accused's confession can be used against other accused for assessing probative value of evidence against him — But it cannot be treated as substantive evidence against other accused.*

Confessional statements under S. 27 come within the terms of S. 30 and a confession by a co-accused can be taken into consideration against another accused provided there is admissible evidence pointing to the accused's guilt. In assessing the probative value of that evidence the co-accused's confession can be taken into consideration. Where the evidence against the accused is only that he was in the company of the other accused before and after the crime he cannot be convicted on the basis of the co-accused's confession inasmuch as it would amount to treating the confession as substantive evidence against him. [P 242 C 2]

* *(b) Penal Code (1860), S. 302—Mud in nails of deceased indicating struggle in water during life — Presumption of death by drowning is not absolute, especially in India.*

Mud in the nails of a deceased indicates struggle in the water during life and is presumptive evidence in favour of death by drowning. But such a presumption is not absolute and other circumstances may of course negative it. But presence of mud on the toes and nails in a country of barefeet and not invariable cleanliness like India can scarcely weigh against the fact that no single characteristic of drowning is found. [P 243 C 1]

* *(c) Penal Code (1860), S. 302 — Deceased murdered after her night meal — Husband, accused, with her at night—Accused's sister living close by on hearing cry at midnight going to investigate but told by accused that nothing was going wrong—Others summoned by accused's sister going to accused's house and finding him and his wife absent—Next morning deceased's body found in well suffocated — Accused reserving defence at Magistrate's Court but stating at Sessions that he woke up in morning and found deceased missing and denying having ever seen his sister on night of murder — Facts held cast utmost suspicion on accused but lacked certainty essential for conviction.*

The deceased was murdered shortly after taking her meal at night. Her husband, the accused, was with her that night on his own admission. At midnight a cry was heard from the house whereupon the accused's sister who lived close-by went to investigate, and was told by the accused that there was nothing wrong. Later that night others summoned by the accused's sister went to the scene and found not only the deceased but her husband absent. The next morning the body of the deceased was found in a well suffocated. At the Magistrate's Court the accused reserved his defence but at the Sessions he stated that the next morning he woke up and saw the wife missing. He denied that he ever saw his sister :

Held that the facts undoubtedly cast the utmost suspicion on the accused; but lacked that element of certainty so essential to a conviction in a criminal case. [P 243 C 2; P 244 C 1]

(d) Criminal trial — Evidence—Accused shown to have been associated with other accused—Other accused acquitted—No hostile presumption can be drawn against accused from aforesaid association.

Where an accused has been shown to have been associated with another accused who is acquitted, no hostile inference can be drawn against the accused from that association. [P 243 C 2]

(e) Criminal trial — Evidence — Of three equally guilty accused two escaping for want of sufficient evidence — It is not proper to acquit other accused against whom evidence is sufficient.

Where of three equally guilty people two are so fortunate as to escape owing to the evidence not sufficiently implicating them, it is neither right nor logically sound to acquit the other accused against whom the evidence is sufficient. [P 244 C 1]

(f) Penal Code (1860), Ss. 302 and 201 — Accused admitting that after deceased's expiry in his presence he secretly disposed of corpse along with other accused — Confession does not amount to admission of murder — Offence falls under section 201.

The accused made a confession that after a struggle for about ten minutes the deceased expired in his presence and thereupon he secretly disposed of the corpse along with other accused :

Held that the confession did not amount to an admission of murder and the offence fell within the purview of S. 201. [P 244 C 1]

Nugent Grant, P. Chandra Reddi and P. Sivaramakrishnayya — for Appellants.

Public Prosecutor — for the Crown.

Mockett J. — The three accused have been convicted and sentenced to death for the murder of one Akkammal, the wife of accused 1. The charge alleges that Akkammal died of suffocation. Her body was found in the village well on the morning of 17th March at about 9 A. M. The medical evidence was to the effect that she had died of suffocation and not of drowning. For the present we will discuss the evidence on the basis that Akkammal was in fact murdered although it will be necessary to return to an investigation of the medical evidence at a later stage. The plan EX. W, indicates that accused 1 lived with his wife at Gangapurampalle in a kottam which is next to the main house in which his parents, P. W. 3, her husband, and her children lived. There is no doubt that accused 1 and his wife were not happy. Accused 1 had married a second wife and had been ordered by a Magistrate to pay Akkammal Rs. 10 a month for maintenance. Ex. J is the revision petition filed against that order, which was dismissed by King J. There is evidence by P. W. 1 the uncle, that accused 1 illtreated his wife. The case for the prosecution is that accused 1 hired accused 2 and 3, to murder his wife and that they all three together achieved this purpose. The evidence against accused 1 is of a different character from the evidence against accused 2 and 3. The evidence against accused 1 consists largely on his conduct on the night of Akkammal's death and after, and the case against accused 2 (and in a measure against accused 3) rests almost wholly on a confessional statement made by accused 2, EX. E. The principal witness against accused 1 is P. W. 3. She is accused 1's sister. Her story is that at midnight on 16th March 1939 she was woken by a cry, she came out of the house and saw accused 1 outside the kottam. She said to him, "What Ramanna, I heard a noise here," to which accused 1 replied, "There is nothing. You had better go and lie down." She does not appear however to have been easy in her mind because she woke her mother P. W. 4 and sent her to fetch P. W. 5 her husband. He came and then, in her evidence, she says :

I told him that I did not know exactly what had happened but I had heard a cry in my sleep.

In the statement taken from her under S. 164, Criminal P. C., she said much the same. This statement was taken on 20th March 1939. But the next part of her narrative is important, namely, that she, P. W. 5 and P. W. 6 went to the kottam to see what had happened, and that neither accused 1 nor Akkammal was there, but the beds were still spread out. Witnesses were called to corroborate P. W. 3's story. We must observe that P. W. 1 and P. W. 2 were called before P. W. 3 and it is difficult to understand how, until P. W. 3 had been called it was possible for evidence to be admitted of what she had said in the absence of accused 1. However, this was done and P. W. 1 stated that on 17th he questioned P. W. 3 who described her conversation with accused 1 in very different language. According to P. W. 1, P. W. 3 stated that about midnight she heard Akkammal cry out, "Chinnamma, I am dead," and on going to make enquiries accused 1 said, "Do you want to send me to jail now? Go and lie down." P. W. 2, the mother of Akkammal, also states that what P. W. 3 told her was that Akkammal cried out, "Chinnamma, I am dead," but P. W. 2 also states that P. W. 3 had told her that the deceased had fallen into a well and died on the 16th night. The above part of the evidence of P. W. 1 and P. W. 2 was inadmissible at the stage it was given, and in any case if that inadmissibility can be cured, it does not confirm P. W. 3's statement but on the other hand shows that a variety of statements is said to have been made by her. But P. W. 3 was examined at the inquest early on the morning of the 17th and there she said nothing about having been woken in the night by a cry. On the other hand Ex. XV shows that early next morning she got up and called to Akkamma to pound sajja, that none replied and so she opened the door and went inside the house.

It is of course said for the prosecution that P. W. 3 being the sister of the accused is making her evidence as favourable to him as possible. Other witnesses were called to corroborate her, i. e., P. Ws. 4, 5, 6 and 7. P. W. 4 professed to have no recollection of what happened. So her deposition in the Magistrate's Court was filed under S. 288, Criminal P. C. But that statement does not go much further than showing that P. W. 3 woke in the night owing to some noise which she said according to P. W. 4, might have been made by a sheep or a goat. P. W. 5 confirms P. W. 3. There is a somewhat contradiction in his evidence. He says that P. Ws. 1 and 2 did not come to his house the following night, a statement which P. W. 1 had made in Ex. A. There is no doubt that P. W. 3 was seriously alarmed and that P. W. 5, her husband, was fetched from his work at the sugarcane mill to investigate. P. W. 7 states that he was called by P. Ws. 5 and 6 to search for accused 1 and the deceased that he went to accused 1's house and found accused 1 and the deceased absent, that he then went to Nimmanapalle where he saw accused 1, and Papulamma, a woman associate of accused 1, that he asked accused 1 where Akkammal was to which accused 1 replied, "She has gone somewhere." It is clear from his examination at the Sessions that accused 1 admits he and his wife did go to sleep in his house that night. This is borne out also by Ex. N which is a report made to the village Magistrate by accused 1 himself. It is said to have been made at Nimmanapalle at 10 A. M. on 17th but the evidence of the village Magistrate himself (P. W. 31) shows that actually at 7 A. M. on that day accused 1 had reported that his wife was missing, on which P. W. 31 told him to search for her and that at 9 the accused came back and said that his wife's duppati was on the bank of a well near the village. The village Munsif accompanied him to the well and the body of Akkammal was discovered in the water.

Accused 1 was arrested on 31st March in a tope at Nimmanapalle by P. Ws. 31, 18 and 24. It is stated by the Sub-Inspector that accused 1 was not present at the inquest, but this does not appear to be correct because the village Munsif (P. W. 31) states that accused 1 was present at the well when the inquest was held. P. W. 29 also admits that although he did not see him at the inquest he saw him in the crowd. It does seem however that accused 1 was not playing a very important part and the theory of the learned trial Judge is that he was keeping in the background awaiting events and, when they did not take a favourable turn, disappeared. However this may be, it does appear to be clear that at an early stage of these proceedings the notion that accused 1 had murdered his wife was becoming a subject of public gossip and it is well known that accused persons do frequently abscond even though they may be innocent of the offence. P. W. 6 refers to a meeting at Nimmanapalle with accused 1 and to P. W. 5 asking accused 1, "Where is Akkamma?," to which he replied, "I too am searching for her." If any hostile inference is to be drawn

against accused 1 as to his presence at Nimmanapalle, it should be stated that the learned Judge did not question him as to why he was there and he thus had no opportunity of explaining his presence there.

The evidence, therefore, against accused 1 may be summarised as follows: It depends very largely on P. W. 3, the effect of whose evidence is that, hearing a noise at midnight she went to accused 1's house and there saw him and was told by him that there was nothing to be concerned about and that she could return to her bed, that later accused 1 and his wife were both found to be absent from the house; and that at 9 A. M. on the following morning, the 17th, Akkammal's body was found murdered in a well. There is the further evidence given by P. W. 28 that accused 1 and 3 were seen whispering together under a tree at Nimmanapalle on the evening before Akkammal died, a matter which was reported to the Sub-Inspector after the event. This witness had never seen accused 3 before that day but was able to identify him on the following Sunday (the 19th). The answer of accused 1 to this is to the effect that he went to bed that night with his wife and that the next morning he woke up and saw her missing. He denies the evidence of P. W. 3 and P. W. 28. He also says he was present at his house on the day on which the inquest was held, a matter which appears to be in part corroborated by P. W. 31 and others. He denies that he was arrested in the manner alleged. He says that he went himself to the village Munsif's house. It is convenient now to turn to Exs. N and A. It must be remembered that Ex. N was given on the morning of the 17th to the village Munsif by accused 1 himself and it is a simple report of a quarrel with Akkammal and of her subsequent disappearance and later the discovery of her corpse in the well. Ex. A is the first information report which was given on the 18th to the Sub-Inspector of Police at Agraharam Camp at 8-30 A. M. The contents of that report cannot be evidence, but it has been brought to our notice and we cannot overlook it that it contains a statement by P. W. 1 that one Venkata Reddi (who was not examined) had reported to him that Rami Reddi at 10 P. M. on 16th March had said to him (Venkata Reddi),

> my wife Akkammal fell into a well. I gave her two blows last night. My wife thereon ran up and I too followed her. She, who had been going two chains ahead of me, fell into a well.

Now, this is a totally different version of the affair and Venkata Reddi is not called as a witness; but, if it is true, it is at least not inconsistent with the story of P. W. 3. Akkammal may have cried out when she was struck which would account for the cry in the night spoken to by P. W. 3. That she ran away and threw herself into a well might account for the absence of both herself and her husband. Much therefore must turn on the evidence of whether this woman was or was not suffocated as charged by the prosecution.

Before dealing with this topic, it is convenient to turn to the case against accused 2 and 3 which stands on a totally different basis. We have alluded to the mysterious Venkata Reddi referred to in Ex. A. This is not the only feature of this case which arouses inquiry. It is not at all clear how it was that accused 2 and 3 were arrested. It is alleged by the police that they were arrested because they were seen by P. W. 10 passing a tamarind tree on the way to Nimmanapalle on the 15th, Wednesday. But as P. W. 10 was unable to see the accused from the witness box this explanation cannot be a fact. This incident is on a par with the evidence of P. W. 18 who claims to have searched the village for accused 1 who was unquestionably there all the time. But, whatever be the reason, accused 2 was arrested at 10 P. M. on 18th March and accused 3 on the morning of 19th March. They both made statements to the police, parts of which have been admitted in evidence under S. 27, Evidence Act. At 10 P. M. on Saturday the 18th March accused 2 made a long statement Ex. E, of which the following has been admitted by the learned Sessions Judge under S. 27, Evidence Act:

> By that time Rami Reddi's wife, Akkammal, struggled for about ten minutes and expired. We tied the bundled up corpse to the bamboo. I and Mondi Ramudu then went by a stream running eastwards, then along a path proceeding north of the woodapple tree, and then to the Racha of ragi (popiar) trees, and turned to the west and threw the pole with which we carried the corpse over the fence of Syed Sabna's mango tree.

Accused 3 also made a long and detailed statement, Ex. R at 2-30 P. M. on Sunday the 19th, of which the following has been admitted by the learned Sessions Judge under S. 27, Evidence Act:

> I went to Nimmanapalle on Wednesday . . . . I and Rami Reddi were together going sometime after sunset, when another Saheb too saw us.

The difference of the dates of Exs. E and R, the above statements, is important, especially to accused 3. After making the statement Ex. E, accused 2 took P. W. 33 (Sub-Inspector) and others of whom P. Ws. 32 and 9

were called and showed M. O. 1, a bamboo pole. So EX. E was admitted on the basis that the pole was discovered in consequence of the information received in EX. E. Exhibit R was admitted as leading to the discovery of the fact testified to by P. W. 28 that accused 3 and Rami Reddi were together sometime after sunset on the 15th. The Sub-Inspector (P. W. 33) stated that, as a result of that statement, he discovered P. W. 28 who did depose to the fact that accused 1 and 3 were together. Apart from these statements, the evidence against accused 2 and 3 may be summarized as follows: Accused 2 was seen by P. W. 10 on the 15th evening with P. W. 3, but this witnesse's eyesight has already been shown to be faulty. P. W. 11 on Wednesday saw accused 2 and 3 under a tamarind tree by the side of the road. P. W. 27 states that he saw accused 2 and 3 at ten minutes past nine in the morning between his village Reddivarepalle and Chintaparti. He claims to know both the accused by sight. Then there is a group of witnesses, P. Ws. 29, 30 and 33. P. W. 29 is the karnam of Agraharam village where the Sub-Inspector (P. W. 33) was at the time the crime was reported to him. P. W. 30 was the acting village Munsif of Agraharam in March. These two and the Sub-Inspector (P. W. 33) state that they were together in connexion with the investigation of a case of theft, and that at 2 A.M. on the night of the 16th, they saw accused 2 and 3 coming together; they questioned accused 2 who said he was Syed Kassim of Nimmanapalle; they said they were going to the Gunti Gamgamma festival at Chintaparti, which festival was in fact going on. Accused 2 had a torchlight. At that time, says P. W. 33, there was no reason to suspect them and they were allowed to proceed. The Sub-Inspector received news of the offence at 8-30 A. M. on the 18th at Agraharam and he thereupon proceeded to investigate. P. W. 21 says he saw accused 2 and 3 together at a village five miles from the scene of Akkammal's death on the Thursday night, which is 16th March.

It is convenient now to deal with the case against accused 3. The only evidence against him is that he was in the company of accused 1 and 2 at or about the time of the crime. His confessional statement, EX. R, merely led to a discovery of a witness speaking to this fact as regards A-1. Exhibit E is not evidence in the correct sense of that word against accused 3. A confession by a co-accused may be taken into consideration against another accused and confessional statements under S. 27, Evidence Act, have been held to come within the terms of S. 30, Evidence Act, by this High Court: *vide* 1937 M W N 442.[1] But there must be admissible evidence pointing to the accused's guilt. In assessing the probative value of that evidence a co-accused's confession may be taken into consideration. The evidence against accused 3 as already stated is only that he was in the company of the other accused before the crime as testified to by P. W. 28 and after the crime as testified to by the other witnesses referred to above. This being so, we do not consider that the Court is entitled to convict accused 3 when the admissible evidence against him goes no further than we have indicated. Such a conviction in this case would amount to a treatment of EX. E, as substantive evidence against accused 3.

There remain the cases of accused 1 and 2. It must be remembered that the parts of EX. E admitted do not contain any confession of the killing of Akkammal. The effect of EX. E is that Akkammal was struggling and died. Why she was struggling is not revealed. The rest of the statement deals with the disposal of the body. But Mr. Grant has asked us to read the whole of that confessional statement and he argued as follows: This statement was never made at all by accused 2. It must be read not as a statement of accused 2 at all and therefore not within the prohibition of S. 25, Evidence Act. It must be read in order to show that the case for the prosecution is demonstrably false because the actual evidence, and especially the medical evidence, is inconsistent with the statement put into the mouth of accused 2 by the police. A Court is always reluctant to shut out any argument advanced by an accused person; and we have examined this statement in the interests of the accused not as a confession but from the point of view advanced by Mr. Grant. An examination of this statement shows that it is alleged that Akkammal met her death by accused 3 "with all his strength squeezing her throat, face and nose with both of his hands." Mr. Grant asks us on the medical evidence to say firstly that it is not certain that this woman was murdered at all and secondly that the mode of her death as testified to by the doctor does not agree with the prosecution case as falsely put forward in EX. E.

1. ('37) 24 AIR 1937 Mad 618 : 171 I C 245 : 38 Cr L J 1027 : I L R (1937) Mad 695 : (1937) 2 M L J 60 : 1937 M W N 442 (F B), In re Athappa Goundan.

Exhibit L is the post mortem certificate and P. W. 16 is the sub-assistant surgeon who conducted the post-mortem. He expresses the opinion, and a very definite opinion, that this woman was not drowned, and he gives six reasons for arriving at that conclusion and he stated, although none of the reasons for concluding that death was not due to drowning was in itself conclusive, yet, if death had been due to drowning, many of these characteristics would have been found. There were no characteristics of death by drowning but there was evidence of suffocation. He found fourteen injuries on the body of the deceased. Of them, referring to EX. L injuries 2, 3, 4, 6 and 7 were semi-circular nail-marks, and in addition, says the doctor, injuries 8, 9, 10 and 14 might have been caused by nails. The effect of this evidence is that injuries, 2, 3, 4, 6 and 7 were caused by nails, in his judgment, owing to the semi-circular marks and the other injuries mentioned might have been caused by nails.

The reasons for saying that death was due to asphyxia due to suffocation was largely based on the marks of the nails and violence round the mouth, but he considered also the dilated pupils; the right side of the heart being engorged and organs congested show death by asphyxia. There was mud on the toes of both feet and nails and both fingers. The defence relied strongly on the latter feature. Lyons' Medical Jurisprudence, Edn. 5, p. 295 supports the view that mud in the nails indicates struggle in the water during life and is presumptive evidence in favour of death by drowning. But such a presumption is not absolute and other circumstances may of course negative it. But the defence also relies on the fact that there is no evidence of any marks on the throat and it must be remembered that accused 2 is said to have squeezed her throat with all his might. But it must be remembered also that her face and nose were also squeezed and there is definite evidence of finger-marks on the face and nose. We have examined the evidence of the doctor and we are impressed with its care and detail and it seems to us to come to this: that the only feature which the defence can suggest indicates drowning is the presence of mud on the toes and nails, and this in a country of bare-feet and not invariable cleanliness can scarcely weigh against the fact that no single characteristic of drowning is found by the doctor. We are satisfied that this woman was not drowned but met her death by violence and that the doctor's evidence is reliable beyond question. It must be remembered that the process described in EX. E combines both strangulation and suffocation and it may be that this woman was suffocated rather than strangled, which is in complete accord with the doctor's evidence.

Akkammal was therefore murdered shortly after taking her meal on the night of 15/16th March 1939. Accused 1 was with her that night on his own admission. At midnight a cry was heard from the house and P. W. 3, an indisputably friendly witness, went to investigate. She was told there was nothing wrong by accused 1. Later that night, others summoned by P. W. 3 went to the scene and they found not only the deceased but—this is of importance—her husband absent. The next morning the body of Akkammal is found in the well suffocated. What happened on that night is known of all men to accused 1. What is his answer? At the Magistrate's Court he reserved his defence. At the Sessions he stated that the next morning he woke up and saw her missing. He denies that he ever saw P. W. 3. These facts undoubtedly cast the utmost suspicion on accused 1; but the question is, do they amount to mere suspicion, do they contain that element of certainty so essential to a conviction in a criminal case? Accused 1 has been shown to have been associated with accused 3; we are acquitting him and therefore no hostile inference can be drawn against accused 1 from that association. There is nothing in the confession of accused 2 to be taken into account against accused 1. We think it proper to say that, while appreciating the extreme difficulty of analysing a confessional statement and admitting only such portions of it as relate distinctly to a fact discovered, it is not impossible that the learned Sessions Judge might have admitted far more than he did and that, had he done so, the position of accused 1 might have been very different. But the prosecution have not thought fit in this case to apply for the reception of further evidence and we, therefore, are considering those portions of EX. E which are admitted and no more. We have already alluded to EX. A which reveals that a witness who was not called stated that accused 1 had said that his wife fell into a well in the sense that as a result of a quarrel she threw herself therein; and we have already alluded to certain unsatisfactory features about the denial of the presence of accused 1 in that village. As a result, our conclusion is that the evidence is not conclusive, that there is a doubt, and

that accused 1 is entitled to the benefit of that doubt.

As our decision with regard to accused 1 has been arrived at by a strict application of the rules of evidence, similarly in the case of accused 2 we judge, and it is well to remember that if of three equally guilty people two are so fortunate as to escape owing to the evidence not sufficiently implicating them, it is neither right nor logically sound to acquit the other accused against whom the evidence is sufficient. In the case of accused 2 according to his own admission, he carried the body of a woman demonstrably shown to have been murdered, and secreted it in a well; the pole on which the body was carried being discovered as a result of his admission, and he was present in the neighbourhood which enabled him to commit the crime was certain. His explanation at the sessions of EX. E is that, coerced and beaten by the police, he agreed that he would "say as they desired and then they recorded as they liked," and he denies that he either showed M. O. 1 the pole or that he associated with accused 3. It will be noticed that he did not say in the Magistrate's Court that the statement was extracted by coercion. We do not think there is any substance in the suggestion that EX. E was extracted in the manner suggested by the defence, and we have already made clear that we have examined it only for a consideration of the defence theory that it was a pure concoction, but it will be observed that that is not strictly the case of accused 2. He said that he "would say as they (the police) desired. Then they recorded as they liked." We entirely reject the idea that the police would have put the whole of this rigmarole into the mouth of this accused when so many much easier methods were open to them had they desired to avail themselves of such methods. But, owing to the exclusion of much in EX. E that might possibly have been admitted and again owing to the absence of any application by the prosecution to admit further evidence, we find nothing in EX. E to amount to an admission that accused 2 committed the offence of murder. He was however unquestionably engaged in disposing of the body of a murdered woman. In his case we are not satisfied that the evidence against him is sufficient to warrant a conviction for murder. We however are satisfied beyond doubt that he has committed an offence under S. 201, Penal Code.

The result of our conclusion is that the convictions and sentences on accused 1 and accused 3 are set aside, their appeals allowed and they are acquitted and will be set at liberty. The conviction and sentence of accused 2 under S. 302, Penal Code, is set aside and he is acquitted; but he is convicted of an offence under S. 201, Penal Code, and is sentenced to rigorous imprisonment for seven years.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 244

WADSWORTH AND PATANJALI SASTRI JJ.

Narayanasami Reddy—Petitioner

v.

Veerasami Reddy and another —

Respondents.

Civil Revn. Petn. No. 1634 of 1938, Decided on 20th August 1940, to revise order of Dist. Munsif, Chingleput, D/- 12th September 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii), Proviso (D) —Proviso (D) covers landholder of estate or estates in respect of which peshkush exceeding Rs. 500 is paid.

Section 3 (ii), Proviso (D) must be read as covering a landholder of an estate or estates, in respect of which estate or estates a sum exceeding Rs. 500 is paid as peshkush. [P 244 C 2]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii)—Person entitled to collect rents of estate is landholder and not agriculturist.

Every person entitled to collect rents of an estate is a landholder under S. 3 (5), Madras Estates Land Act, and therefore is not an agriculturist. [P 245 C 1]

K. Bhashyam Iyengar and R. Viswanatha Iyer for T. R. Srinivasan—for Petitioner.

T. M. Krishnaswami Iyer and A. Srirangachariar—for Respondents.

Wadsworth J. — The question in this revision petition is whether the petitioner is entitled to the benefits of an agriculturist, having regard to the terms of proviso (D) to S. 3 (ii) Madras Act, 4 of 1938. The petitioner was at the time of his application the landholder of more than one estate. The total peshkush payable in respect of these estates exceeded Rs. 500, but no one of the estates paid so much as Rupees 500 peshkush. Petitioner contends therefore that he is not the landholder of an estate in respect of which estate a sum exceeding Rs. 500 is paid as peshkush. We are unable to accept this contention. Reading the definition along with S. 3 (35), Madras General Clauses Act, we must hold that the definition is to be read as covering a landholder of an estate or estates, in respect of which estate or estates a sum exceeding Rs. 500 is paid as peshkush. That is the view taken by the Court below.

It is also suggested that the petitioner comes within the definition of an agriculturist because in one of the estates standing in his name he is not the real owner. We cannot accept this contention. A landholder under S. 3 (5), Madras Estates Land Act, is a person owning an estate and includes every person entitled to collect the rents of the estate. There is no doubt that in respect of the estate which was purchased in court auction in the name of the applicant, he was either the owner or the person entitled to collect the rents. In the result therefore the civil revision petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 245

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

P. A. Raju Chettiar — Appellant

v.

(*Minor*) *Shanmugham Pillai and others* — Respondents.

Appeal No. 216 of 1938, Decided on 1st May 1940.

(a) Civil P. C. (1908), S. 146 and O. 22, R. 10 —Party to suit creating mortgage during pendency of suit—Mortgagee can appeal from decree passed in such suit.

Where during the pendency of a suit a party has created a mortgage and a decree is passed against the party, the mortgagee is competent to file an appeal against the decree : A I R 1919 Mad 755, *Rel. on* and A I R 1922 P C 304, *Expl.* [P 245 C 2; P 246 C 1]

(b) Will — Construction — Will providing that estate should go to daughter for her life and after her death to her sons or sons' children which would be alive — Word 'or' held could not be read as 'and'.

A will provided that testator's estate should go to his daughter during her lifetime and after her death the estate should go in equal shares to "such of his daughter's sons or sons' children as would be alive" :

Held that the word 'or' could not be read as 'and'. What the will said was that after daughter's death the estate should go to her sons or if there were no sons living then to the sons' children. [P 246 C 1]

T. V. Ramiah — for Appellant.

R. Desikan, K. Parasurama Iyer and V. Meenakshisundaram — for Respondents.

Leach C. J. — This appeal raises the question of the construction of a will. One Shanmugham Pillai, the maternal great-grandfather of respondents 1, 2 and 3 and the grandfather of respondent 4, died in November 1917 and by his will directed that the balance of the income of his estate, after allowing for a charitable bequest, should be paid yearly by the trustees appointed by the will to his daughter Ponnammal during her lifetime. Then follow these provisions :

> After her death all my properties should go in equal shares to such of my aforesaid daughter Ponnammal's sons or sons' children as are alive. The said trustees should put them in possession of the properties as aforesaid at the appointed time according to their respective shares. At the time of such delivery of possession, if those who take the property are minors they (trustees) should manage only their share of properties and deliver possession thereof as soon as the minor becomes a major.

Ponnammal died in or about the month of July 1935. She was survived by her son respondent 4, who was married to one Sarathambal, the mother of respondents 1, 2 and 3. Sarathambal and her children filed a suit in the Court of the subordinate Judge, Coimbatore to recover three-fourths of the estate of Shanmugham Pillai. Their contention was that on the death of Ponnammal the entire estate became divisible in equal shares between respondent 4 and his children. They urged that the word 'or' in the passage "after her death all my properties should go in equal shares to such of my aforesaid daughter Ponnammal's sons or sons' children" should be read as 'and.' The subordinate Judge accepted this construction of the will and decreed the suit. Hence this appeal.

The appellant is a mortgagee of a part of the estate, the mortgage having been created by respondent 4 during the pendency of the proceedings in the trial Court. Respondent 1 having challenged the right of the appellant to file this appeal it is necessary to deal with this point first. Section 146, Civil P. C., says that save as otherwise provided by the Code or by any law for the time being in force where a proceeding may be taken or an application made by or against a person, then the proceeding may be taken or the application may be made by or against a person claiming under him. Order 22, R. 10 makes provision for the continuance of a suit when there has been a death or marriage or insolvency during its pendency and when there has been an assignment or devolution of interest before the hearing has been completed. There is nothing in O. 22, which prevents the application of S. 146 in this case and a decision to this effect was given by this Court in 41 Mad 510.[1] For the respondents it has been suggested that the decision of the Privy Council in 1 Pat 581[2] has in

1. ('19) 6 A I R 1919 Mad 755: 48 I C 840: 41 Mad 510, Sitaramasami v. Lakshminarasamma.
2. ('22) 9 A I R 1922 P C 304 : 68 I C 973 : 49 I A 220: 1 Pat 581 (P C), Manindra Chandra Nandi v. Ram Kumar Lal.

effect overruled 41 Mad 510.[1] A perusal of the judgment of the Privy Council shows that this is not the case and it was so held by this Court in 56 Mad 469.[3] We consider that the appellant had the right to file this appeal and the objection must be overruled. The appellant's contention that the decision of the trial Judge is erroneous is well founded. The word 'or' in this will cannot be read as 'and.' What the will says is that after Ponnammal's death the estate shall go to her sons or if there are no sons living to the sons' children. That the will must be construed in this way is indicated by S. 96, Succession Act. That section says :

> Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he is then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Illustration (iv) to the section runs as follows :

> Property is bequeathed to *A* or his heirs. *A* survives the testator. *A* takes the property absolutely.

The legal position is stated in Jarman on Wills (Edn. 7, p. 452) in these words :

> The question whether 'or' imports substitution arises most frequently in cases where the latter part of the gift is in favour of a class of persons related to the original devisee or legatee, such as 'issue,' 'children,' 'heirs'; as for example, where the gift is to *A* or his issue or to *A* or in case of his death to his issue. The tendency of the modern cases is to construe such a gift as intended to substitute the issue for the original devisee or legatee in the event of the latter dying in the testator's lifetime.

In (1849) 12 Beav 547=50 E R 1170,[4] there was a bequest to "my son William or his children." It was held that the son who survived was absolutely entitled and that the children could only take by substitution in the case of the death of their parent. In (1858) 24 Beav 217=53 E R 341,[5] there was a bequest to A for life and after her death to B and C or their children. B and C survived. It was held that their children took nothing. It is unnecessary to pursue the investigation into the authorities further. Sufficient has been said to make it clear that the subordinate Judge erred in construing the will in the way he did. The appeal will be allowed and the suit dismissed with costs against respondents 1, 2 and 3 in this Court and in the Court below.

C.R.K./D.S. *Appeal allowed.*

3. ('33) 20 AIR 1933 Mad 411: 143 I C 578: 56 Mad 469 : 64 M L J 489, Sreeramamurthi v. Jayaraja Lakshmi Ammal.
4. (1849) 12 Beav 547: 50 E R 1170, Penley v. Penley.
5. (1858) 24 Beav 217: 53 E R 341, Sparkes v. Restal.

A. I. R. 1941 Madras 246

Special Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

Al. Vr. St. Veerappa Chettiar — Petitioner

v.

Commissioner of Income-tax, Madras — Respondent.

O. P. No. 114 of 1940, Decided on 25th September 1940.

Income-tax — Simple mortgage by assessee's father in 1913—Suit on mortgage in 1925 compromised and decree passed—Debtor to pay to assessee Rs 3,75,000 in full settlement of claim before 31st July 1931—On failure to pay as aforesaid zamindari to become assessee's absolute property—Compromise decree appointing receiver and providing collection made by him to be set off against Rs. 3,75,000—In event of non-payment of balance remaining due after aforesaid set-off zamindari still to become assessee's absolute property—From 28th July 1928 date of compromise decree to 31st July 1931, receiver collecting Rs. 42,000 and paying same to assessee—In default of payment of balance on 31st July 1931 assessee becoming absolute owner of zamindari — Assessee's title to zamindari challenged in 1933 after he got possession thereof and finally decided in his favour in 1936—In 1937-38 income-tax authorities while assessing assessee including all profits made out of mortgage transaction — Assessment at close of transaction held justified in law especially when income-tax authorities had agreed not to assess profits of transaction until it was closed—Rupees 42,000 collected by receiver held not agricultural income — Aforesaid amount held constituted profits of mortgage transaction and therefore no deduction could be allowed in respect of that.

In the year 1913, the assessee's father advanced Rs. 2,15,000 on the security of a zamindari under a simple mortgage. The loan was not repaid and in 1925 the assessee was compelled to file a suit to enforce payment of the amount then due. A compromise was eventually agreed upon, and a decree was passed embodying the terms of settlement. Under this decree the debtor was to pay to the assessee a sum of Rs. 3,75,000 in full settlement of all claims on or before 31st July 1931. In the event of the amount not being paid by the due date the zamindari was to become the absolute property of the assessee's family. By this decree a receiver was appointed and it was a term of the compromise that any moneys which the assessee received from the receiver should be set off against the Rs. 3,75,000 and that the debtor should only be responsible for the balance. It was however stipulated that in the event of the balance not being paid, the whole of the zamindari would still become the property of the assessee's family. From 28th July 1928, the date of the compromise decree, to 31st July 1931 Rs. 42,000 was paid into Court by the receiver as the net rent collections for that period. This amount was later on paid to the assessee. The sum due to be paid to the assessee under the terms of the compromise decree on 31st July 1931 was not paid and in consequence his family became the absolute owners of the zamindari. The estate was not however handed over to the assessee until 2nd February 1933. But in that year the assessee's title

to the zamindari was challenged and was finally decided in his favour in 1936. The assessee however had induced the income-tax authorities to agree to the assessment being made when the mortgage transaction was closed. In assessing the assessee as the manager of the family for the year 1937-38 the income-tax authorities included the profits which they calculated had been made out of the mortgage transaction. The assessee however contended that as the amounts paid to him in cash were received by him more than three years before the year of account they were not assessable to tax:

Held that the sum of Rs. 42,000 representing rents which the receiver collected from the tenants of the agricultural lands of the zamindari could not be regarded as agricultural income inasmuch as the assessee was neither the owner of the zamindari when moneys were collected nor in the position of a usufructuary mortgagee : A I R 1935 P C 172, *Disting.* [P 248 C 1]

Held further that the assessee was not entitled in law to escape assessment on the profit which was made out of the mortgage transaction. On his own showing the transaction did not close until the High Court had given its decision in 1936 and therefore it was not until that year profits could properly be calculated. In circumstances the income-tax authorities were fully entitled to assess on that basis. [P 248 C 2]

Held also that under the terms of the compromise decree, the assessee having acquired the whole of the zamindari plus the Rs. 42,000, the Rs. 42,000 were part of the profit which was made out of the transaction, and therefore no deduction could be allowed in respect of that amount. [P 249 C 1]

P. Kesava Aiyangar and Krishnamachariar — for Petitioner.

K. V. Sesha Aiyangar — for Respondent.

Leach C. J. — The petitioner is the managing member of an undivided Hindu family and as such he has been assessed to income-tax for the year 1937-38. The family belongs to the Nattukottai Chettiar community and carries on a money-lending business. In the year 1913, the petitioner's father advanced Rs. 2,15,000 to Bangaru Ammal, the zamindarini of Thevaram, on the security of the zamindari. The loan was not repaid and in 1925 the petitioner was compelled to file a suit in the Court of the subordinate Judge of Dindigul to enforce payment of the amount then due. Accumulations of interest, it was said, had brought the figure upto Rs. 5,49,683, but this was denied. A compromise was eventually agreed upon and a decree was passed by the subordinate Judge embodying the terms of settlement. Under this decree the debtor was to pay to the petitioner a sum of Rupees 3,75,000, in full settlement of all claims on or before 31st July 1931. In the meantime this sum was not to carry interest. In the event of the amount not being paid by the due date the zamindari was to become the absolute property of the petitioner's family. By this decree a receiver was appointed and it was a term of the compromise that any moneys which the petitioner received from the receiver should be set off against the Rs. 3,75,000, and that the debtor should only be responsible for the balance. It was however stipulated that in the event of the balance not being paid the whole of the zamindari would still become the property of the petitioner's family. From 28th July 1928, the date of the compromise decree, to 31st July 1931, Rs. 42,000 was paid into Court by the receiver as the net rent collections for that period. This amount was later on paid to the petitioner. The sum due to be paid to the petitioner under the terms of the compromise decree on 31st July 1931 was not paid and in consequence his family became the absolute owners of the zamindari. The estate was not however handed over to the petitioner until 2nd February 1933.

The zamindarini died on 14th December 1930 and her heir was her mother Errammal. Errammal died on 2nd February 1933, leaving a will by which she purported to bequeath the zamindari to one Thangaswami Naicker, who with two others challenged the right of the petitioner to obtain possession of the estate. The case was carried to this Court and the litigation did not end until 2nd September 1936, when the title of the petitioner's family to the property was finally decided. Until this had happened, the account books of the petitioner showed the zamindarini as the debtor, but the title of the petitioner's family having been confirmed he closed this account and opened one under his own name transferring to that account the moneys which he had received in connexion with the loan. In assessing the petitioner as the manager of the family for the year 1937-38 the income-tax authorities have included the profit which they calculated has been made out of this mortgage transaction. The profit has been calculated at the sum of Rs. 2,57,998, less Rs. 84,700, which had been received towards the loan before 1924. The petitioner objected to an assessment being made on this basis and he requested the Commissioner of Income-tax to refer to this Court, under the provisions of S. 66, Income-tax Act, the questions raised by him. In accordance with this request the Commissioner has referred the following questions :

(1) Whether the sum of Rs. 42,000 deposited in the Court between July 1928 and July 1931 and withdrawn by the petitioner and adjusted as income in the year of account is agricultural income.

(2) Whether the entire income excluding the sum of Rs. 84,700 interest realized in 1915 to 1923 from this transaction as a whole can be said to have

accrued, arisen or been received in the year of account.

The petitioner's case with regard to the first question is this. He says that as the Rs. 42,000 represents rents which the receiver collected from the tenants of the agricultural lands of the zamindari this cannot be taxed, income from agriculture being exempt. If the petitioner were the owner of the zamindari when these moneys were collected there would be force in the contention, but he was not, nor was his family. These moneys were paid into Court by the receiver in reduction of the amount due under the mortgage and the total sum was paid over to the petitioner for this purpose. The petitioner was not even in the position of a usufructuary mortgagee. He held a simple mortgage and the title to the estate claimed by him did not vest until after all these moneys had been collected and paid into Court in reduction of the mortgage debt. There is no substance at all in the petitioner's contention here. It has been suggested that the decision of the Privy Council in 14 Pat 623=62 I A 215,[1] has application, but this cannot be accepted. That case had reference to a usufructuary mortgage and, as I have already mentioned, the petitioner was never in the position of a usufructuary mortgagee.

The second question also must be answered in favour of the income-tax authorities. Year by year from 1926-27 until the year of assessment 1937-38 the petitioner was pressing the income-tax authorities not to take into account any sums received by him on account of this mortgage, but to leave the position open until the matter had been concluded. When the petitioner's agent produced before the Income-tax Officer the accounts in respect of the year 1926-27 it was found that no interest in respect of the loan to the zamindarini had been debited and it was contended by the assessee that as the loan was the subject-matter of litigation no payment of interest should then be taken into account. This contention was accepted. In the year of assessment 1929-30 the Income-tax Officer discovered that the petitioner had obtained a decree against the zamindarini, but the Income-tax Officer was induced to stay action by the statement that no execution proceedings had been taken and that when the decretal amount was realized the income thereby received would be accounted for in his books. In the assessment year 1930-31 no accounts were produced for the year of account. The petitioner's agent here represented that proceedings for the recovery of the decretal amount had not been taken and that it would be sometime before any money was realized on the loan. The accounts for the assessment year 1931-32 showed that a sum of Rs. 38,865 had been received in the previous year. The contention then raised was that unless the decretal amount was realized in full no part of the realization could be taken as profit. For the assessment years 1932-33 and 1933-34 the accounts again showed receipts on account of this mortgage. Thereupon the petitioner's agent represented that there was an understanding between the department and the petitioner that interest should be taken into account only when the entire amount was repaid. On this representation the income-tax officer took no portion of the moneys received in these two years as income assessable in those years.

Notwithstanding that the petitioner induced the income-tax authorities to agree to the assessment being made when the transaction was closed, he now says that as the amounts paid to him in cash were received by him more than three years before the year of account they are not assessable to tax. To say the least, it is not an honest contention to put forward in view of the representations made by him from year to year. But without taking into consideration the honesty or dishonesty of the petitioner or the effect of his representations, it is clear that he is not entitled in law to escape assessment on the profit which was made out of this mortgage transaction. On his own showing this transaction did not close until the High Court had given its decision in 1936 and therefore it was not until that year profits could properly be calculated. In these circumstances the income-tax authorities were fully entitled to assess on that basis. The question whether the profit calculated by the department is excessive does not arise in this reference, but the Court has been given to understand that in other proceedings the petitioner intends to challenge the figure arrived at by the income-tax authorities.

There is one other point which requires to be dealt with. The petitioner says that in any event he should be allowed to deduct the Rs. 42,000 referred to in the first question as that sum was paid into Court in reduction of the Rs. 3,75,000. In raising this point the learned advocate for the petitioner

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1. ('35) 22 AIR 1935 P C 172: 157 I C 289: 14 Pat 623 : 62 I A 215 (P C), Commissioner of Income-tax v. Maharajadhiraj of Dharbanga.

overlooks the fact that under the terms of the compromise decree his client got the whole of the zamindari plus the Rs. 42,000. The Rs. 42,000, is part of the profit which was made out of the transaction, and therefore no deduction can be allowed. For the reasons indicated we answer the first question referred in the negative, and the second question in the affirmative. The petitioner must pay the costs of this reference, Rs. 250.

C.R.K./G.N. *Answer accordingly.*

A. I. R. 1941 Madras 249

Special Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

Vaidyaratnam P. S. Varier, Kottakkal, South Malabar — Petitioner

v.

Commissioner of Income-tax, Madras — Respondent.

O. P. No. 267 of 1939, Decided on 24th September 1940.

Income-tax Act (1922), S. 6 (vi) and (iv)— Assessee carrying on extensive business in Ayurvedic medicines and also maintaining dramatic troupe — Troupe giving public performance at assessee's different places of business—At all performances admission fees charged — Maintenance of troupe held possible source of income and not hobby — Profits arising from troupe held income from "other sources" within meaning of S. 6 (vi) —Whether troupe was maintained for advertising medicines held immaterial.

The assessee who carried on an extensive business in the manufacture and sale of Ayurvedic medicines also maintained a dramatic troupe which gave public performances in the Malabar District, Cochin and Travancore at certain seasons of the year. At Kottakkal, Palghat and Calicut the assessee was the owner of premises in which he sold his medicines. At each place, adjoining the premises used by him for the sale of his Ayurvedic medicines, was a hall in which the assessee's dramatic troupe also gave performances. At all the performances prices for admission were charged :

Held that the assessee maintained the troupe on a commercial basis; whether he did so for the purpose of advertising his Ayurvedic medicines was immaterial. The maintenance of troupe was not a hobby but a possible source of income and the profits arising therefrom were obviously income from "other sources" within the meaning of S. 6 (vi), even if it could not be classified as income from a business under S. 6 (iv). [P 250 C 1]

D. A. Krishna Variar and Ravi Varma — for Petitioner.

K. V. Sesha Ayyangar — for Respondent.

Leach C. J. — The assessee is an Ayurvedic physician. He carries on an extensive business in the manufacture and sale of Ayurvedic medicines at Kottakkal, Palghat and Calicut. In addition to the income which he derives from the manufacture and sale of medicines and from the practice of his profession, he derives income from property and "sundry other sources." One of his other activities is the maintaining of a dramatic troupe which gives public performances in the Malabar District, Cochin and Travancore at certain seasons of the year. At Kottakkal, Palghat and Calicut the assessee is the owner of premises in which he sells his medicines. At each place, adjoining the premises used by him for the sale of his Ayurvedic medicines, is a hall in which the assessee's dramatic troupe also gives performances. At all the performances prices for admission are charged. For the year 1937-1938, the assessee returned an income of Rs. 18,061-4-11 and sought to deduct a sum of Rs. 3475 as loss incurred by him in that year in the maintenance of the dramatic troupe. The Income-tax Officer refused to allow the deduction. The ground for refusal was that the maintenance of this dramatic troupe really amounted to a hobby of the assessee and therefore could not be classified as a business. This order of the Income-tax Officer was confirmed by the Commissioner on appeal. The assessee then asked the Commissioner to state a case on the ground that the refusal to allow the deduction involved a question of law. The Commissioner rejected the application, and in consequence the assessee applied to this Court for an order compelling the Commissioner to make a reference. This Court agreed with the assessee that a point of law was involved and accordingly directed the Commissioner to make a reference on the following question :

> Is there material to support the finding that the assessee's dramatic troupe is maintained by him as a hobby and not as a business or as a source of income?

The Commissioner has now made the reference. The assessee has maintained this dramatic troupe for many years, and in the statement of the case made by the Commissioner the profits and losses for the years from 1922-23 to 1933-34 are set out. In 1922-23 there was a profit of Rs. 997 and in 1928-29 a profit of Rs. 1820. It is common ground that when these profits were made the income-tax authorities assessed them to income-tax. In the other years mentioned there were losses and upto and including the year 1934-35 the income-tax authorities allowed deductions for the losses when assessing the assessee to income-tax. It is difficult to see how they could do otherwise seeing that they had insisted on taxing the assessee

when he had made profits. The Income-tax Officer, Palghat, who made the assessment for the year 1935-36 however decided that the assessee should not be allowed to deduct the loss of Rs. 3475 which admittedly he had suffered in that year in this connexion. The only ground that the Income-tax Officer advanced for disallowing this loss was that the dramatic troupe was a hobby and therefore could not become "a source" of income. That was his opinion, and as already indicated it was concurred in by the Commissioner.

The Commissioner has given two reasons in support of his decision. He says that the motive behind the formation of the dramatic troupe was philanthropic and not commercial because in a prospectus issued by the assessee it was said that the object of the founding of the troupe was to stage Malayalam dramas on reformed lines and to utilise the proceeds arising out of such performances for rendering free medical aid at the assessee's Vaidyasala. The second reason was that the assessee would never have persevered with such a losing concern unless he looked upon it as a hobby unconnected with his business activities. In opposing the finding that he was merely indulging in a hobby the assessee stated he seldom attended the performances and therefore the maintenance of the troupe could not be regarded as a hobby. The Commissioner has taken some pains to show that this statement is not true, but it is difficult to see what bearing this statement has on the question, whether true or false.

It is manifest that the assessee maintains this troupe on a commercial basis, whether he does so for the purpose of advertising his Ayurvedic medicines matters not. If this troupe earns a profit, as it has done in two of the years mentioned in the statement of the case, the profit would obviously be income from "other sources" within the meaning of S. 6 (vi), even if it could not be classified as income from a business under S. 6 (iv). In 1929-30 the profit made was taxed under "other sources." We are not prepared to accept the reasons advanced by the Commissioner in support of the theory that there is here a hobby and not a possible source of income. In fact, we have no hesitation in holding that there was no material on the record to support the finding that the assessee's dramatic troupe is maintained by him as a hobby. It may not be a "business," but it certainly must be classified as a source, or possible source, of income.

The question referred will be answered in the negative and as the assessee has succeeded, he is entitled to his costs, which we fix at Rs. 250. He is also entitled to the refund of his deposit of Rs. 100.

C.R.K./G.N. *Answer accordingly.*

A. I. R. 1941 Madras 250

LAKSHMANA RAO J.

In re C. Raghava Menon — Accused.

Criminal Revn. Case No. 427 and Ref. No. 15 of 1940, Decided on 6th September 1940, referred by District Magistrate, Malabar, D/- 14th June 1940.

Penal Code (1860), S. 403 — Mere retention of money is not punishable.

Mere retention of money would not warrant a conviction under S. 403. [P 250 C 2]

P. Govinda Menon — for Accused.

Public Prosecutor — for the Crown.

Order. — The accused was the clerk of the official receiver of Calicut and three sums of Rs. 35 were received by him during the absence of the official receiver on 3rd October 1939, 2nd November 1939 and 2nd December 1939. They were entered in the accounts on 7th October, 21st November and 18th December and on the complaint of the official receiver the police filed a charge-sheet against the accused for an offence under S. 409, Penal Code. The facts alleged did not warrant a charge under S. 409, Penal Code, and the Sub-divisional Magistrate framed a charge under S. 403, Penal Code, for temporary misappropriation of the amount. The accused denied the offence and pleaded that the delay in making the entries and paying the amount over to the official receiver was due to oversight due to heavy work but the plea was not accepted and the accused was convicted and sentenced to pay a fine of Rs. 17 on each count.

The case has been referred by the District Magistrate for enhancement of sentence, but the evidence does not justify the conviction. The accused was not in difficulties and as found by the Sub-divisional Magistrate there was no evidence that he used the amount. It has been repeatedly held that mere retention of money would not warrant a conviction under S. 403, Penal Code, and the accused was subsequently reinstated as the result of a departmental enquiry. The conviction is therefore set aside and the fine if levied will be refunded.

C.R.K./D.S. *Conviction set aside.*

A. I. R. 1941 Madras 251

GENTLE AND PATANJALI SASTRI JJ.

In re Andi Thevan — Accused.

Referred Trial No. 50 and Criminal Appeal No. 226 of 1940, Decided on 10th June 1940, referred by Addl. Sess. Judge, Madura Division, D/- 5th March 1940.

(a) Criminal trial — Evidence — Evidence of independent witnesses found truthful — Similar evidence of other witnesses must be accepted notwithstanding that they are associated with or partisans of deceased or complainant.

Where the evidence of independent witnesses is found truthful and acceptable, the evidence of other witnesses who similarly speak to the happenings of the same events must also be accepted notwithstanding that they are associated with or partisans of the deceased or complainant. [P 253 C 2]

(b) Penal Code (1860), S. 302— Accused having attacked four persons, running in street with knife — On deceased's attempt to snatch knife accused stabbing him in vital part —Deceased dying immediately —Offence of murder held committed — Sentence of death held proper.

The accused having already attacked four persons was running in the street armed with a knife. The deceased attempted to take it from him or to stop him, whereupon the accused stabbed him in a vital part of his body in such a way that he died immediately :

Held that the only offence which could be committed under the circumstances was that of murder and the sentence of death was a proper punishment. [P 253 C 2]

(c) Penal Code (1860), S. 300, Exception 1 and S. 302 — Deceased having seen attacks by accused on two others and sustained earlier attack upon himself doing his best to prevent accused from continuing attacks but dying of stabs inflicted by accused — Any violence used by deceased in wrestling with accused held did not amount to grave and sudden provocation under S. 300, Exception 1 — Sentence of death held proper.

The deceased having seen the attacks made by the accused on two others and sustained an earlier attack upon himself did his utmost to prevent the accused from continuing the attacks upon himself or upon any other persons but was stabbed by the accused as a result of which he died :

Held that any violence used by the deceased in wrestling with the accused and throwing him against a wall could not amount to sudden and grave provocation within the exception to S. 300 so as to reduce the offence committed from murder to culpable homicide and that the sentence of death passed on accused was proper in the circumstances. [P 254 C 1]

(d) Penal Code (1860), S. 300, Exception 1 and S. 302—Sudden and grave provocation is question of fact — On accused's refusal to accompany deceased latter pulling former from steps of his house where he was seated — Thereupon accused inflicting fatal injuries on deceased — Deceased's act held did not fall under S. 300, Exception 1 as he was unarmed—Sentence of transportation held justified (Per Gentle J.; Patanjali Sastri J., *Contra.*)

The question of what is grave and sudden provocation is a question of fact and the Court must consider the facts of each case and apply the provisions of S. 300 to those facts. The facts in one case are not always of assistance in another case. [P 254 C 2]

After the accused refused to accompany the deceased and four others all of whom were unarmed to a panchayat, the deceased dragged him by his hand and pulled him away from the steps of his house where he was then seated. Thereupon the accused took out his knife and inflicted injuries upon the deceased which shortly afterwards proved fatal :

Held that although pulling by the hand was exercising some force and was done in order to make the accused go to some place against his will and might have been provocative, the act did not fall within the purview of S. 300, Exception 1 inasmuch as it was done by an unarmed man. [P 254 C 2]

Held further that inasmuch as there was some provocation regarding the circumstances surrounding the episode the proper sentence was one of transportation for life and not one of death. [P 254 C 2]

D. Narasaraju — for Accused.

Public Prosecutor — for the Crown.

Gentle J. — The appellant was tried and convicted by the learned Additional Sessions Judge of Madura upon five counts in an indictment, the first three counts being for murder under S. 302, Penal Code, the fourth count for attempting to murder under S. 307, Penal Code, and the fifth count voluntarily causing hurt with a dangerous weapon under S. 324, Penal Code. He was sentenced to transportation for life for the offence of murder in the first count, to death in respect of the second and third counts, rigorous imprisonment for a term of ten years under the fourth count and rigorous imprisonment for eighteen months under the fifth count. The offence is alleged to have been committed in Madura on the evening of 3rd October 1939. The occurrence took place in a lane in a block of houses which are owned by P. W. 1 who lives in a large house in the block himself and lets the others out to tenants, which tenants include P. Ws. 2, 3, 4, 9 and the accused, P. W. 4 being a subtenant of the accused who is himself the immediate tenant of P. W. 1. The three deceased persons are Muthukaruppan, Masanan, and Dorairaj. Muthukaruppan and Dorairaj together with P. W. 9 are brothers. P. W. 8 is the wife of P. W. 9. Three or four days before the occurrence, a quarrel arose between the son of P. W. 9 and the son of the accused. The respective mothers of these children seem to have intervened, naturally supporting their own offspring, and the offices of P. W. 1 were obtained for him to terminate the quarrel. P. W. 2, another tenant of the building, seems to have supported the side of P. W. 9's son and wife, P. W. 8 and the matter ended by pacifying

the parties although P. W. 2 and the accused seem to have exchanged hot words.

On the evening of the occurrence, the two deceased Muthukaruppan and Dorairaj, together with P. Ws. 5 and 6 were playing cards together about two furlongs from the block of houses, the deceased Masanan went to them and told Muthukaruppan that it was necessary in the interests of peace that a reconciliation should be effected between the wife of the accused and P. W. 8. Thereupon all the above five persons went to the house of the accused being No. 8 in the block and adjacent to a lane running east to west. The case for the prosecution is as follows: The accused was in a sullen and resentful mood. Muthukaruppan asked him to accompany them to the house of P. W. 1 in order that the difference between the women could be composed. One criticism made upon this part of the evidence is that P. W. 9, the husband of P. W. 8 was at the time away from the village and comment has been made of the unlikelihood of the suggestion that anything in the nature of a panchayat, would take place involving differences in which P. W. 8 was concerned in the absence of P. W. 9. The accused said that he was not prepared to go to any panchayat and Muthukaruppan then caught hold of him by the hand and pulled him again asking him to go to the proposed panchayat. At this time the accused is said to have been sitting on some steps which lead from the passage communicating with his house into the east to west lane. When Muthukaruppan pulled him by the hand, the accused suddenly whipped out a knife (M. O. 1) which was in his waist, opened it so that it formed a dagger and stabbed Muthukaruppan in the chest. Muthukaruppan ran down the lane in an easterly direction followed by the accused. P. W. 5 followed and attempted to prevent the progress of the accused whereupon the accused stabbed him three times in the head, arm and shoulder, Masanan tried to snatch the knife from the hands of the accused who stabbed him two or three times and then the accused entered a lane leading from east to west lane which was on his right, into which Muthukaruppan had gone. Accused immediately emerged from this second lane back into first lane. Masanan again caught hold of the accused, tried to wrench the knife from his hand and pushed him with some force. The accused was flung against the wall of the house opposite the entrance to the second lane and then recovering himself, the accused stabbed Masanan twice, once in the back and once in the thigh. Masanan fell down and died. At this point, it is relevant to indicate that when P. W. 5 was giving evidence about this in the committing Magistrate's Court, he said that Masanan snatched the knife from the accused. This he denied before the learned Sessions Judge. The accused then turned back in the direction of his house. P. W. 6 next tried to obtain possession of the knife from him and was stabbed by the accused in the hand and abdomen. Dorairaj then went towards him and tried to get hold of the knife. The accused plunged it twice into his chest and abdomen and Dorairaj dropped down dead at that spot.

The medical officer (P. W. 11) examined the injured persons and in so far as the deceased are concerned, he gave the causes of death, and that the injuries were serious. He said the injuries inflicted upon P. W. 6 were grievous and upon P. W. 5 were simple. The injuries inflicted upon the last two persons are the subject of the charges and convictions under the fourth and fifth counts. He also examined the accused and found a small cut on one finger and an abrasion on one wrist. He expressed the opinion that the cut might be caused by an attempt to wrench a knife from his hands and also that the abrasion in the wrist might be due to contact with a wall such as when he was pushed by Mansanan against the wall facing the second lane. The eye-witnesses who have spoken to the whole or parts of the five happenings are P. Ws. 3, 4, 5, 6, 7 and 8, of which P. Ws. 3 and 4 are independent and unconnected with any of the other witnesses. A suggestion was made to P. W. 4 that he was in similar employment as the accused and also that he was his debtor in respect of some rent. This the witness denied. This is the only suggestion or criticism which was made in regard to the witness. P. W. 3 spoke to the second attack upon Masanan and the tussle or struggle which took place at the junction of the second with the first lane. P. W. 4 gave evidence of attacks upon the five injured persons. The learned Sessions Judge has accepted the evidence of these two witnesses and in doing so consequently has believed the story which the other prosecution witnesses, who may be described as interested, have given and he recorded the convictions which are mentioned above.

The defence which the accused put forward can be summarised as follows: He

referred to the earlier quarrels put forward by the prosecution and said that on the evening in question the three deceased—and later he included P. Ws. 5 and 6 — went to his house and there beat him and his wife with a stick and a leather strap and at that place he said that he stabbed these five persons. It is not clear, although he says it was in his house, whether he intended to convey that the happening occurred inside the house or within his compound or other part of his premises but it is manifest that he intended to say that the whole affair and episode connected with the five injured persons was in some part of his premises.

Immediately after the termination of the occurrence, the accused went to the police station and whilst he was there P. Ws. 5 and 6 also arrived. Exhibit A is the statement of P. W. 5 given to the police officer, P. W. 16, in which he mentions the arrival of Masanan, with the other two deceased, that P. Ws. 5 and 6 were sitting together, and the subsequent visit to the deceased's premises and the attacks upon the three deceased and P. Ws. 5 and 6. P. W. 6 did not make a statement at the police station, he was in perilous condition and was sent to the hospital where he made a dying declaration (Ex. B). At that time apparently it was thought that he would not recover. He gives in this exhibit details of the attacks by the accused upon the five persons. The detail is not entirely in accordance with the detail of the statement by P. W. 5 in Ex. A. But these two statements were given very shortly after the happening of the events. The statement which the accused gave to the police officer is Ex. L. Neither the learned public prosecutor nor learned counsel on behalf of the appellant has raised any objection to the examination of this document by the Court. After giving in some detail the earlier history which it is not necessary to discuss, he says that the three deceased and P. Ws. 5 and 6 came to his house and beat himself and his wife with their hands and at that place the whole occurrence took place. In the committing Magistrate's Court, the accused said that 10 or 15 persons including the persons who were stabbed beat him (the accused), he does not say with what the beatings were inflicted. In his statement before the learned Sessions Judge he said that the five persons kicked him and beat himself and his wife with a stick and a leather belt.

Under S. 105, Evidence Act, when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code or within any special exception or proviso contained therein is upon him and the Court shall presume the absence of such circumstances unless they are proved by the one asserting them. No evidence has been called in support of the story which the accused has put forward. There are merely his three statements which to some extent vary. If the accused's story is true, then the evidence of P. Ws. 3 and 4 must be wrong. There is nothing to justify the rejection of the evidence of these two witnesses. There is nothing to show that they are in any way unfriendly or ill-disposed towards the accused or partisans of any of the prosecution witnesses or the deceased. P. W. 3 stated he witnessed the happening of the second assault upon Masanan and he does not pretend to have seen anything more. A witness who is unfriendly or has been approached to support the story of another is not likely to confine his evidence to one of five episodes. I see no reason whatever to differ from the view to which the learned Additional Sessions Judge arrived, namely that these two witnesses' evidence should be accepted and that they are witnesses of truth. Their evidence being accepted, then it must follow that in substance, the testimony given by the other eye-witnesses, although they are associated with or partisans of the deceased or P. Ws. 5 and 6 must be true. The evidence of the two independent witnesses being truthful and acceptable, then the evidence of others who similarly speak to the happenings of the same events must also be accepted. The result therefore is that in my view the case so far as facts are concerned which the prosecution sought to establish has been proved. The next matter for consideration is what offences have been committed by the accused. I will deal with the charge in respect of the death of Muthukaruppan last. So far as the charge of murder in respect of Dorairaj is concerned, it is shortly this. The accused having already attacked four persons, he was running in the street armed with a knife and Dorairaj attempted to take it from him or to stop him. Thereupon, the accused stabbed him in a vital part of his body in such a way that he died immediately. The only offence which can be committed under these circumstances is that of murder under S. 302.

I now come to the charge in respect of the death of Masanan. The accused stabbed him in the first instance while he was running in a westerly direction, the injuries then inflicted were slight. After a short interval, Masanan closed with the accused in order to take the knife from him and at that time the accused had already attacked three persons including Masanan himself. There was doubtless some violence used by Masanan. He appears to have thrown or flung the accused against a wall. It is not only right but indeed it would be the duty of Masanan having seen the attacks made by the accused on two others and sustained an earlier attack upon himself, to do his utmost to prevent the accused from continuing the attacks upon himself or upon any other persons. It is not always that persons sufficiently courageous — unarmed themselves—are prepared to do this. Any violence which Masanan used in wrestling with the accused and throwing him against the wall cannot amount to sudden and grave provocation within the exception to S. 300, Penal Code. The journey which the accused made from his house in the east to west lane and thence into the lane leading from it and then back again shows a continuous intention to inflict hurt, and indeed death, upon those who stood in his way or who tried to impede this progress. Masanan did nothing on that day in any way to justify a Court holding that there was sudden and grave provocation which would reduce the offence committed from murder to culpable homicide. In my view, the offence committed in regard to Masanan was murder and the conviction for that offence is correct. So far as the offences in respect of P. Ws. 5 and 6 which form the subject of the convictions under the fifth and fourth counts are concerned, no argument was addressed to us that those convictions were wrong or the sentences were unduly heavy. Suffice it to say that no interference with the learned Sessions Judge's judgment both as regards conviction and sentence is justified.

I now come to the charge in respect of the death of Muthukaruppan. Learned counsel on behalf of the appellant has argued that, accepting the evidence of the prosecution as given by the witnesses, it shows that after the accused refused to accompany Muthukaruppan and the four others to the panchayat, he dragged him by his hand and pulled him away from the steps of his house where he was then seated. It was then that the accused took out his knife and inflicted the injuries upon the deceased which shortly afterwards proved to be fatal. It was contended that this amounted to sudden and grave provocation so as to reduce the offence from murder to culpable homicide. That all these five persons were unarmed is a fact which I find from the evidence and no one witness has said to the contrary. Although pulling by the hand is exercising some force and was done in order to make the accused go to some place against his will and may be provocative, this was done by an unarmed man. In my view, such conduct is not what the first exception contained in S. 300, Penal Code, contemplates as being grave and sudden provocation. The question of what is grave and sudden provocation is a question of fact and one must consider the facts of each case and apply the provisions of the section to those facts. The facts in one case are not always of assistance in another case. Accused 1, in my view, was not subjected to such treatment by Muthukaruppan which would reduce the offence committed by the accused to culpable homicide and I am of the opinion that the offence which was committed by the accused in regard to Muthukaruppan is one of murder. Now as to the sentences. I agree with the learned Sessions Judge that the sentences of death which he imposed in respect of the deaths of Masanan and Dorairaj are correct. There is nothing in the facts justifying lesser sentences. The accused made violent attacks upon these two deceased who only tried to prevent him inflicting injuries by attempting to take the weapon from his hands and stopping his wild career. His vicious attacks upon them when they went to prevent further injury can amount only to murder of such a degree that sentence of death is the proper punishment. So far as the conviction regarding Muthukaruppan is concerned, I agree with the view which the learned Sessions Judge has expressed. There was some provocation regarding the circumstances surrounding the episode and the proper sentence is one of transportation for life and not one of death. In my view, the convictions and sentences which the learned Additional Sessions Judge has passed should be confirmed and the appeal dismissed.

Patanjali Sastri J. — I agree with the judgment just pronounced by my learned brother except as regards the offence relating to the deceased Muthukaruppan. I do not recapitulate the facts as my learned brother has referred to them in detail. I am

inclined to think that the offence so far as Muthukaruppan is concerned amounts only to culpable homicide not amounting to murder. It is quite clear from the evidence of P. W. 1 that a few days prior to the occurrence there was an abortive panchayat by P. W. 1 to compose the quarrel between P. W. 9 and his wife on the one hand and the accused and his wife on the other and during that attempt hot words passed between the accused and P. W. 2 who was evidently a partisan of P. W. 9. Subsequently the accused appears to have been smarting under the memory of these happenings and the learned Sessions Judge described his mood on the day of the occurrence as "sullen and resentful." While he was in that mood deceased Muthukaruppan and Dorairaj accompanied by P. Ws. 5 and 6 presented themselves in a body at or near the premises of the accused and invited him, according to the prosecution story, for another panchayat by P. W. 1 and what followed is thus described by P. W. 5:

> The accused said that Muthukaruppan had no business to call him and that he was not prepared to come for a panchayat. Muthukaruppan caught the accused's hand and pulled him, asking him to come for a panchayat. The accused thereupon whipped out a knife from his waist, opened the blade and stabbed Muthukaruppan with it on the left side of the chest.

The learned Judge below took the view that though this was sudden provocation, it was not sufficiently grave to attract the application of exception 1 to S. 300, Penal Code. I am unable to share that view. As indicated in the explanation attached to that provision, whether in a given case, the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact, and in my judgment, having regard to all the circumstances of this case, what Muthukaruppan is said to have done to the accused at the time of the occurrence amounted to such provocation as is contemplated in the provision referred to above. The offence committed by the accused in relation to Muthukaruppan would therefore be only culpable homicide not amounting to murder. This does not however affect the result of the case as I agree with my learned brother that the conviction and sentence for the other offences committed by the accused should be confirmed.

C.R.K./G.N. *Appeal dismissed.*

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Special Bench

LEACH C. J., KING AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras — Petitioner

v.

S. M. S. Karuppiah Pillai, Madura — Respondent.

O. P. No. 110 of 1940, Decided on 25th September 1940; reference by Commissioner of Income-tax, Madras.

* * *Income-tax Act (1922), Ss. 26 (2) and 44 — Partner continuing partnership business after dissolution of partnership succeeds to business within meaning of S. 26 (2) — S. 44 does not apply.*

A firm for the purposes of assessment to income-tax is an entity quite distinct from the partners who compose it. Hence a partner who continues the partnership business after the dissolution of the partnership succeeds to the business within the meaning of S. 26 (2). S. 44 does not apply to such a case: 2 I T R 284 (S B); AIR 1939 Mad 376; AIR 1934 Rang 13 (SB); (1927) 11 Tax Cas 565, *Rel. on*; AIR 1936 Mad 67 (FB), *Expl.* [P 256 C 1, 2]

K. V. Sesha Ayyangar — for Petitioner.

V. Ramaswami Iyer — for Respondent.

Leach C. J. — The main question raised in this reference is whether a partner who continues the partnership business after the dissolution of the partnership succeeds to the business within the meaning of S. 26 (2), Income-tax Act, 1922. On 16th September 1935 the assessee and one Venkatarama Ayyar entered into a partnership for the production and exhibition of a cinema film called "Pathi Bhakthi." The partnership continued until the month of May of the following year, when Venkatarama Ayyar retired from the partnership and was paid the amount of the profits which represented his share, namely the sum of Rs. 9524. Thereafter the film was exhibited by the assessee for his own benefit. For the assessment year 1937-38 the income-tax authorities assessed Venkatarama Ayyar in respect of this sum of Rs. 9524 and he paid the tax, but later the income-tax authorities considered that they were wrong in so doing, and to have the question settled, the Commissioner of Income-tax has, under the provisions of S. 66 (2) of the Act referred the following question:

> Whether the provisions of S. 26 (1) or S. 26 (2) of the Act are applicable to this case and the petitioner is liable to be assessed on the sum of Rs. 9524 which represents the ex-partner's share of the profits of the film business.

In his statement of the case the Commissioner has very properly stated that should the Court answer this question against the assessee he would exclude the sum of Rs. 9524

from the assessment of Venkatarama Ayyar, who, of course, would thereupon be entitled to a refund. Section 26 (2) reads as follows:

> Where at the time of making an assessment under S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year.

For the assessee it is said that inasmuch as he was a partner in the business of exhibiting this film before he acquired the right to exhibit it for his sole benefit there could be no succession, because as part owner of the business he could not succeed to himself. This argument ignores the fact that a partner is not the partnership. A firm for the purposes of assessment to income-tax is an entity quite distinct from the partners who compose it. In two cases which have come before this Court it has been accepted that where a partner carries on the business of the partnership after dissolution he does "succeed" within the meaning of S. 26 (2). These cases are 2 I T R 284 : 7 I T C 283[1] and 7 I T R 29 : I L R (1939) Mad 269.[2] For the assessee, it has been suggested that the judgments in these cases cannot be regarded as deciding the question because this proposition was not disputed. It is true that the argument which has been addressed to this Court was not addressed to the Court in the two cases mentioned; but the cases cannot be ignored for this reason. Obviously it was not considered to be worth while taking the point. If the partnership is an entity distinct from the partners there must be succession in circumstances such as we have here. The Rangoon High Court took the same view in 11 Rang 501 : 2 I T R 85,[3] and the same view has been taken in England : *see* (1927) 11 Tax Cas 565.[4]

In the course of his arguments, Mr. Ramaswami Ayyar has suggested that the decision of this Court in 59 Mad 377 : 3 I T R 339[5] has application here, but this cannot be accepted. There the Court was merely concerned with the question whether there could be succession within the meaning of S. 26 (2) in the case of the death of one member of a joint Hindu family. It was held that there could not be. It was not a matter of succession at all. It was a matter of survivorship. The family remained joint, notwithstanding the death of the member. In no sense of the word could it be said that there was succession or a change in the identity of the assessee. It has been also argued on behalf of the assessee, that as Venkatarama Ayyar has paid the tax on the Rs. 9524, there cannot be a fresh assessment by reason of the provisions of S. 44 of the Act. That section says :

> Where any business, profession or vocation carried on by a firm has been discontinued, every person who was at the time of such discontinuance a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm.

This section only applies when there has been a discontinuance of the business, which is not the case here. The section says that if a business is discontinued the partners shall nevertheless be jointly and severally liable for the profits which had been earned. We are not concerned here with a case where there has been a discontinuance of the business. We are concerned with a case where the same business has been carried on by one of the partners, and carried on without any break. In such a case the section which is applicable is S. 26 (2) and not S. 44. For the reasons indicated we answer the question referred in the affirmative. The Commissioner is entitled to his costs, Rupees 250.

C.R.K./D.S. *Answered in affirmative.*

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1. ('34) 2 I T R 284 : 7 I T C 283 (S B), Karuppaswami Mooppanar v. Commissioner of Income-tax, Madras.

2. ('39) 26 AIR 1939 Mad 376 : 181 I C 525 : ILR (1939) Mad 269 : (1939) 1 M L J 482 : 7 I T R 29, Commissioner of Income-tax, Madras v. Muthukaruppan Chettiar.

3. ('34) 21 A I R 1934 Rang 13 : 148 I C 594 : 11 Rang 501 : 2 I T R 85 (S B), Commissioner of Income-tax, Burma v. N. N. Firm.

4. (1927) 11 Tax Cas 565, Faraday, Rodgers & Eller v. Cartner.

5. ('36) 23 A I R 1936 Mad 67 : 159 I C 840 : 59 Mad 377 : 70 M L J 13 : 3 I T R 339 (F B), Kesava Rao v. Commissioner of Income-tax, Madras.

A. I. R. 1941 Madras 256

LEACH C. J. AND HORWILL J.

Travancore National Bank Subsidiary Co. Ltd. (in liquidation) by Official Liquidator, R. Narasimhachariar — Appellant

v.

Travancore National and Quilon Bank Ltd. (in liquidation) by Official Liquidators, Messrs. C. Gill & J. S. Goodwin — Respondents.

Appeal No. 32 of 1939, Decided on 8th August 1940, from judgment and order of Venkataramana Rao J., *Reported in A I R 1940 Mad 258.*

Banker and customer — Chit fund company — Money deposited with bank as security for due payment of what subscriber owed to company — Bank going into liquidation — Bank held not trustee for company and latter could not claim preferential payment from bank.

A company was formed for the purpose of organising chit funds. The subscriber who was successful at the monthly auction could not withdraw the amount subscribed that month unless he furnished security to the company for its repayment. If he furnished security, of course, he was allowed to withdraw the money and dispose of it as he pleased. If security was not furnished, the company either retained the amount or paid it into the bank. In the latter event the subscriber was required to open a savings bank account with the bank and the money was paid into it. One of the conditions of the keeping of this account was that the amount deposited in it should not be available for withdrawal for purposes other than payment of the instalments for which the subscriber was liable in respect of the chit fund until the subscriber had paid all his instalments. The bank went into liquidation :

Held that the bank could not be regarded as a trustee for the company and hence the company could not claim preferential payment from the bank. [P 258 C 1]

S. Parthasarathy and V. K. Thiruvenkatachari — for Appellant.

King and Partridge — for Respondents.

Leach C. J. — The appellant and the respondent are limited liability companies and both of them are now in liquidation under orders for compulsory winding up. For the sake of brevity I will refer to the appellant as "the company" and the respondent as "the bank." The company was formed by the Bank for the purpose of organising chit funds, which was considered to be a profitable business. The Bank held all the shares in the company, except two, and it is common ground that it controlled the company through one of its officers. The chit funds which the company organised were for periods of 25 months with four classes of subscribers. The subscriber who was successful at the monthly auction could not withdraw the amount subscribed that month unless he furnished security to the company for its repayment. If he furnished security, of course, he was allowed to withdraw the money and dispose of it as he pleased. If security was not furnished, the company either retained the amount or paid it into the Bank. In the latter event the subscriber was required to open a savings bank account with the Bank and the money was paid into it. One of the conditions of the keeping of this account was that the amount deposited in it should not be available for withdrawal for purposes other than payment of the instalments for which the subscriber was liable in respect of the chit fund until the subscriber had paid all his instalments. When he opened the account the subscriber was required to sign a letter addressed to the Bank and couched in the following terms :

I beg to inform you that I am holding . . . . . No . . . . . in your chit fund No . . . . . which was prized at the auction conducted on the . . . . . for the . . . . . instalment.

I have acknowledged receipt of the bid amount for which I have given a separate receipt and I confirm my agreement that as security for the due payment of all the future subscriptions towards my above ticket . . . . . in chit No . . . . . you will hold as much amount as would cover up the future liability of this in Chitty Savings Bank account with you.

I also confirm my agreement with you that you will appropriate towards future instalments as they fall due the necessary amount from my deposit in your Chitty Savings Bank account.

This letter is not very appropriately worded as the chit fund did not nominally belong to the Bank, but there can be no doubt as to its effect. The Bank was to hold what was deposited in the account as security for the due payment of what the subscriber owed to the company. The company and the Bank carried on business in the same premises in Madras and the arrangement was completed by an officer of the Bank acting on behalf of the company and the Bank. The Court is informed that the Bank kept a considerable number of these accounts. The company and the Bank having gone into liquidation, the question arose whether the company was entitled to have the amounts standing in these various savings bank accounts treated as moneys over which the liquidator of the company had a preferential claim. In order to have the question settled he took out a summons under S. 183, Companies Act. The matter was heard by Venkataramana Rao J., who held that the liquidator of the company was not entitled to any preferential payment from the liquidators of the Bank, but that he was entitled to rank as an ordinary creditor in respect of these various amounts. The appeal is from this decision.

The claim for preferential payment was based on an allegation that the Bank held these moneys as a trustee for the company. This claim was rejected by the learned Judge who held that the letter which the subscriber addressed to the Bank on the opening of the savings bank account operated as an assignment to the company of the moneys standing to the credit of the account. The learned advocate who appears on behalf of the appellant concedes that if there is no trust the learned Judge's deci-

sion cannot be challenged. He does not dispute that the letter signed by the subscriber on the opening of the account can be read as an assignment of the money to the Bank for the benefit of the company. The learned advocate for the Bank denies that there is any trust and accepts the learned Judge's decision as being correct.

We are in entire agreement with the learned Judge when he says that there is no basis on which the Bank can be regarded as a trustee for the company. Before there can be a trust of moveable property the author of the trust must indicate with reasonable certainty by words or acts (a) an intention on his part to create a trust, (b) the purpose of the trust, (c) the beneficiary and (d) the trust property and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfer the trust property to the trustee. These are the provisions of S. 6, Trusts Act, 1882. In this case it is impossible in our opinion to say that there was an intention on the part of the subscriber to create a trust. What the subscriber agreed to do and did was to open a savings bank account with the Bank which was to be kept on certain conditions. The payment into the account of the money by the company was a payment in on behalf of the subscriber and the intention was that this money should be used in discharging the subscriber's financial obligations to the company. It is accepted that the letter which the subscriber signed effected an assignment of the amount to the company, but there was no trust in contemplation. Moreover, the whole arrangement was really brought about by the Bank for its own benefit. It owned the company which it had formed for the purpose of making profit out of chit funds and the conditions which it imposed upon the subscribers to the chit funds were conditions which were merely intended to safeguard itself.

The learned advocate for the appellant has quoted to us (1857) 26 L J Ch 710,[1] but the facts in that case are so far apart from the facts in this case that it has no application. From whatever point of view this matter is looked at, the argument cannot be accepted that there is here a trust which entitles the liquidator of the company to claim preferential payment from the Bank. The liquidator must prove as an ordinary creditor in the Bank's liquidation. In order that there may be no misunderstanding it may be added that the subscribers have not been made parties to this appeal and have not appeared. The liquidators of the Bank are entitled to the costs of the appeal. The liquidator of the company will obtain his costs out of the assets of the company.

C.R.K./D.S. *Order accordingly.*

1. (1857) 26 L J Ch 710 : 3 Jur (N S) 532 : 5 W R 666, Farley v. Turner.

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BURN AND LAKSHMANA RAO JJ.

In re Vettukkattu Pachayanna Goundan — Accused — Prisoner.

Referred Trial No. 114 and Criminal Appeal No. 486 of 1940, Decided on 16th September 1940, referred by Sess. Court, Salem Division, D/- 17th July 1940.

(a) Criminal P. C. (1898), S. 288 — Murder case — Several eye-witnesses giving evidence in Magistrate's Court in accordance with dying declaration of deceased — In Sessions Court some of them denying personal knowledge of occurrence —Depositions in Magistrate's Court held could be treated as substantive evidence.

In a murder case several eye-witnesses gave evidence in the Magistrate's Court against the accused in accordance with the statement made by the deceased in his dying declaration. But when they came to the Sessions Court some of them alleged that they had no personal knowledge of the occurrence :

Held that in these circumstances the Sessions Judge was justified in admitting as evidence under S. 288, Criminal P. C., the depositions of those witnesses in the Magistrate's Court and in treating those depositions as substantive evidence.

[P 259 C 1]

(b) Penal Code (1860), S. 302—Mere fact that several years have elapsed between murder and punishment is no ground for not awarding death sentence.

It would be a dangerous proposition to state that if a murderer succeeds in making himself scarce for a number of years, he may then hope to escape the extreme penalty of the law in a case in which the extreme penalty is clearly called for. Hence the mere fact that several years have passed since the commission of murder is no ground for awarding lesser sentence. [P 259 C 1, 2]

P. Basi Reddi — for Accused.

Public Prosecutor — for the Crown.

Burn J.—The case against the appellant was that at about sun-set on 18th June 1934 near the village of Mandagapalayam, he stabbed two women with a spear inflicting fatal injuries upon them. The two women were named Pappayi and Palani. The appellant had been on terms of illicit intimacy with Palani and it is said that Pappayi had persuaded Palani to give him up. This was the supposed motive for the attack by the appellant upon the two women. Pappayi and Palani were both taken to the hospital at Tiruchengode the same evening and as they were in a dangerous condition, Sub-

Magistrate (P. W. 13) was sent for and both of them made dying declarations. Exhibit D is the dying declaration of Palani but the learned Sessions Judge has not relied on this because it contains internal evidence that Palani was not fully conscious when she was making her statement. Exhibit E is the dying declaration of Pappayi who was fully conscious while her statement was being recorded. Besides the evidence contained in the dying declaration of Pappayi, there were the depositions in the Magistrate's Court of no less than seven eye-witnesses, the women (P. Ws. 3 to 9) who were accompanying Palani and Pappayi on their way back from their field. All these witnesses in the Magistrate's Court gave evidence against the appellant in accordance with the statement made by Pappayi in her dying declaration. But when they came to the Sessions Court, five of them (P. Ws. 3, 4, 5, 6 and 8) alleged that they had no personal knowledge of the occurrence. One (P. W. 9) said that she had only seen the stabbing of Pappayi and only one (P. W. 7) had adhered to the testimony which she gave before the committing Magistrate. In these circumstances, the learned Sessions Judge admitted as evidence under S. 288, Criminal P. C., the depositions of P. Ws. 3, 4, 5, 6 and 8 in the Magistrate's Court. It is quite clear that he was fully justified in so doing and in treating those depositions as substantive evidence.

The appellant absconded and was not arrested until 27th March 1940 when P. W. 15, a member of the vigilance committee found him on the street, and, having some recollection in his mind of a Gazette notification, arrested him and took him to the Sub-Magistrate of Tiruchengode. That is the reason why this case did not come on for trial until July 1940. Learned counsel for the appellant has quite rightly made no attempt to show that the evidence against the appellant cannot be accepted. He has urged only the question of sentence. Quoting the judgment in R. T. No. 141 of 1929, learned counsel has urged that since the offence took place more than six years ago, the appellant might be let off with a sentence of transportation for life. We see that in the case referred to, the only reason for reducing the sentence of death which had been passed by the learned Sessions Judge to a sentence of transportation for life was that ten years had elapsed between the crime and the punishment. With due respect we do not think that that alone is any ground for imposing a lesser sentence. On the contrary we think it would be a dangerous proposition to state that if a murderer succeeds in making himself scarce for a number of years, he may then hope to escape the extreme penalty of the law in a case in which the extreme penalty is clearly called for. There are no extenuating circumstances in this case. The appellant deliberately committed two murders, without any excuse. We confirm the conviction of the appellant for the two offences of murder and the sentence of death and dismiss his appeal.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1941 Madras 259

LEACH C. J. AND HORWILL J.

Mayandi Chettiar — Appellant

v.

Madura Municipality through its Commissioner — Respondent.

Second Appeal No. 562 of 1937, Decided on 19th September 1940, against decree of Sub-Judge, Madura, D/- 21st January 1937.

(a) Madras District Municipalities Act (5 of 1920), Ss. 216, 338 and 339—Building completed without sanction — Direct action cannot be taken under Ss. 338 and 339—S. 216 applies — Executive authority has no option to proceed either under S. 338 or S. 216 — If it chooses to take action it must proceed under S. 216.

Sections 338 and 339 cannot be properly applied in the case of buildings because S. 216 specifically provides what shall be done when there is an infringement of the building regulations. Section 216 applies to a case where a person has completed a building without sanction. Therefore, except in the case of buildings, direct action may be taken under Ss. 338 and 339. The completion of a building, as well as the commencement of a building, without municipal sanction are within the scope of S. 216. The fact that the word 'may' is used in S. 216 (1) does not leave it to the option of the executive authority to proceed under S. 216 or S. 338. The executive authority may not deem it necessary to take any action in the case of a building work but if it does it must proceed according to S. 216.

[P 261 C 2]

(b) Civil P. C. (1908), S. 100 — Concurrent finding as to amount of damages — Quantum of damages cannot be questioned in second appeal.

In the case of a concurrent finding as to the amount of loss suffered by a party, the quantum of damages is not open to argument in second appeal.

[P 262 C 1]

T. L. Venkatarama Iyer — for Appellant.

C. S. Rama Rao Saheb — for Respondent.

Leach C. J. — By an order dated 10th August 1931, the Provincial Government superseded the Madura Municipal Council and appointed a special officer to carry out the functions of the Council for a period of one year from 14th August 1931. This order was passed under the provisions of S. 41 (1), Madras District Municipalities Act, 1920.

On 7th June 1932 the special officer caused a building belonging to the appellant to be demolished. Thereupon the appellant filed in the Court of the District Munsif, Madura Town, the suit out of which this appeal arises for the recovery of damages. The suit was subsequently transferred for hearing to the Court of the District Munsif, Madura Taluk, who held that the appellant's contention was well founded and gave him a decree for Rs. 100 with costs. The respondent council appealed to the subordinate Judge of Madura, who reversed the decree of the District Munsif on the ground that the special officer had acted within the law. The appellant now appeals to this Court and asks for the restoration of the decree of the Court of the District Munsif.

Before referring to the sections of the Madras District Municipalities Act, 1920, which have application, it will be convenient to state the facts. On 25th June 1931 the appellant applied to the Council for sanction to erect a building for the purpose of storing therein oil manufactured by him and submitted plans, as was required by the building regulations. On 17th July the Sanitary Inspector reported that he had no objection to the erection of the building, but without waiting for the sanction of the executive engineer the appellant commenced to build and completed the work. On 20th July 1931 the executive engineer called upon the appellant to submit a plan of the layout of the whole survey number. This lawful requirement was however not complied with until 9th May 1932. After the executive engineer had on 20th July 1931 called for a plan of the layout of the whole survey number no further communication was addressed to the appellant until 5th May 1932, when the special officer issued a notice, purporting to be pursuant to Ss. 338 and 339 by which he required the appellant to demolish his building within four days on the ground that it had been erected 'without municipal licence'. This notice was tendered to the appellant, but he refused to accept it, although four days later he sent the plan of the layout as required by the executive engineer. On 7th June 1932 the special officer sent men to the site for the purpose of demolishing the building and this work was carried out in the presence of officials of the Municipality and the Circle Inspector of Police. These facts are not in dispute.

The case for the appellant is that the local authority had no power to demolish his building without taking the steps contemplated by S. 216 of the Act. The case for the respondent council is that the special officer had full authority to do what he did by reason of the provisions of Ss. 338 and 339. The appellant's reply is that S. 216 is a section which applied in the case of a breach of the building regulations and that S. 338 only applies when no special procedure is laid down. We consider that there is great force in the appellant's contention. The building regulations are contained in Chap. 10 of the Act. This chapter comprises Ss. 191 to 217. At the time when the appellant applied for sanction to his plans the executive authority was the chairman, but he was displaced by the special officer as the result of the order of the Provincial Government of 10th August 1931. Section 197 states that if a person intends to construct or reconstruct a building, other than a hut, he shall send to the executive authority an application in writing for the approval of the site, together with a site plan of the land, and an application in writing for permission to execute the work, together with a ground plan, elevations and sections of the building, and a specification of the work. Section 198 prohibits the executive authority granting permission until the approval of the site has been accorded and S. 199 says that construction shall not be begun until the executive authority has granted permission for the execution of the work. Section 216 states the procedure to be followed where the executive authority is satisfied

(1) that the construction of a building (a) has been commenced without obtaining the necessary permission, or (b) is being carried on, or has been completed otherwise than in accordance with the plans or particulars on which the permission was based, or (c) is being carried on or has been completed in breach of any of the provisions of the Act, rule or by-law or of any lawful direction or requisition, or (ii) that any alterations required by a notice issued under S. 205 have not been duly made, or (iii) that any alteration of or addition to a building or work has been commenced or is being carried on or has been completed in breach of S. 215.

In any of these cases the executive authority may make a provisional order requiring the owner or builder to demolish the work done, or so much of it as has been unlawfully executed, or to make such alterations as may be necessary to bring the work into conformity with lawful requirements. These are the provisions of sub-s. (1) of S. 216. Subsection (2) directs the executive authority, when he has made a provisional order under sub-s. (1), to serve a copy of it on the owner of the building, together with a notice requiring him to show cause within a reason-

able time why the order should not be confirmed. Sub-section (3) says that if the owner fails to show cause to the satisfaction of the executive authority, the executive authority may confirm the order with any modification as he may think fit and that order shall then become binding on the owner. If an order under sub-s. (3) becomes effective it can be enforced by virtue of the provisions of S. 339. Section 338 on which the respondent Council relies is in these words:

> If, under this Act, or any rule, by-law or regulation made under it, the licence or permission of the council or executive authority or registration in the municipal office is necessary for the doing of any act, and if such act is done without such licence or permission or registration or in a manner inconsistent with the terms of any such licence or permission, then: (a) the executive authority may by notice require the person so doing such act to alter, remove, or, as far as practicable, restore to its original state the whole or any part of any property, moveable or immovable, public or private, affected thereby, within a time to be specified in the notice; and further, (b) if no penalty has been specially provided in this Act for so doing such act, the person so doing it shall be liable on conviction before a Magistrate to a fine not exceeding Rs. 50 for every such offence.

Section 339 which is the section which gives power to enforce default, reads as follows:

> (1) Whenever by any notice, requisition, or order under this Act, or under any rule, by-law or regulation made under it, any person is required to execute any work or to take any measures or do anything a reasonable time shall be named in such notice, requisition or order within which the work shall be executed, the measures taken, or the thing done.
>
> (2) If such notice, requisition, or order is not complied with within the time so named the executive authority may cause such work to be executed or may take any measures or do anything which may, in his opinion, be necessary for giving due effect to the notice, requisition or order as aforesaid; and further,
>
> (3) if no penalty has been specially provided in this Act for failure to comply with such notice, the said person shall be liable on conviction before a Magistrate to a fine not exceeding Rs. 50 for every such offence.

Sections 338 and 339 are in Chap. XVI which is headed, "Procedure and Miscellaneous." The provisions of the Act with regard to licenses are to be found in Chap. XII within which fall Ss. 244 to 285. Licenses are required for the keeping of animals (S. 245), for the use of premises for certain trades (S. 249), for the keeping of a slaughter-house (S. 255), for the carrying on of a milk business (S. 258), for the carrying on of the trade of a butcher, fish-monger or poulterer (S. 259), for the keeping of a private market (S. 262), for the use of a place for the disposal of the dead (S. 279), and for the carrying on of the occupation of a grave-digger (S. 285). Permission of the local authority is required in certain cases such as the digging of a well, tank, pond or fountain (S. 233), and the construction of a factory in which it is proposed to employ steam-power, water-power or other mechanical power or electrical power (S. 250). Registration may be required in respect of carriages let out for hire and for bicycles and tricycles kept within the municipal area (S. 104) and for the keeping of carts (S. 105). The Act does not direct any special procedure to be followed for remedying breaches of the law with regard to licenses, permissions and registrations, apart from that to be found in the chapter relating to building regulations. Therefore except in the case of buildings, direct action may be taken under Ss. 338 and 339. The subordinate Judge did not consider that S. 216 applied to a case where a person had completed a building without sanction, but this opinion is obviously untenable. I have already stated the circumstances in which the executive authority can take action, and the completion of a building as well as the commencement of a building are within the scope of the section. As a matter of fact, Mr. Rama Rao has not attempted to support this part of the subordinate Judge's judgment. In our opinion the maxim *generalia specialibus non derogant* applies in this case. The effect of this maxim is concisely stated in Halsbury's Laws of England, Hailsham Vol. 31, p. 526 in these words:

> Where in the same or a subsequent statute a particular enactment is followed by a general enactment, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment is operative, and the general enactment is taken to affect only those other parts of the particular enactment to which it may properly apply.

Section 338 cannot be properly applied here because section 216 specifically provides what shall be done when there is an infringement of the building regulations. The fact that the word 'may' is used in sub-s. (1) of S. 216 does not leave it to the option of the executive authority to proceed under S. 216 or S. 338. In S. 338 the word is also 'may'. The executive authority may not deem it necessary to take any action, but if he does he must proceed according to S. 216. Therefore, the special officer's order was unlawful and his action in demolishing the appellant's building without calling upon him to show cause was high-handed. It is true that the appellant had broken the law. He had built without having had his plans

sanctioned by the executive authority and he had not complied with the requirement of the executive authority that he should submit a plan of the layout of the whole survey number. He was greatly in fault, but it has not been suggested that the building which he erected was in any way contrary to the regulations of the respondent council. This Court asked Mr. Rama Rao what was the explanation which the special officer had to offer for the disregard of the provisions of S. 216 and he was unable to give one. The fact that the appellant had himself disregarded certain provisions of the Act, blameworthy though it was, did not, as Mr. T. L. Venkatarama Ayyar has remarked, make him an outlaw. The action taken by the special officer in this case so far as the Court is able to gather from the record and the statements of fact made by counsel, (which are in no way in conflict) cannot be supported on any ground. There was no request for an explanation and if the building did in fact comply with the regulations —there is no evidence that it did not—the punishment was out of all proportion to the offence. But the main consideration is that the building ought not in any event to have been pulled down without the procedure set out in S. 216 being followed.

It has not been suggested that if the special officer's action was unlawful, which in our opinion it certainly was, the respondent Council should not be called upon to pay damages. The appellant has suffered damage and his loss has been assessed by both the lower Courts at Rs. 100. Therefore the quantum of damages is not open to argument in this Court, and the respondent Council must pay the amount. The appeal succeeds and the decree of the District Munsif will be restored. The appellant will have his costs in the subordinate Court and in this Court based on the amount of his decree.

C.R.K./G.N. *Appeal allowed.*

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* A. I. R. 1941 Madras 262

BURN AND MOCKETT JJ.

Official Receiver, Guntur —Appellant

v.

Amara Seshayya and others —

Respondents.

Appeal No. 469 and Civil Revn. Petn. No. 1427 of 1938, Decided on 23rd August 1940, against order of Sub-Judge, Guntur, D/- 5th April 1938.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 58— Creditor's suit decreed in 1931 — Debtor subsequently adjudicated insolvent— Official Receiver selling some of debtor's joint family property attached by creditor before judgment — Partition suit in 1933 by insolvent's minor son born subsequent to his father's insolvency — Before decision of suit two more sons born to insolvent —Official Receiver appointed special receiver in partition suit — Execution petition by creditor in 1937 for attachment of sons' share in sums realized by official receiver by sale of joint family property attached before judgment and also for sale of sons' share in remaining attached joint family properties—Official Receiver objecting on the ground that all property of insolvent had vested in him — Official Receiver held was not representative of sons but a third party objecting under O. 21, R. 58 — Consequently no appeal was competent from order allowing execution — Remedy of Official Receiver is by way of suit under O. 21, R. 63.

Subsequent to the creditor's decree obtained in 1931 the judgment-debtor was adjudicated insolvent in the same year. The Official Receiver sold some of the joint family properties attached by the creditor before judgment. In 1933 the only minor son of the insolvent born subsequent to his insolvency instituted a partition suit but before its decision in 1936 two more sons were born to the insolvent. The Official Receiver was appointed as special receiver in the partition suit. In 1937 the creditor filed an execution petition for the attachment of the sons' share in the sum realized by the Official Receiver by the sale of some of the joint family properties attached before judgment and for sale of the sons' share in the rest of the attached properties. The Official Receiver objected on the ground that all the properties of the insolvent had vested in him from the date of the insolvency petition :

Held that the Official Receiver in his objection could not be said to be representing the sons in his capacity as special receiver in the partition suit and therefore he was in the position of a third party objecting to an attachment under O. 21, R. 58 and therefore no appeal was competent from the order of the execution Court rejecting the objection and allowing execution to proceed. The proper remedy for the Official Receiver was by way of suit under O. 21, R. 63 : A I R 1932 Cal 203 and A I R 1935 Mad 151, *Rel. on.* [P 264 C 1]

Held further that the alleged share of the sons in the sum realized by Official Receiver by sale of the attached joint family properties could not be said to be the property of the sons but merely represented a portion of sale proceeds of certain items of joint family property liable to discharge certain other debts of the insolvent besides the one due to the decree-holder. The decree-holder who was a party to the partition suit did not claim any priority over other creditors and therefore was bound by the decree and could not attach the sum in question in execution of his decree alone. [P 265 C 1, 2]

(b) Hindu law — Debts — Father — Money decree against father alone —Subsequent partition between father and sons—Sons' interest cannot be pursued in execution of aforesaid decree — Debt binding on joint family — Decree-holder's remedy is by separate suit against sons — Fact that joint family property was attached before judgment is of no avail.

In execution of a decree obtained against the father alone the interest of the sons after a partition between them and their father cannot be pursued. If the decree debt is one binding on the joint

family, the decree-holder can have a remedy against the sons after partition by way of a separate suit but he cannot proceed by way of execution against their interest in the joint family property. The fact that the joint family property was attached before judgment does not entitle the decree-holder to proceed after partition against the interest of the sons who were not parties to the suit : A I R 1937 Mad 424, *Rel. on.* [P 264 C 2]

* *(c) Civil P. C. (1908), O. 21, Rr. 58 and 63 and S. 115 — Other remedy open — Still revision petition admitted — It can be considered on merits.*

The principle that revision should not be allowed where another remedy is available is a principle which may very conveniently be applied at the stage of admission. Consequently, where a revision petition from an order under O. 21, R. 58 rejecting an objection has been admitted the High Court has jurisdiction to act under S. 115 even though a remedy by way of suit under O. 21, R. 63 is open to the petitioner : 8 Mad 484 (F B), *Expl.* [P 265 C 2]

P. Satyanarayana Rao — for Appellant.

V. Govindarajachari — for Respondents.

Burn J. — This appeal and this revision petition are brought against the order passed by the learned subordinate Judge of Guntur in E. P. No. 84 of 1937 in O. S. No. 34 of 1931. The execution petition was dated 1st March 1937. The suit had been decreed on 14th December 1931 against defendant 9 for a sum of Rs. 23,741-1-2 with interest and costs. It was alleged in the execution petition that certain sums had been recovered in execution in 1936 and 1937 and that an amount of Rs. 30,582 plus further interest and costs was still due. The prayer in the execution petition was for execution against five defendants impleaded in the execution petition as supplemental defendants 10 to 14. The supplemental defendant 10 is the Official Receiver of Guntur and defendants 11 to 14 are said to be the minor undivided sons of K. Venkatasubba Rao defendant 8 in the suit. K. Venkatasubba Rao had been adjudicated insolvent in I. P. No. 74 of 1931 and certain items of the joint family property had been sold by the Official Receiver for a sum of Rs. 6555. The decree-holder alleged that he had attached the properties of defendant 8 before judgment in O. S. No. 34 of 1931. He said that he desired attachment by means of a prohibitory order of a sum of Rs. 5244 representing the four-fifth share of the supplemental defendants 11 to 14 (the minor sons of defendant 8) of the sum of Rs. 6555. He prayed that the Official Receiver, defendant 10, might be ordered to deposit this amount in Court so that it might be paid to him to the credit of this decree in O. S. No. 34. He prayed also for the issue of a sale notice regarding the remaining joint family properties which had been attached and for payment of four-fifth of the sale proceeds of such items to him. The Official Receiver opposed this application and the minor sons also opposed it. The learned subordinate Judge overruled these objections and ordered that the preliminary attachment of the sum of Rs. 5244 should be made absolute. Hence this appeal and the revision petition which are filed by the Official Receiver.

Mr. Govindarajachari on behalf of the respondent decree-holder raised a preliminary objection to the maintainability of the appeal and after hearing his arguments and the arguments of Mr. P. Satyanarayana Rao for the appellant, we find ourselves obliged to accept the preliminary objection. Mr. Govindarajachari's contention was that the Official Receiver did not in this proceeding represent any of the parties to the decree and that consequently no appeal would lie from the order passed by the learned subordinate Judge. Mr. Satyanarayana Rao attempted to show that the Official Receiver could be considered to be a representative of the sons of the insolvent, defendant 8. It has been pointed out by Rankin C. J. in 35 C W N 971,[1] that no hard and fast rule can be laid down regarding the position of the receiver in insolvency in such a case as this. The learned Chief Justice observes :

It appears to me that any general statement to the effect that a receiver is or is not a representative for the purposes of S. 47 of the Code is necessarily misleading. It all depends on the purpose and nature of the application made by the receiver whether he is a representative of the judgment-debtor or not. For some purposes he would be entitled as representing the judgment-debtor to litigate matters under S. 47 of the Code; but where he comes to the executing Court for the purpose of saying that as the judgment-debtor's property now belongs to the receiver the Court cannot sell for the judgment-debtor's debt that which is the property of another person because it has vested in the receiver for the benefit of the creditors, then, for that purpose the receiver is not, in my judgment, a representative of the judgment-debtor. The receiver in such a case, if he is not acting under S. 52, Provincial Insolvency Act, but acting under the usual provisions of the Civil Procedure Code is really a third party making a claim.

To the same effect is the decision of a Bench of this Court in 58 Mad 403.[2] The facts of each case have to be taken into consideration in order to find out whether the Official Receiver is a representative of

1. ('32) 19 A I R 1932 Cal 203 : 136 I C 593 : 35 C W N 971, Mohitosh Dutta v. Satish Chandra.
2. ('35) 22 A I R 1935 Mad 151 : 154 I C 934 : 58 Mad 403 : 68 M L J 78, Official Receiver of Kistna v. Imperial Bank of India.

the judgment-debtor or not. In the present case the Official Receiver contended that all the property of the insolvent had vested in him with effect from the date of the insolvency petition. He was therefore in the position of a third party objecting to attachment under O. 21, R. 58, Civil P. C., and when his objection was disallowed by the learned subordinate Judge he had no right of appeal but had the right of filing a suit under O. 21, R. 63, Civil P. C.

As for the contention that he was a representative of the sons of the insolvent, that is based on the fact that in 1933 a suit for partition was filed against defendant 8 on behalf of his eldest son a minor at that time who was the only son of the insolvent then in existence. That was O. S. No. 372 of 1933. Before it was decided in 1936, two other sons had been born to the insolvent. A decree was passed for partition and in that the Official Receiver was appointed as a special receiver with directions to pay out of the insolvent's estate all the debts that were properly binding upon the estate and to distribute the rest between the insolvent, defendant 8, and his minor sons. It is however not possible to hold that in this execution proceeding the Official Receiver was representing the sons in his capacity as special receiver in the partition suit. As a matter of fact, the sons were not parties to O. S. No. 34 of 1931 for the simple reason that none of them had been born when that suit was filed. They were not parties therefore to the decree. We are told moreover that, in his capacity as special receiver in the partition suit, the Official Receiver did file a claim under O. 21, R. 58, Civil P. C., which was dismissed by the learned subordinate Judge on 28th March 1938. We think, it is clear that in this case the Official Receiver is not a representative of any of the parties to the suit and therefore has no right of appeal. Sustaining Mr. Govindarajachari's preliminary objection, we must dismiss A. A. O. No. 469 of 1938.

Mr. Satyanarayana Rao then proceeded to argue C. R. P. No. 1427 of 1938 which was filed as an alternative remedy. His main contention is that the learned subordinate Judge had no jurisdiction in this case to attach the sum of Rs. 5244, as representing the share of the insolvent's minor sons. To understand this, it is necessary to mention the facts which have been very perfunctorily dealt with in the order of the learned subordinate Judge. O. S. No. 34 of 1931 was filed on 7th April 1931 and the decree was passed on 14th December 1931. On 11th April 1931 the insolvent's property had been attached before judgment. Six days after that I. P. No. 74 of 1931 was filed against defendant 8 and he was adjudicated insolvent on 10th October 1932. The partition suit (O. S. No. 372 of 1933) was filed as already mentioned on 14th July 1933 and on 14th August 1936, a preliminary decree for partition was passed. This E. P. was filed on 1st March 1937. Now it is quite clear that after partition, the interest of the sons cannot be pursued in execution of a decree passed against the father alone. There are many cases in which this has been laid down and it is only necessary to refer to the latest decision in this Court, I L R (1937) Mad 1004.[3] If the decree debt is one binding on the joint family, the decree-holder can have a remedy against the sons after partition by way of a separate suit but he cannot proceed by way of execution against their interest in the joint family property. Mr. Govindarajachari does not dispute this statement of the law but he contends that the attachment before judgment which was made on 11th April 1931, puts this case into a different category altogether. His contention is that since the decree-holder in O. S. No. 34 attached the whole of the joint family property before judgment that attachment enables him to proceed now against the interest of the sons in spite of the fact that they were not parties to the suit. We are unable to accept this contention.

The principle laid down in the case cited and in the other cases of the same sort does not make any distinction between attachments effected before judgment and attachments attempted after judgment. It must be borne in mind that when this attachment before judgment was made no son had been born to defendant 8. We have been told from the Bar by Mr. Govindarajachari that the insolvent's eldest son (plaintiff 1 in the partition suit) was born on 29th October 1931 and that therefore he must have been in *gremio matris* on the date of attachment. The documents filed before us do not show the date of birth of any of the insolvent's sons. But that is a matter of no importance, because the respondent in this case was not at any time purporting to act against the shares of the sons in pursuance of the attachment effected before judgment. His application was ex-

3. ('37) 24 AIR 1937 Mad 424 : 169 I C 400 : I L R (1937) Mad 1004 : (1937) 1 M L J 249, Kuppan Chettiar v. Masa Goundan.

pressly for a fresh attachment of a sum of money in the hands of the Official Receiver. For this reason, it is also unnecessary to consider a subsidiary contention of Mr. P. Satyanarayana Rao that upon adjudication the whole of the insolvent's property vested in the Official Receiver with effect from the date of the insolvency petition, making the attachment before judgment of no avail: *vide* 42 Cal 72.[4]

On this ground alone the revision petition must be allowed. Mr. Satyanarayana Rao for the petitioner has raised two other points. One is that this decree-holder was made a party to the partition suit (O. S. No. 372 of 1933). It is alleged that in that suit he did not claim any priority over other creditors and that he is bound by the decree in that suit. The decree provided for what was virtually an administration of the estate of the insolvent, defendant 8, in O. S. No. 34 of 1931, directing the Official Receiver as special receiver to sell so much of the insolvent's property as was necessary to discharge all his legitimate debts and divide the surplus between the insolvent and his sons. In the present E. P., it is clear that the decree-holder in O. S. No. 34 of 1931 is attempting to get an advantage over the other creditors of K. Venkatasubba Rao. He is trying to collect Rs. 5244 towards his decree alone without regard to the debts of the insolvent which are binding upon his estate. It is we think quite true to say as Mr. Satyanarayana Rao says that this sum of Rs. 5244 cannot in any sense be held to be the property of the minor sons of K. Venkatasubba Rao. It represents four-fifth of the sale proceeds of certain items of joint family property. It has no separate existence as the property of the minor sons. It is merely a part of the joint family estate and in O. S. No. 372 of 1933 it has been found that that sum is liable for the discharge of certain other debts besides the one due to the decree-holder in O. S. No. 34 of 1931. It is impossible therefore to say that the minor sons of K. Venkatasubba Rao are entitled to this sum of Rs. 5244. They have been declared to be entitled to their respective shares of whatever may be left after Venkatasubba Rao's debts have been discharged. This contention also we think must prevail. Mr. Govindarajachari has not been able to show us any reason why the decree-holder in O. S. No. 34 of 1931 should be allowed to ignore the decree in O. S. No. 372 of 1933 to which he was a party, and to proceed in execution of his decree in a manner which is contrary to the terms of the decree.

Another contention of Mr. Satyanarayana Rao is that since the cash attached was in the hands of the special receiver in O. S. No. 372 of 1933 leave of that Court was necessary before it could be attached. He has referred us to the case of A I R 1925 Mad 51[5] and the case cited in that decision. It is not necessary to pronounce upon the validity or otherwise of this contention since we are satisfied that on the grounds already mentioned the petition must succeed.

Mr. Govindarajachari attempted to argue that revision could not be allowed in this case because the Official Receiver had a remedy by way of suit under O. 21, R. 63. He refers us to the Full Bench decision in 8 Mad 484.[6] In that judgment dealing with a similar revision petition (No. 266 of 1884) the learned Judges have observed, "We have no power to interfere under S. 622, Civil P. C., the petitioner's remedy is by suit." From this we are asked to infer that the Full Bench laid down that whenever there is a remedy by way of suit the remedy by way of revision cannot be allowed. We can only say that this decision has never been considered in this Court as laying down any such proposition. In point of fact the learned Judges do not say that because the petitioner has a remedy by way of suit therefore they have no power to interfere by way of revision. Cases in which this Court has interfered in revision in spite of the fact that the petitioner had another remedy are too numerous to be quoted. The principle that revision should not be allowed where another remedy is available is a principle which may very conveniently be applied at the stage of admission. This revision petition was admitted by Varadachariar J., nearly two years ago, and since it has been admitted we think that it would be wrong at this stage to say that it must be dismissed merely because the Official Receiver might have proceeded by way of suit. Since it is clear to us that the learned subordinate Judge had no jurisdiction to attach this money in the hands of the Official Receiver and special receiver, it would be an unnecessary multiplication of legal proceedings to refer the petitioner now to a suit. We are satisfied that we have jurisdiction to act

4. ('14) 1 AIR 1914 P C 129 : 24 I C 304 : 42 Cal 72 : 41 I A 251 (P C), Raghunath Das v. Sundar Das.

5. ('25) 12 A I R 1925 Mad 51 : 79 I C 632, Thayumana v. Ramasami.

6. ('85) 8 Mad 484 (F B), Ittiachan v. Velappan.

under S. 115, Civil P. C., and to allow this petition. The order of attachment of the sum of Rs. 5244 is accordingly set aside and E. P. No. 84 of 1937 dismissed. The petitioner will recover his costs of this petition from respondent 1 (plaintiff in O. S. No. 34 of 1931) both here and in the Court below.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 266

WADSWORTH J.

R. K. Thirumalai Chettiar — Appellant

v.

K. N. Nanjayya Gowder and another— Respondents.

Appeal No. 370 of 1936, Decided on 10th August 1939, against order of Sub-Judge, Coimbatore, D/- 24th February 1936.

(a) Civil P. C. (1908), Sch. 2, Paras. 14, 15 and 21 — Provision in award objectionable with reference to para. 14 or para. 15 severable from rest of award—Award so far as it is unobjectionable can be enforced.

If the award contains any provision which is objectionable with reference to para. 14 or para. 15 and if that provision is severable from the rest of the award, the Court can enforce the award so far as it is unobjectionable. [P 266 C 2]

(b) Civil P. C. (1908), Sch. 2, Para. 14 (c) — Stipulation for liquidated damages in case of default is not per se illegal — Court cannot go into what is proper amount of damages.

A stipulation for liquidated damages in the award in case of default is not per se illegal. The Court has no jurisdiction to go into what is the proper amount of damages and cannot interfere with this figure embodied in the award. [P 267 C 1]

(c) Arbitration—Reference to arbitration should be read so as to interpret broadly intention of parties.

The reference to arbitration should be read not in any pedantic spirit but so as to interpret broadly the intention of the parties. [P 267 C 2]

T. V. Ramiah — for Appellant.

A. C. Sampath Ayyangar — for Respondents.

Judgment.—This appeal arises out of an order on an application to file an award as a decree. The award proceeded on a reference to arbitration made outside the Court and the Court has on the application of the appellant passed a decree in terms of the award except for one stipulation which has been regarded as penal. The arbitration arose out of a dispute between partners and the reference was in the following terms :

As we cannot conduct the said shop jointly, we have completed the accounts relating to the business in respect of the same from 1st April 1934 till 30th April 1935 and have delivered the same to the panchayatdars. Only agreeing to abide wholeheartedly by the award which you, the panchayatdars, may pass directing the delivery of the said company to one of the partners and also the rules and regulations you may frame in connexion therewith, we have executed the muchilika signing hereunder.

As a reault of this reference the arbitrators passed an award determining the amounts due by and from each of the partners and directing that the business should be handed over to one of the partners and that the other partners should not only pay what was due by them but should execute release deeds in favour of the partner who is to have the control of the business. They stipulated for a time within which these obligations should be carried out and in the case of each of the partners upon whom obligations were cast they provided for some payment by way of damages in the event of default. Each of the present respondents was to pay a sum of Rs. 1000 in default of his paying the amount found due from him and executing the release deed. The learned subordinate Judge, recognizing that there was no objection at the time when the award was passed and that the written statements of the contesting defendants only disputed the validity of the award to the extent of the alleged penalty, first passed a decree for the enforcement of the award so far as there was no objection. Then after some argument he took a memorandum from the plaintiff's vakil agreeing to allow the Court to fix a reasonable sum in lieu of the damages of Rs. 1000 payable by each of defendants 1 and 2 (respondents here). The learned subordinate Judge—to my mind quite rightly—held that he had no jurisdiction to estimate the amount of damages and fix a sum other than that stipulated for in the award. He proceeded however to consider the validity of this term of the award and came to the conclusion that it went beyond the terms of the reference in so far as it provided what the learned Judge found to be a penalty.

Now, the powers of a Court in enforcing an award on arbitration without the intervention of Court are laid down in paras. 20 and 21 of Sch. 2, Civil P. C. Paragraph 21 requires the Court to pronounce judgment according to the award where no ground such as is mentioned in para. 14 or para. 15 is proved; and it is, I think, established that if the award contains any provision which is objectionable with reference to para. 14 or para. 15, and if that provision is severable from the rest of the award, the Court can enforce the award so far as it is unobjectionable. We are not now concerned with para. 15 there being no allegation of misconduct, fraud or such matters. Paragraph 14 (a) deals with omissions from the award, with

which we are not concerned, and with the determination of matters not referred to arbitration, which is the ground alleged here for challenging the award. There has also been some reference to cl. (c) which relates to an objection to the legality of the award apparent on the face of it. I do not think myself that clause (c) has any application to the facts of the present case. A stipulation for liquidated damages in case of default is not per se illegal. The most that can be said is that if a Court which has to adjudicate on a contract finds that with reference to the terms of S. 74, Contract Act, the amount stipulated in the contract is in excess of the reasonable compensation for breach of the contract, the Court can reduce the damages to what it considers to be reasonable. It follows therefore that this provision whereby defendants 1 and 2 are each required to pay Rs. 1000 if they fail to pay what is due from them and to release their interest in the business within the stipulated time, is not necessarily an illegal stipulation. The most that can be said is that it may provide by way of damages for more than what the Court, if it had jurisdiction to go into the matter, would be prepared to award under S. 74, Contract Act. As I have already indicated, to my mind the Court has no jurisdiction to go into what is the proper amount of damages and cannot interfere with this figure embodied in the award unless it can be shown to be a decision illegal on its face (which in my opinion it cannot) or unless it can be shown to go beyond the scope of the reference to arbitration.

Now, the reference to arbitration is not confined to providing that the arbitrators shall decide who is to have the management of the business for the future and what are the rights and liabilities of the partners in the dissolved business. What the reference contemplates is that the arbitrators should pass an award directing the delivery of the business to one of the partners and frame rules and regulations for that purpose. That is to say, the arbitrators are put into the position not merely of the adjudicating Court but also to some extent of the executing Court. They are required not only to decide on matters of title but to frame regulations for the enforcement of their decision. Any other view seems to me to ignore the essential words "directing the delivery of the said company and the rules and regulations you may frame in connexion therewith." I have had the advantage of a reading of the Tamil original and it seems to me that the Court translation substantially renders the meaning of this passage. It contemplates not merely an adjudication on the rights and liabilities of the parties but the delivery of the business to the partner who is to carry it on and the drafting of rules to see that this delivery is carried out. When once it is conceded that the arbitrators were authorized to frame rules regulating the delivery of the business, it seems to me to follow that they were empowered to fix the times for the performance of various parts of the act of delivery and to assess the damages for defaulting in adhering to that time-table. I am of opinion that the reference to arbitration should be read not in any pedantic spirit but so as to interpret broadly the intention of the parties. The fact that this award was not contrary to the intention of those who made the reference is shown by the absence of any objection by them to the award when it was propounded. It is only after there was default and after the defaulting parties were required to pay the damages stipulated, that they awoke to the fact that the award was in any way defective. I hold therefore that this award is one which can and should be enforced in toto. The appeal is therefore allowed. There will be a decree for the plaintiff as prayed for with costs as against defendants 1 and 2 throughout.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 267

BURN AND LAKSHMANA RAO JJ.

In re Karuppan Chetti and another

Accused.

Referred Trial No. 42 and Criminal Appeals Nos. 197 and 198 of 1940, Decided on 30th April 1940, referred by Addl. Sess. Judge, Madura Division, in C. C. No. 119 of 1939.

(a) Criminal trial — Confession — Fact that confession before Magistrate is slightly different from that made to police officer or that confession omits facts spoken to by prosecution witnesses is no ground for rejecting confession.

Slight divergences between the confessions made to the police officer and before the Magistrate or omissions from the confessions of facts spoken to by the prosecution witnesses are not sufficient reasons for rejecting the confessions. [P 269 C 1]

(b) Evidence Act (1872), S. 30 — Confession by accused implicating other accused is of less evidentiary value than testimony of accomplice—It may help Court to decide credibility of other evidence—But it cannot be used as positive evidence.

The confession of an accused implicating another accused is of less evidentiary value than the testi-

mony of an accomplice because the man in the dock cannot be cross examined. It can only be taken into consideration under S. 30 along with such other evidence as there may be. Such a confession may help the Court to decide whether the other evidence is or is not credible but it cannot supply the place of positive evidence against the other accused regarding the commission of the crime.

[P 269 C 2; P 270 C 1]

K. S. Jayarama Iyer, N. Krishnamurthi and C. K. Venkatanarasimham—for Accused.

Public Prosecutor — for the Crown.

Burn J.—The appellants were accused 2 and 3 in S. C. No. 119 of 1940 in which the learned Additional Sessions Judge of Madura tried them and one Pethnasami Chetti (accused 1) on the charge that accused 2 and 3 had murdered one Chockalingam Chetti on 17th June 1939 and that accused 1 had abetted the commission of the murder by them. The learned Additional Sessions Judge considered that the evidence of abetment by accused 1 was insufficient and acquitted him, but accused 2 and 3, the learned Additional Sessions Judge, agreeing with the assessors, found guilty of the offence of murder.

There is no doubt about the fact that Chockalingam Chetti was murdered on the night of 17th June 1939, at Bodinaickanur. He was stabbed in 24 places and his head was cut off. The case was undoubtedly one of murder. The chief evidence against the appellants consisted of confessions made by accused 3. He was arrested on 26th June in the house of a country doctor (P. W. 29) to whom he had gone for treatment of a wound on his leg. When the Circle Inspector saw him, accused 3 made a long confession to the Inspector which has been recorded in EX. AA. The learned Additional Sessions Judge has only admitted in evidence under S. 27, Evidence Act, certain portions of this statement which in his opinion relate distinctly to important facts discovered in consequence of the information given by accused 3. Accused 3 said that he was prepared to show the weapon which had been used by himself and accused 2 in killing Chockalingam Chetti. He also said that he would show the place where the head had been buried separately from the trunk. He took the police to a place about a furlong to the north of Bodipuram and there he produced from under a bush a dagger (M. O. 1) and an aruval (M. O. 2). According to his story the dagger had been used by himself and the aruval by accused 2. The evidence of the doctor who made the post-mortem examination showed that at least two kinds of weapons had been used, a stabbing instrument and an ordinary cutting instrument. Accused 3's story that M. Os. 1 and 2 were the weapons used may therefore be true but it was not confirmed by the results of chemical and serological examination. The chemical examiner was unable to find blood on the dagger (M. O. 1). He found blood on the aruval (M. O. 2) but it was in such a disintegrated condition that it was not possible to apply the test for human blood. Accused 3 also pointed out the place where he said the skull had been buried. Here again his information was not fully corroborated by the fact discovered for the skull was not found there. It was corroborated to some extent however because the police found a nasty smell and some human hair. A human skull was found a few days later about a furlong further off, and the lower jaw bones separated from it. The doctor was able to find that the jaw bones fitted the skull but he was not able to say that the skull was the skull of the person to whom the trunk had belonged.

Accused 3 was taken before the Sub-Magistrate on 28th. On 1st July he made a long and detailed confession to the Sub-Magistrate of Tirumangalam which is EX. J. The Sub-Magistrate took all the possible precautions to ensure that he should not make a confession of any kind unless he really wanted to do so and the Sub-Magistrate was satisfied that he was making a statement voluntarily. Accused 3 persisted in confessing throughout the proceedings in the Court of the Magistrate who held the preliminary enquiry. When he was questioned on 30th September 1939, more than three months after the offence, he again repeated his confession and in fact added details which he had not mentioned before. The Sub-Magistrate decided to commit the three accused for trial on 4th October and even on that date when accused 3 was asked if he had any witnesses to be examined in the Sessions Court he said that he had none, but he did not disown his confessions. This is somewhat important because the plea of learned counsel for accused 3 is that his confessions ought to be held to be irrelevant as having been made under inducement. It was alleged that the Inspector of Police had induced him to confess by promising that he should be taken as an approver.

If the confessions of accused 3 are true, there is no doubt about his participation in the murder of Chokkalingam Chetti for he says that he stabbed him in several places. We have been asked to say that the confessions cannot be relied upon because they do

not tally with all the evidence that has been given by the prosecution witnesses and because they are not identical. There are slight differences between the confessions made on 1st July and on 30th September. We do not think, however, that these divergences between the two confessions or the omissions from the confessions of facts spoken to by the prosecution witnesses are sufficient reasons for rejecting the confessions. The allegation that the Police Inspector induced accused 3 to confess by promising to take him as an approver cannot be believed. It is clear, we think, that these confessions were made voluntarily by accused 3 and that, so far as concerns his participation in the murder, they are true. They are rather strongly corroborated by the discovery on information given by him of the two weapons and of the place where something dead had been buried. The confessions are strongly corroborated by the evidence given by three witnesses, P. Ws. 27, 28 and 29. As already stated, accused 3 was arrested in the house of P. W. 29 who is a country physician. Accused 3 had been taken to that house by his relations P. W. 27 and by P. W. 28. All these three witnesses said that when he was asked to explain the wound on his legs, accused 3 admitted that he and accused 2 at the instigation of accused 1 had killed a Chetti in Bodinaickanur. The assessors and the learned Sessions Judge, we think, were undoubtedly right in holding that accused 3 was guilty of the offence of murder. We confirm his conviction for murder and also the sentence of death and dismiss his appeal.

The case of accused 2 is quite different. The evidence against him was that of several witnesses who said that, on three or four days before this murder was committed they had seen him in company with accused 3 in Bodinaickanur. Accused 3 belongs to Mallapuram which is a long way from Bodinaickanur. There was evidence also given by P. W. 26 that on the night of 17th June, accused 2 went to Bodipuram along with accused 3 and both of them entered the house of accused 2. The evidence of P. W. 26 was accepted by the learned Sessions Judge. Learned counsel for accused 2 has criticised the evidence of P. W. 26 rather severely because he was unable to explain consistently how he happened to get up and come out of doors in the middle of the night and see accused 2 and 3. In one place he said that he thought somebody was knocking at the door of the house in which he was sleeping. But in the Sessions Court he says that he got up and came out because he heard somebody knocking at the door of the house of accused 2. The learned Sessions Judge was apparently favourably impressed by the demeanour of this witness and we find it difficult to reject his evidence. Besides this, the only other item of evidence against accused 2 was given by a police foot-print expert. In the confession of accused 3 before the Sub-Magistrate on 1st July it was stated that, after committing the murder, accused 3 and 2 ran away in a north easterly direction and passed over some clay bricks which had been laid to dry. When these bricks were examined, marks of human feet were found on them. The foot-print expert took specimen prints from the feet of accused 2 and 3 in clay which was as nearly as possible of the same texture as that of the bricks found near the brick kiln. Having compared these test prints with the prints found on the bricks near the kiln, the expert said that in his opinion the foot-prints had been made by accused 2 and 3. We have examined the prints ourselves and find it very difficult to express any opinion.

It is quite conceivable that the eye of the expert can see a good deal more in matters of this kind than an untrained eye. But it has to be remembered that the brick kiln where these foot prints were found is about a quarter of a mile away from the place where Chockalingam Chetti was murdered. The positive evidence therefore even if it is all accepted, is simply that before the murder the 2nd accused was in the company of the third; immediately after the murder, or very shortly after the murder, he was in company with accused 3 and his foot-prints have been found alongside the foot-prints of accused 3 on some soft bricks about a quarter of a mile away from the scene of the crime. On these facts learned counsel for accused 2 asks us to say that accused 2 cannot be held guilty of the murder of Chockalingam Chetti. We think that this contention is well founded. Accused 3 implicated accused 2 in the crime in his confessions and if accused 3's confessions are true, accused 2 took in fact a leading part in the killing of Chockalingam Chetti. But the confessions of accused 3, as has frequently been held, are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under S. 30, Evidence Act, along with such

other evidence as there may be. This has been generally interpreted to mean that confessions like these given by accused 3 in this case may help the Court to decide whether the other evidence is or is not credible. It cannot however supply the place of positive evidence regarding the commission of the crime. In the present case, for instance, if we were in doubt as to the credibility of the evidence given by P. W. 26, that doubt might be resolved by taking the confessions of accused 3 into consideration. But since the rest of the evidence does not show that accused 2 took part in the crime the confessions of accused 3 cannot be used to supplement it and to furnish the sole evidence of the actual murder. The circumstances proved against accused 2 by the witnesses to whom we have referred, do not in our opinion lead inevitably to the inference that he took part in the murder of Chockalingam Chetti. For these reasons, we set aside the conviction of accused 2 and the sentence of death and direct that he be set at liberty.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. 1941 Madras 270

LEACH C. J. AND HORWILL J.

Pachaiammal and another— Appellants

v.

Hindustan Co-operative Insurance Society, Ltd., Madras and others — Respondents.

Appeal No. 13 of 1939, Decided on 16th August 1940, from judgment of Mockett J., D/- 8th February 1939.

* *Letters Patent (Madras), Cl. 12 — Insurance company with its head office at Calcutta having branch office at Madras—Contracts of insurance not made in Madras but in Calcutta — Company cannot be said to be carrying on business in Madras.*

A company only carries on business where it enters into contracts relating to its business, not at places where it may have canvassers or agents for the purpose of obtaining offers of business and attending to matters ancillary to its business.

[P 271 C 1]

Hence where an insurance company with its head office at Calcutta has its branch office in Madras but the contracts of insurance are made in Calcutta and not in Madras, it cannot be said that the company is carrying on business in Madras within the meaning of Cl. 12, Letters Patent: *Case law referred.* [P 272 C 2]

Sir A. Krishnaswami Iyer (Advocate-General) and K. S. Rajagopala Ayyangar — for Appellants.

A. V. Seshayya and S. Ramachandra Iyer — for Respondents.

Judgment. — The question which falls for decision in this appeal is whether the respondent company, the Hindustan Co-operative Insurance Society, Ltd., carries on business in Madras within the meaning of Cl. 12, Letters Patent of this Court. Appellant 1 is the widow and appellant 2 is the daughter of one C. T. Subramania Mudali, who died on 31st May 1926. The deceased lived at Little Conjeevaram in the Chingleput District and therefore outside the limits of this Court's original jurisdiction. He insured his life with the company for a sum of Rs. 5000 payable at the age of 60 years. According to the pleadings the policy was issued on 6th August 1925 and the assured died on 31st May 1926. The company repudiated liability on the ground that the assured had failed to disclose that he was suffering from certain diseases when he made the proposal. The suit was filed on the original side of this Court by the appellants, who claimed that the Court had jurisdiction because the company was carrying on business in Madras. In its written statement the company raised the question of the Court's jurisdiction and its contention that the Court had no jurisdiction was upheld by Mockett J., who accordingly dismissed the suit. The appeal is from that decision.

It is common ground that if the company cannot be deemed to be carrying on business in Madras the present suit cannot be maintained, because no part of the cause of action arose here. As a matter of fact, the leave of the Court to file the suit was neither sought nor given. The head office of the company is in Calcutta and it has branch offices in many places in India. In Madras the company has a very large branch office. The Madras office employs about 400 canvassing agents and its establishment charges amount to Rs. 67,000 a year. The supervision of the canvassers employed in the Madras Presidency rests entirely with the Madras office. When a proposal is made in the Madras Presidency it is forwarded to the head office at Calcutta through the Madras office, which arranges for the medical examination of the person making the proposal. Although premia may be paid to the head office they are usually paid to the Madras office. The payments here made in respect of premia amount to over Rs. 6,00,000 a year. The Madras office however has no power to accept proposals for policies. That power is reserved entirely to the head office and it

alone has power to issue policies and to authorize payments in respect of policies. Therefore so far as the Madras Presidency is concerned the position is this. The Madras office does everything in connexion with the company's business, except entering into formal contracts of insurance and authorizing payments in respect thereof. The appellants claim that in these circumstances it is contrary to common sense to say that the company is not carrying on business in the city of Madras. When considered without regard to authority this assertion does not appear to be unreasonable, but what is meant by carrying on business has been the subject of much judicial discussion and it must now be regarded as settled that a company only carries on business where it enters into contracts relating to its business not at places where it may have canvassers or agents for the purpose of obtaining offers of business and attending to matters ancillary to its business.

The question of what is meant by carrying on business has frequently been discussed in England in cases relating to liability to income-tax, but it is not necessary to refer to all the cases which have been cited in arguments in this connexion. It will be sufficient to refer to the well known case in (1896) A C 325[1] and to two later decisions. In (1896) A C 325,[1] the House of Lords held that a wine merchant in France who merely canvassed through agents for orders for the sale of his wines to customers in the United Kingdom, did not carry on business in the United Kingdom, as all contracts for the sale of wines and all deliveries to customers were made in France. In the course of his judgment in this case, Lord Herschell said :

> If all that a merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods.

In (1906) A C 455,[2] Lord Loreburn L. C. observed that the true rule was that a company resided for purposes of income-tax where its real business was carried on, and the real business was carried on where the central management and control actually abided. In (1921) 3 K B 583,[3] the Court of appeal had to decide whether a Danish firm resident in Copenhagen which manufactured and dealt in cement making machinery was liable to income-tax in the United Kingdom. The firm had an office in London which was in the charge of a qualified engineer, who was a whole-time servant. He answered inquiries from prospective customers and advised them, but he had no power to enter into contracts. That power was reserved to the office in Copenhagen and it was from there that the goods were shipped to England. It was held that the firm exercised its trade in Denmark and was not resident in the United Kingdom. Atkin L. J. put the case this way. The question was where did the operations take place from which the profits in substance arose, and relying on the observations of Lord Herschell and Lord Watson in (1896) A C 325,[1] held the firm must be deemed to be carrying on business in Copenhagen. The branch office in Madras of the respondent company is very much in the same position as the office of the Danish firm in London. Proposals are solicited, inquiries are answered and everything ancillary to the transaction of the business of the company is done here, but the contracts of insurance are not made here. They are made in Calcutta, and the entering into contracts of insurance is the real business of the company.

The learned Advocate-General has referred to certain decisions in England with regard to the jurisdiction of the Supreme Court. Residence in England gives the Court jurisdiction, and in (1906) A C 455[2] Lord Loreburn L. C., agreeing with the Master of the Rolls, observed that the residence of a company within the meaning of the Income-tax Acts was not necessarily the same thing as residence for the purpose of serving a writ. The learned Advocate-General has contended that the income-tax cases stand on a different footing from the cases relating to jurisdiction, but they show no divergence of opinion on the question of what is meant by "carrying on business." The learned Advocate-General has referred us to (1899) A C 431,[4] (1886) 33 Ch D 446,[5]

1. (1896) 1896 A C 325: 65 L J Q B 410: 74 L T 435: 44 W R 561: 60 J P 692, Grainger & Son v. William Lane Gough.
2. (1906) 1906 A C 455: 75 L J K B 858: 95 L T 221: 13 Manson 394: 5 Tax Cas 198: 22 T L R 756, De Beers Consolidated Mines Ltd. v. Howe.
3. (1921) 3 K B 583: 37 T L R 949, Smith and Co. v. Greenwood.
4. (1899) 1899 A C 431, La Compagnie Generale Trans Atlantique v. Thomas Law and Co.
5. (1886) 33 Ch D 446: 55 L J Ch 758: 54 L T 863: 34 W R 753, Lhoneux Limon and Co. v. Hong Kong and Shanghai Banking Corporation.

(1902) 1 K B 342,[6] (1911) 2 K B 516,[7] (1912) 1 K B 222[8] and (1914) 1 K B 715.[9] When the facts are examined it will be found that in all these cases, except the last, the companies carried on business in England within the meaning of the income-tax cases. In the last-mentioned case the company did not carry on business in England and consequently it was held that the service of a writ on its agents was not good service. It is not necessary to consider in what respect residence within the meaning of the English Income-tax Acts may differ from residence for the purpose of serving a writ, because all that the Court is concerned with in the present case is what is meant by "carrying on business" and both the income-tax cases and the jurisdiction cases are in agreement here.

There are decisions of our own Court which are also directly opposed to the appellants' case. In 42 Mad 455[10] a Bench of this Court held that a shipping company which earned money by carrying goods by sea and called regularly at Coconada for the purpose of loading and unloading cargo was not carrying on business in Coconada, because there was only a sub-agent there and all contracts with shippers were entered into by the agent of the company in Madras. Therefore the company was not exercising any trade or carrying on business in Coconada so as to be liable to be taxed under S. 53, Madras District Municipalities Act. Another Bench of this Court approved of and followed that decision in 52 Mad 207.[11] It was there held that the expression "transacting business" is the same as carrying on business." A case in which the facts were exactly similar to the facts in this case was 56 M L J 299,[12] where Kumaraswami Sastri J., held that a life insurance company which had its head office in Bombay and a branch office in Madras with no power to enter into contracts, but merely to forward proposals and send moneys to the head office, was not carrying on business in Madras. This decision was followed by Lakshmana Rao J. in C. S. No. 120 of 1937. The English authorities are against the appellants and decisions of this Court are also against them. We agree with the learned Judge that the authorities are such that the Court is bound to hold that the respondent company is not carrying on business in Madras within the meaning of the Letters Patent. Consequently the appeal must be dismissed with costs. The appellants could have sued in the subordinate Court if they had so chosen and it is regrettable that that course was not adopted, the authorities being so emphatically against them.

C.R.K./D.S. *Appeal dismissed.*

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6. (1902) 1 K B 342: 71 L J K B 284: 86 L T 472: 50 W R 226: 18 T L R 229: 19 R P C 46, Dunlop Pneumatic Tyre Co. Ltd. v. Actien-Gesells Chaft Fur Motor Und Motorfahrzeugban Vorm Cudell and Co.

7. (1911) 2 K B 516: 80 L J K B 1117: 104 L T 886, Sacchasin Corporation Ltd. v. Chemische Fabrik Von Hyden Aktiengesellschaft.

8. (1912) 1 K B 222: 81 L J K B 189: 105 L T 695: 56 S J 51: 28 T L R 28, Aktiesselskabet Dampskib "Hercules" v. Grand Trunk Pacific Railway Co.

9. (1914) 1 K B 715: 83 L J K B 561: 110 L T 464: 58 S J 232: 30 T L R 242, Okura and Co., Ltd. v. Forsbacka Jernvesks Aktiesbolog.

10. ('19) 6 A I R 1919 Mad 209 : 51 I C 692 : 42 Mad 455 : 36 M L J 226, Municipal Council of Coconada v. The 'Clan' Line Steamers Ltd.

11. ('29) 16 A I R 1929 Mad 409 : 120 I C 867 : 52 Mad 207 : 56 M L J 525, Municipal Council, Dindigul v. Bombay Co., Ltd., Madras.

12. ('29) 16 A I R 1929 Mad 347 : 121 I C 155 : 56 M L J 299, G. D. John v. Sambamurthy Aiyar.

A. I. R. 1941 Madras 272

HORWILL J.

M. J. Kutinha — Petitioner

v.

Mrs. Nathal Pinto Bai and another — Respondents.

Civil Revn. Petn. No. 1670 of 1937, Decided on 23rd August 1940, to revise order of Dist. Munsif, Mangalore, D/- 11th October 1937.

(a) Madras Village Courts Act (1 of 1889), Ss. 73 and 32—Default of appearance by plaintiff — Panchayat Court instead of dismissing suit under S. 32 deciding it on merits and then dismissing it — Successor of Panchayat Court on plaintiff's application restoring suit—Decision of suit must be regarded as given on merits—Application against decision under S. 73 is competent — Order restoring suit is without jurisdiction — It cannot be regarded as review order inasmuch as there is no provision for review in Act.

The Panchayat Court, instead of dismissing the plaintiff's suit under S. 32 for his non-appearance, decided it on merits and then dismissed it. The successor of the Panchayat Court on the plaintiff's application set aside the decree and restored the suit on the ground that the plaintiff had had good cause for non-appearance. The defendant applied under S. 73 and the District Munsif quashed the order restoring suit as being without jurisdiction:

Held that the decision of the Panchayat Court dismissing the suit must be regarded as given on merits and therefore application against the decision under S. 73 was competent: A I R 1924 All 144; A I R 1925 All 252 and A I R 1915 All 139, *Rel. on.* [P 273 C 2]

Held further that the order restoring the suit was without jurisdiction and could not be treated as an order passed in review of the order of the Panchayat Court inasmuch as the Madras Village Courts Act made no provision for reviews: A I R 1919 Mad 244, *Rel. on*; AIR 1915 All 139, *Disting.* [P 273 C 2]

(b) Review — Unless remedy by way of review is provided by statute, Court cannot review its own judgment except in very exceptional circumstances.

Unless a statute provides a remedy by way of review, the Court cannot review its own judgment except in very exceptional circumstances, such as, for example, where it passed an order inadvertently or on account of some false representation by the officers of the Court: A I R 1919 Mad 244, *Rel. on.* [P 273 C 2]

K. P. Sarvothama Rao — for Petitioner.

K. Y. Adiga — for Respondents.

Order. — The Attavar Panchayat Court tried the suit with which we are concerned on 12th January 1937 in the presence of both parties, and adjourned it to 14th January 1937 for further evidence. The plaintiff was then absent; but instead of dismissing the suit for default, as it should have done under S. 32, it purported to dispose of the suit on the merits. The plaintiff later filed a petition before the Kadiri Panchayat Court, which had succeeded to the jurisdiction of the Attavar Panchayat Court, to set aside the decree of the Attavar Panchayat Court passed in default. In an elaborate judgment, the Kadiri Panchayat Court held that the plaintiff had had good cause for non-appearance and set aside the decree and restored the suit. The defendants thereupon filed an application before the Principal District Munsif of Mangalore to have this order quashed as being without jurisdiction. The learned Munsif held that the order restoring the suit was without jurisdiction and therefore acted under S. 73, Village Court's Act, and quashed the order. The plaintiff has come to this Court in revision.

In 74 I C 905,[1] a somewhat similar question presented itself. In the absence of the appellant and his pleader, an appellate Court purported to dispose of the appeal on its merits; and the question that arose in the High Court was whether a second appeal would lie. If the appeal had been dismissed for default, no appeal would have lain; but if it was dismissed on the merits, a second appeal did lie; and the learned Judges held that they had to consider not what the Court below ought to have done but what it actually did. It held that the lower appellate Court had in fact disposed of the appeal before it on the merits, even though it had no jurisdiction to do so. As it was disposed of on the merits a second appeal lay. That decision was followed by a single Judge of the same High Court, who was also a party to that decision, in 84 I C 521.[2] In 37 ALL 460[3] which has been referred to for another purpose by the learned advocate for the petitioner, it seems to have been agreed by both sides that although the lower Court should have disposed of the proceedings before it in default of appearance it did not in fact do so, and the disposal was treated in the High Court as being on the merits. So, there is no doubt that the learned District Munsif was right in holding that the disposal of the Attavar Panchayat Court was a disposal on the merits and that the remedy of the respondent lay by way of an application to the District Munsif to quash the order that was passed without jurisdiction.

It is argued that even though the order of the Kadiri Panchayat Court is one setting aside a decree passed in default, it is valid, as a review of the previous judgment. In 37 ALL 460[3] such a remedy was allowed; but there was no difficulty there because the learned Judges were dealing with an ordinary civil suit in which a petition for review lies. The Village Courts' Act however makes no provision for reviews; and it has been made clear in many decisions (37 M L J 162[4] is one of them) that unless a statute provides a remedy by way of review, the Court cannot review its own judgment except in very exceptional circumstances, such as, for example, where it passed an order inadvertently or on account of some false representation by the officers of the Court. One cannot therefore take the order of the Kadiri Panchayat Court as a lawful order passed in review of the order of the Attawar Panchayat Court. Finally, it has been urged that the learned Munsif ought not to have interfered with an order that was obviously just, and that he must well have himself quashed the order of the Attavar Panchayat Court and restored the suit in the way the Kadiri Panchayat Court did. It does not however appear either that an application had been made by the defendants to the Court asking it to do that or that such an application would have been in time. It is pointed out that it is still open to the petitioner to apply to the District Munsif's Court under S. 73, because S. 73 gives a discretion to the Court to entertain

1. ('24) 11 A I R 1924 All 144 : 74 I C 905 : 45 All 669 : 21 A L J 667, Nasirkhan v. Itwari.

2. ('25) 12 A I R 1925 All 252 : 84 I C 521, Madho Dass v. Maharajah of Benares.

3. ('15) 2 A I R 1915 All 139 : 29 I C 553 : 37 All 460 : 13 A L J 679, Mt. Phul Kuar v. Hasmatullah Khan.

4. ('19) 6 A I R 1919 Mad 244 : 53 I C 56 : 37 M L J 162, Anantharaju Shetty v. Appavu Hegade.

an application even after the expiry of sixty days. However, we are not concerned in this revision petition with an application which has not yet been made. In the result the petition fails and is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 274

KING J.

N. Subramania Sastrulu of Kandukur and another — Appellants

v.

Official Receiver, Chittoor — Respdt.

Appeals Nos. 190 and 191 of 1938, Decided on 10th September 1940, against appellate order of Dist. Court, Chittoor, in C. M. A. Nos. 75 and 76 of 1937.

(a) Provincial Insolvency Act (1920), S. 54 — Intention under S. 54 should not be judged from natural consequences of acts—Dominant intention in insolvent's mind must be found to have been actually to prefer creditor—Question to be considered is not whether insolvent's assets were actually less than his liabilities but whether he honestly thought they were more.

Under S. 54 where the burden of proof is upon the Official Receiver recourse to the principle that the intention of a person must be judged by the obvious and natural consequences of his acts is not a correct method for discovering the intentions of a person who shortly afterwards becomes insolvent. The dominant intention in the mind of the insolvent must be found to have been actually to prefer a creditor before his alienation can be set aside. The mere fact that the creditor has actually received a preference in the disposal of the insolvent's estate is not enough: (1899) A C 419; (1887) 18 Q B D 295; A I R 1938 Mad 177 and A I R 1940 Mad 228, *Rel. on.* [P 274 C 2; P 275 C 1]

Where at the time of the execution of the mortgages sought to be set aside under S. 54, the insolvent has entertained honestly the belief that his property was worth considerably more than its real worth and that he could also deal with the other creditors in due course by the same method no question of fraudulent preference can arise. The question to be considered is not whether his assets were actually less than his liabilities but whether he honestly thought they were more. [P 275 C 1]

(b) Provincial Insolvency Act (1920), S. 54 — Transfer under pressure of actual attachment of property does not fall under S. 54.

The actual attachment of the insolvent's properties by some of the creditors amounts to such pressure as would reasonably lead the insolvent to take steps to deal with the debts owing to those creditors. A transfer under such pressure does not fall under S. 54. [P 275 C 2]

S. V. Venugopalachariar — for Appellants.

T. K. Srinivasathathachariar and T. T. Srinivasan — for Respondent.

Judgment.—The subject-matter of these two appeals is two mortgages executed on 15th October 1932 in favour of two of the creditors of Padmavati Ammal, against whom an insolvency petition was filed on 7th November 1932 and who was finally adjudicated insolvent in 1934. The proceedings by the Official Receiver were, in the first instance, taken against three mortgages, all of which were executed on the same day. They were taken under Ss. 4, 53 and 54, Provincial Insolvency Act. The learned subordinate Judge of Chittoor dismissed the Official Receiver's applications. The learned District Judge of Chittoor has set aside the learned subordinate Judge's order and annulled all the three mortgages. These are appeals by two of the mortgagees against the learned District Judge's order. The annulment by the District Judge, it must be mentioned, has been based on S. 54 alone; he does not hold that the mortgages are not fully supported by consideration; but he holds that they were fraudulent preferences of some of the insolvent's creditors to the detriment of the others. I think these appeals must be allowed. The learned District Judge has held that the insolvent has fraudulently preferred these appellants, not so much upon the finding of any positive facts which constitute any intention on her behalf to defraud, but mainly for the reason that a preference in favour of the appellants inevitably followed from her action. The learned Judge says:

> Intentions of persons must be judged, as intentions can only be, by the obvious and natural consequences of their acts.

No doubt, this is a legal maxim which applies very often when the Court has to find what the intentions of a particular party are, but with regard to S. 54, Provincial Insolvency Act, where the burden of proof is upon the Official Receiver this method of discovering the intentions of a person who shortly afterwards becomes insolvent is not the correct method to adopt. The authorities in England are very clear in this matter, (*see* (1899) A C 419[1] and (1887) 18 Q B D 295,[2]) and this principle, that the dominant intention in the mind of the insolvent must be found to have been actually to prefer a creditor before his alienation could be set aside, has also been adopted in India: *see* (1937) 2 M L J 868[3] and (1940) 1 M L J 786.[4] It is impossible therefore to support

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1. (1899) 1899 A C 419 : 68 L J Q B 866 : 80 L T 841 : 16 Manson 264 : 15 T L R 418, Sharp (Official Receiver) v. Jackson.
2. (1887) 18 Q B D 295 : 56 L J Q B 195 : 35 W R 148, Ex parte Taylor; In re Goldsmith.
3. ('38) 25 A I R 1938 Mad 177 : 176 I C 652 : (1937) 2 M L J 868, Ranga Reddi v. Official Receiver, Anantapur.
4. ('40) 27 A I R 1940 Mad 228 : 188 I C 208 : (1940) 1 M L J 786, Krishnan v. Devarayan.

the learned District Judge's order merely upon the fact that the appellants have actually received a preference in the disposal of the insolvent's estate.

I have been taken through the evidence with a view to examine whether on the evidence it is possible to hold that there was the dominant intention in the mind of the insolvent fraudulently to prefer the appellants. I am unable to hold that there is any material for any such finding. In the first place, it is conceded by the learned advocate for the Official Receiver that, putting his case at the best, on the evidence available, the assets of the insolvent were, at the time these mortgages were executed, very nearly equal to her liabilities. The learned District Judge, it may be mentioned, refuses to consider any of the statements of the witnesses with regard to the value of the insolvent's properties. He refers to them as vague surmises and says that the only important fact is that when the properties other than the mortgaged properties were sold by the Official Receiver, only Rs. 400 were realized, and also that the Official Receiver leased them on a rental of Rs. 35 a year. These are, no doubt, important facts if the task of the Court were to estimate the real value of the insolvent's estate. But I do not think that the statements made by those very creditors themselves who support the Official Receiver in this case can be ignored, and one of them, the principal opponent of the appellants, Bhaskararamayya has actually given evidence in this very case that the property of the insolvent which was not mortgaged was worth Rs. 14,000.

Even taking as true the contention of the learned advocate for the Official Receiver that the actual value of the estate was less than the liabilities at the time of the mortgages as the learned District Judge has himself pointed out, it is a truism that landed property is always overvalued by the owner. It is therefore extremely probable that the insolvent here thought that her property was worth considerably more than what it was really worth. If that were so, it seems clear to me that she must at the time she executed these mortgages have entertained honestly the belief that she could also deal with the other creditors in due course by the same method. The question to be decided is not whether her assets were actually less than her liabilities, but whether she honestly thought that they were more. I think there is enough evidence in this case to justify the finding that she may have honestly so thought. The learned Judge also refers in para. 5 of his judgment to the fact that the question at issue in insolvency is not whether the assets are sufficient to pay the liabilities, but whether the liabilities can be met, as they arise, by money payment. That is no doubt quite correct when the Court has to decide whether a person who is said to be insolvent should be adjudicated insolvent or not, but, when the question is to decide the intention which is present in a person's mind, it seems to me that unless it is presumed that the person in question knows the law of insolvency and points such as these it is impossible to say that anyone who believes that he is possessed of landed property which is worth more than his liabilities is aware that insolvency is imminent. I am not prepared to hold that on 15th October 1932 the insolvent had any reason to believe that within two or three weeks an insolvency petition would be filed against her.

There is another point which, I think, should be considered in connexion with S. 54. The learned Judge in para. 5 of his judgment says that where all a man's creditors are pressing for payment and he cannot pay them all with money, the honest thing, the truly voluntary thing, the thing which the law insists on, is that he should pay them all he can rateably. There is no finding in this particular case that all the creditors of the insolvent were in fact pressing her for payment. Two of the principal creditors have given evidence and they are not prepared to state distinctly and definitely that they exerted any pressure upon the insolvent or upon the insolvent's relative, Dhurvasa Rao. It is true that one of them, Bhaskararamayya, had filed a suit against the insolvent about three weeks before, but there is no proof that any intimation of that fact was given to the insolvent. The other creditor had not filed a suit at all and there is no evidence that either of them had issued any kind of registered letter to her. On the other hand, both the appellants had not only filed suits, but had also applied for and obtained attachment. No doubt they also have not used any particular threatening language in any particular document sent to the insolvent, but it is clear that the actual attachment of the insolvent's properties amounts to such pressure as would reasonably lead the insolvent to take steps to deal with the debts owing to these creditors.

On a review of the whole evidence, I am of the opinion that there is no proof in this

case that the dominant motive in the mind of the insolvent in executing these mortgages in favour of persons who were not related to her or for whose preference no special private reasons existed, was to prefer them fraudulently to the prejudice of her other creditors. The evidence seems to me to suggest rather that this was an honest attempt to deal with the more pressing claims upon her by mortgaging certain of her assets, and at the time she did so, she must have bona fide thought that she would be able to deal with the other debts in due course. In the result, I set aside the order of the learned District Judge and restore the order of the learned subordinate Judge dismissing the Official Receiver's applications with costs throughout. Leave to appeal is refused.

C.R.K./G.N. *Appeals allowed.*

A. I. R. 1941 Madras 276

WADSWORTH J.

Gudipati Brahmanandam — Petitioner

v.

Gudipati Sarveswara Rao and others — Respondents.

Civil Revision Petn. No. 1543 of 1937, Decided on 9th August 1940, to revise order of Dist. Munsif, Gudivada D/- 17th July 1937.

Madras High Court, Civil Rules of Practice, R. 183—Sale in execution of attached debt is not ab initio void — Application to set it aside is governed by Art. 166, Limitation Act.

There is nothing in R. 183, Civil Rules of Practice, which would justify the conclusion that a sale of the attached debt in execution is void, merely because the Court would have been better advised to have realized it by the appointment of a receiver having regard to the terms of R. 183. Such sale being not ab initio void there must be an application to get it declared invalid. The law of limitation governing that application will be Art. 166, Limitation Act. [P 276 C 2]

P. Satyanarayana Rao — for Petitioner.

K. Venkatarama Raju — for Respondents.

Order. — The present petitioner was the purchaser in court auction of a mortgage debt due to one Krishnayya who was the judgment-debtor in a money suit. The decree-holder, having attached this mortgage debt, brought it to sale and it was purchased by the present petitioner on 14th October 1935. More than a year later, the son of the mortgagee, who by this time is dead, filed an application which recites O. 21, R. 90, Ss. 47 and 151, Civil P. C., and S. 18, Limitation Act, praying the Court to set aside the sale and direct the mortgagor, who was made a party, to deposit the amount due on the mortgage, out of which the decree debt was to be satisfied and the balance paid to the applicant. The lower Court has dealt with this application in a somewhat summary manner. The learned District Munsif recites R. 183 of the Civil Rules of Practice, as laying it down that a debt attached in execution of a decree should be realized by appointment of receiver and not by sale, unless the attached debt is very insignificant. He then states, wrongly, that the decree debt was not over Rs. 100 whereas in fact it was three times this figure and that the sale fetched less than Rs. 100, whereas the price was Rs. 251 and, without going into the question of limitation at all, the learned District Munsif sets aside the sale and directs the decree-holder to take steps under R. 183 of the Civil Rules of Practice.

It seems to me that this order cannot be upheld. Granted that Rule 183 directs the Court to realize an attached debt by the appointment of a receiver and not by sale, unless this is undesirable from the smallness of the amount of the debt or otherwise, there is nothing in R. 183 which would justify the conclusion that a sale of the debt in execution is void, merely because the Court would have been better advised to have realized it by the appointment of a receiver having regard to the terms of R. 183. If once it is conceded that the sale in question, however ill-advised it may be, cannot be regarded as void, it must be set aside in some manner known to law. There must be an application and presumably the law of limitation governing that application will be Art. 166. If for any reason, the applicant can bring himself within time in respect of an application which is prima facie time-barred, by calling in aid the provisions of S. 18, Limitation Act, the grounds upon which limitation is saved must be proved and definitely found before the Court can go into the question of the validity of the sale. Here, there is a sale which may or may not have been well-advised and which may possibly be attacked on other grounds. But the sale is certainly not ab initio void, and there must be an application to get it declared invalid. The application filed by the son of the judgment-debtor is apparently time barred. Before the Court can adjudicate on the validity of the sale, it must necessarily give a finding regarding the limitation of the application. I say nothing about the merits of the application, having regard to the other contentions raised by the parties. But I do hold that the order of the lower Court setting

aside the sale without giving a finding on question of limitation cannot be sustained. The civil revision petition is therefore allowed with costs, the order of the lower Court is set aside. The lower Court is directed to deal with the contentions of the parties and dispose of the application afresh in the light of this judgment.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1941 Madras 277

WADSWORTH AND PATANJALI SASTRI JJ.

S. Ramaswami Iyer—Petitioner

v.

Komalavalli Ammal—Respondent.

Civil Revn. Petn. No. 324 of 1939, Decided on 14th October 1940.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii) — Person having saleable interest in agricultural land outside municipality is agriculturist — Fact that he owns also lands within municipality is immaterial.

All that S. 3 (ii) requires is that the person who claims to be an agriculturist should have a saleable interest in an agricultural land situated outside a municipality, and if he has such land, it is wholly immaterial whether or not he also owns agricultural lands within a municipality. [P 277 C 2]

(b) Hindu law — Will — Will conferring life estate—Condition absolutely restraining disponees from alienating property is void.

The condition in a will, conferring a life estate, absolutely restraining the disponees from alienating their interest in the properties is void as being repugnant to the nature of the estate granted. [P 278 C 1]

(c) Civil P. C. (1908), O. 21, R. 92—Period for setting aside auction sale expired — Sale unconfirmed — Judgment-debtor still has no saleable interest in property sold.

After the expiry of the period for an application to set aside an auction sale, the auction-purchaser can effectively sell the property purchased even in the absence of a confirmation of the auction sale by the Court and therefore the judgment-debtor cannot be said to have a saleable interest in the same property in the absence of a question of subordinate interests carved out of the property being owned by different persons : A I R 1936 P C 204, *Rel. on*; A I R 1931 Mad 140, *Expl.*; A I R 1933 P C 101; A I R 1923 Mad 685 and A I R 1933 Mad 399, *Disting*; A I R 1916 Bom 57 and A I R 1921 Mad 157 (F B), *Ref.* [P 279 C 2]

N. Ramanath Iyer—for Petitioner.

C. A. Seshagiri Sastri—for Respondent.

Patanjali Sastri J.—This is a petition to revise an order of the subordinate Judge of Mayavaram whereby the sale held on 17th March 1938 in execution of the decree in O. S. No. 5 of 1933 on the file of that Court was set aside under S. 23, Madras Agriculturists' Relief Act, on the application of the respondent. The petitioner obtained the decree on foot of a mortgage executed in his favour by the respondent's brothers. The mortgage comprised in addition to certain other properties the six items of immovable property here in question to which the respondent claimed title under a will of her deceased father which is marked EX. A in these proceedings. The respondent was impleaded as defendant 4 in the suit and her claim to have these properties exonerated from liability failed as she was held estopped from setting up her own title to them by reason of having attested the mortgage, thereby leading the mortgagee to believe that the mortgagors had the right to mortgage the properties. Three objections to the maintainability of the respondent's application under S. 23, Madras Act 4 of 1938, were raised by learned counsel for the petitioner. The first was that out of the six items of property now in question, four were situated within the limits of Mayavaram Municipality and that therefore the respondent was not an agriculturist within the meaning of the definition in S. 3 (ii) of the Act. The other two items are admittedly agricultural lands situated outside the municipality. The definition so far as it is material here says :

'Agriculturist' means a person who (a) has a saleable interest in any agricultural or horticultural land in the province of Madras not being land situated within a municipality.

This provision, it was said, means that any person who owns an agricultural land situated within a municipality is not an agriculturist although he has such land outside the municipal limits. This construction is clearly wrong. All that the definition requires is that the person who claims to be an agriculturist should have a saleable interest in an agricultural land situated outside a municipality, and if he has such land, it is wholly immaterial whether or not he also owns agricultural lands within a municipality. Indeed, learned counsel for the petitioner did not seriously press this contention. It was next argued that all that the respondent obtained under this will (EX. A) was a mere right to enjoy the properties during her lifetime without any power of alienation, and that she had no saleable interest in them such as would bring her within the definition. Learned counsel laid stress on the words "hold and enjoy during her lifetime" used in connexion with the disposition in favour of the respondent while the word 'get' was used in the grant to the respondent's male issue, and argued that this indicated that the testator's intention was to confer upon the

respondent nothing more than a right of enjoyment. It was also urged that this construction should be adopted as it would give effect to the restraint imposed on the respondent's powers of alienation which otherwise would be defeated as being void for repugnancy. We are unable to construe the will in the manner suggested. We do not consider that the testator used the words "hold and enjoy" in deliberate contradistinction to the word 'get' with a view to make clear that he was not conveying an estate in these properties to his daughter. The latter word is used in the disposition in favour of the respondent's daughter which is also made subject to the same condition restraining alienation. We are of opinion that the testator intended to confer the same kind of estate on the respondent as he conferred upon her daughter, namely a life estate in the properties, and that the condition absolutely restraining the disponees from alienating their interest in the properties is void as being repugnant to the nature of the estate granted. It follows that the respondent derived a saleable interest in these properties under her father's will Exhibit A.

The last contention, which was also the main contention before us, was that inasmuch as the properties were sold on 17th March 1938, i. e., a few days before the commencement of the Act, the respondent ceased to have any saleable interest in these lands at the commencement of the Act or at the time of her application under S. 23, and was therefore disentitled to claim the benefit of that provision. This contention was not raised in the Court below and the respondent had no opportunity to show that, apart from the properties sold in court-auction, she owned other agricultural lands and was thus entitled to apply under the section. The point was however allowed to be raised as petitioner's learned counsel agreed that if his contention was accepted, the case might be remitted to the lower Court for ascertaining whether the respondent owns other agricultural lands.

It has to be observed that though the respondent's properties were sold in court-auction before the commencement of the Act, the sale had not been confirmed when the respondent applied on 20th June 1938, under S. 23 of the Act, though the period of 30 days prescribed for an application under the Civil Procedure Code to set aside a sale in execution of a decree had expired, and no such application, it was said, had been made. The question for consideration, therefore, is whether in these circumstances the respondent can be held to have a saleable interest in the properties at the time when she instituted the proceedings out of which this revision petition has arisen. It was argued for the petitioner that when a judgment-debtor's property is sold in court-auction and no application to set aside the sale has been made within 30 days under O. 21, Rr. 89, 90 and 91, he has no saleable interest left in the property, as it must be deemed to have passed under the sale to the auction-purchaser. It was pointed out that confirmation by Court is a mere ministerial act as the Court is bound to confirm the sale in such circumstances under O. 21, R. 92. There are no doubt indications in the provisions of the Civil Procedure Code that an auction-purchaser at a court-sale does not obtain title to the property immediately on his purchase. Order 21, R. 92 (1) provides:

> Where no application is made under R. 89, R. 90 or R. 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

Under S. 316 of the old Civil Procedure Code of 1882, the title to the property vested in the purchaser only from the date of the sale certificate while under S. 65 of the present Code, when the sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. Again, under O. 21, R. 89, a judgment-debtor whose property has been sold has been held entitled to apply to set aside the sale as the person "owning such property" in spite of the sale. In 40 Bom 557,[1] the judgment-debtor effected a private sale of the property sold in court-auction before such sale was confirmed, and the position was held to be not essentially different from a case where there is nothing more than an agreement for sale between the parties, as the conveyance, in such circumstances, could not operate unless the auction sale was set aside. In 44 Mad 554,[2] a Full Bench of this Court had to consider the question whether a judgment-debtor who after the sale of his property in court-auction sold it privately to a third party was entitled to apply under

1. ('16) 3 A I R 1916 Bom 57 : 37 I C 211 : 40 Bom 557 : 18 Bom L R 571, Pandurang Laxman v. Govind Dada.
2. ('21) 8 A I R 1921 Mad 157 : 63 I C 937 : 44 Mad 554 : 40 M L J 497 (F B), Sundaram v. Mamsa Mavuthar.

O. 21, R. 89. All the learned Judges proceeded on the view that after a court-sale, the judgment-debtor continues to be the owner of the property, though they expressed somewhat different opinions as to his position when he effects also a private sale of such property after the court-sale. Wallis C. J., was of opinion that the private sale being valid as between the parties though it would operate only subject to the auction sale being set aside, the judgment-debtor could no longer be regarded as the owner of the property but was entitled to apply as a person holding an interest in the property by virtue of a title acquired before the court-sale. Oldfield and Kumaraswami Sastri JJ. took the view that the judgment-debtor, in such circumstances, continued to be the owner notwithstanding the court-sale and the private sale.

It is thus clear that a judgment-debtor whose property is sold does not cease to be its owner capable of selling it effectively under certain conditions, so long as he can apply to have the sale set aside, that is to say, till the expiration of thirty days from the date of sale. But what is the position after that period? Can he still dispose of the property so as to pass an effective title to the transferee against the auction-purchaser? In other words, has he a "saleable interest" in the property? Whatever could be said in support of an affirmative answer to this question if the matter were res integra, we consider that the decision of the Privy Council in 59 Mad 910[3] requires that it should be answered in the negative. In that case a decree-holder having purchased certain properties of his judgment-debtor at a court-sale in execution of a mortgage decree entered into a compromise with the judgment-debtor's guardian under which one of the properties purchased was to be left to the judgment-debtor in consideration of the latter agreeing to pay a certain sum and to abstain from raising objections to the sale of the properties. The compromise was sanctioned by the Court which confirmed the auction sale with the exception of the property which was agreed to be left to the judgment-debtor, and issued a sale certificate covering the other properties. A mortgage of that property subsequently executed for the sum agreed to be paid under the compromise having turned out to be inoperative for want of due attestation, the question arose whether the compromise amounted to a sale by the decree-holder purchaser in respect of which a vendor's lien for unpaid purchase money could be claimed. In upholding the claim and overruling the objections that there could be no sale by the auction-purchaser to the judgment-debtor as the title to the property in question never passed to the former under the auction sale which was not confirmed in respect of that property, their Lordships observed :

> That village, along with other mortgaged property, was, as stated, sold to the plaintiff on 28th October 1920; and the period within which the judgment-debtor could apply to the Court for setting aside the sale was 30 days from the date of the sale. During that period no such application was made by him, and *the title of the auction-purchaser became unimpeachable . . . . . It is obvious that after the expiry of the statutory period for setting aside the sale, there was no person who could question the title of the auction-purchaser*, and a certificate of sale granted by the Court would in such case be a formal document of title. In the absence of an order setting aside the sale the Court is bound to confirm it, and the law does not prescribe any special period for an application for an order of confirmation. (Italics ours.)

These observations are, in our view, decisive of the point now under consideration. They show that after the expiry of the period for an application to set aside an auction sale, the auction-purchaser can effectively sell the property purchased even in the absence of a confirmation of the auction sale by the Court or in other words, that he has a "saleable interest" in the property. If he has acquired such interest it is difficult to see how the judgment-debtor can also be said to have a saleable interest in the same property, there being no question here of subordinate interests carved out of the property being owned by different persons. It was urged by Mr. Seshagiri Sastri for the respondent that the abovementioned decision must be taken to have been based upon the rules made by the Local Government for the administration of the Agency tracts of the Madras Presidency as the property there in question lay within those tracts, and it was pointed out that those rules do not provide for confirmation by the Court of an auction sale or for issue of a sale certificate and that, on the other hand title to the property vested under the rules in the purchaser immediately on his purchase. Our attention was drawn to the argument of the learned counsel for the appellant before this Court where this aspect was empha-

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3. ('36) 23 A I R 1936 P C 204 : 163 I C 4 : 63 I A 304 : 59 Mad 910 (P C), Zamindar of Polavaram v. Maharajah of Pittapur.

sized : *see* 54 Mad 163[4] at p. 166. The decision could, no doubt, have been based on the provisions of those rules, but it is plain that the case was throughout dealt with on the footing that the Civil Procedure Code was applicable. The original auction sale was in fact confirmed and a sale certificate was also issued, though in respect of the other properties, and the discussion relevant to the present issue, both in the judgment of this Court (*see* 54 Mad 163[4] at p. 172) and in that of the Privy Council, proceeded having the provisions of the Civil Procedure Code in view, as the reference to confirmation by Court and sale certificate clearly shows. Indeed in the arguments of counsel before the Board as reported, no reference was made to the Agency Rules, while the relevant provisions of the Code were cited. We cannot therefore regard the decision of their Lordships as inapplicable here.

Mr. Seshagiri Sastri placed reliance on 12 Pat 305[5] as showing that the title of a purchaser in court-auction becomes complete only on confirmation by Court. The case related to an income-tax assessment and the question was when the assessee, a money-lender who had purchased certain properties of his judgment-debtor in execution for the amount payable to him under a decree, could be said to have realized his debt. It was held that the interest on the debt could be deemed to have been realized only when the sale was confirmed. Their Lordships did not have to consider the position of a judgment-debtor in relation to the property sold in court-auction after the expiry of the period prescribed for setting aside the sale where no confirmation follows, and the decision is no authority for the view that he has, in such circumstances, a saleable interest in the property.

It was said that apart from O. 21, Rr. 89, 90 and 91, the Court can set aside auction sales under S. 47 on other grounds (*see* the cases collected in Mulla's Civil Procedure Code, Edn. 10, p. 185) and can also refuse to confirm such sales under its inherent powers, (46 Mad 583[6] and 64 M L J 586[7]) and that therefore it cannot be said that the auction-purchaser acquires an indefeasible title before confirmation. These cases proceed on the ground that the sale was either a nullity or was tainted by fraud on Court to which the purchaser was privy, and have not, in our opinion, much bearing upon the narrow point arising for consideration before us. In the result, the order of the Court below is set aside and the case is remitted to that Court for disposal after enquiry as to whether the respondent had a saleable interest in other agricultural lands apart from the properties sold in court-auction, and also whether in fact no application for setting aside the sale had been made before the proceeding under S. 23 of the Act was instituted, no finding having been recorded on these points. Both parties will be at liberty to adduce fresh evidence. Costs in this Court will abide and follow the result.

C.R.K./G.N. *Order accordingly.*

4. ('31) 18 A I R 1931 Mad 140 : 135 I C 17 : 54 Mad 163 : 60 M L J 56, Zamindar of Polavaram v. Maharaja of Pittapur.
5. ('33) 20 AIR 1933 P C 101 : 142 I C 446 : 12 Pat 305: 60 I A 133 (PC), Raghu Nandan Prasad Singh v. Commissioner of Income-tax B. & O.
6. ('23) 10 AIR 1923 Mad 635 : 72 I C 545 : 46 Mad 583 : 44 M L J 680, Raghavachariar v. Murugesa Mudali.
7. ('33) 20 AIR 1933 Mad 399 : 143 I C 454 : 64 M L J 586 Govinda Padayachi v. Murugayya Chettiar.

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BURN AND LAKSHMANA RAO JJ.

In re Gampala Subbigadu — Accused.

Referred Trial No. 36 and Criminal Appeal No. 174 of 1940, Decided on 9th April 1940, referred by Court of Session, Cuddapah Division, D/- 8th February 1940.

(a) Evidence Act (1872), S. 105 — Plea of private defence — Person setting up plea must prove it.

The burden lies on the person setting up the plea of private defence to prove it under S. 105. In the absence of proof Court cannot presume the truth of the plea. [P 281 C 2]

(b) Penal Code (1860), S. 302 — Infliction of fatal wounds by accused on deceased—Prosecution evidence cannot be rejected merely because witnesses fail to prove how accused came by his injuries.

When the evidence is clear that it was the accused who inflicted the fatal wounds upon the deceased, it is not possible to reject that evidence merely because the prosecution witnesses do not explain how the accused himself came by his injuries. [P 281 C 2]

(c) Penal Code (1860), S. 302 — Sentence — Deliberate attack pursued to fatal end — Severe injuries received by accused are no reason for mitigation of punishment.

The severe injuries which the accused himself receives are not a reason for mitigating his punishment, where the attack upon the deceased was deliberate and was pursued to a fatal end. [P 282 C 1]

P. Sivaramakrishnayya — for Accused.

Public Prosecutor — for the Crown.

Burn J. — The appellant has been convicted by the learned Sessions Judge of Cuddapah and sentenced to death for the murder of one Bitti Chennugadu alias Laddugadu on 19th August 1939. Bitti Chennu-

gadu was undoubtedly murdered on 19th August at Buggalapalli where he lives. According to the evidence for the prosecution, P. Ws. 3, 4 and 5 and the accused were engaged at about noon in skinning a cow by the side of the Cuddapah-Rayachoti road. At that time Chennugadu, it is said, came and objected to their skinning the cow in that place because it was stinking and because it would provoke the anger of any inspecting officer who might come. He threatened to go and report the matter to the Village Munsif and so saying he turned away. When he had gone a few steps, the accused is said to have run after him and stabbed him in the back with the knife which he was using to skin the carcass. Chennugadu ran a few yards further away but the accused pursued him and stabbed him twice in the back and twice in front. The evidence of the doctor who made the post-mortem examination the next day (P. W. 1) shows that one of the stabs inflicted from the front penetrated his heart and must have caused death instantaneously. Besides the evidence of P. Ws. 3, 4 and 5 there was the evidence of P. W. 2, a brother of the deceased. He said that he was standing near a shop belonging to one Adam Sab which is close to the scene of the offence. He said that he saw two stabs inflicted. The Village Munsif was informed by one Dhollavadu (he lives half a furlong away). The Village Munsif took a statement (Ex. B) from P. W. 2 at about 2 P. M. and reported the occurrence to the police station at Cuddapah which is about four and half miles away. The Sub-Inspector of Police reached the village by 7-30 P. M. and held an inquest the same night.

The accused in the Sub-Magistrate's Court said that he knew nothing about the matter and in the Sessions Court also said that he had never seen the deceased and P. W. 2 but he filed a statement in writing in which he said that the deceased Chennugadu, Venkatasubbadu and others beat him with stones and sticks and, being unable to bear that, he himself had beaten to protect himself. It was a fact that the accused was very severely injured on the same day. The Village Munsif found him lying unconscious in front of his own house when he, the Village Munsif, was coming towards the scene of the crime. The investigating officer (P. W. 14) found him lying still in the same place when he reached the village. He made arrangements to send him to the hospital and the Resident Medical Officer (P. W. 6) examined him the next day. He had four lacerated wounds on his head, an incised wound on his left ear and abrasions on his shoulder and side. He was unconscious at the time the doctor saw him and the doctor says that he remained unconscious for 2 or 3 days. He was suffering from concussion of the brain and his own life was in danger for a considerable time. He was not discharged from the hospital till 7th October 1939. The mother of the accused preferred a complaint to the Sub-Inspector on the same night on behalf of her son against P. W. 2 and three others. The Sub-Inspector says that after investigation he referred that complaint and it does not appear that any further proceedings were taken on it by the mother of the accused.

The prosecution witnesses do not explain these injuries on the person of the accused and learned counsel has invited us to discard the evidence of the prosecution witnesses for that reason. It is clear, he says, that they have not given a full or wholly truthful account of what happened and therefore they ought not to be believed. This plea however cannot be accepted in the face of the accused's own statement that he caused the injuries on the person of the deceased in self-defence. Having set up the plea of self-defence the burden lay on him under S. 105, Evidence Act, to prove it and in the absence of proof it is not possible for the Court to presume the truth of the plea of self-defence. One witness was examined for the defence (the District Medical Officer of Cuddapah). He apparently was examined because some attempt was made in the Sessions Court to show that the accused was not in his right mind. The doctor's evidence however did not show that he was insane either at the time the offence was committed or at the time the trial took place. P. W. 3 when questioned about the injuries on the person of the accused said :

> Later on I saw the accused fallen near his dayadis house. He had injuries. I do not know how they were caused. I heard that he got them subsequent to the murder. I did not go near the accused.

As the learned Sessions Judge has pointed out, this is not itself evidence that the accused received his injuries after he had murdered the deceased. But it is not at all improbable that that was the case. When the evidence is clear that it was the accused who inflicted the fatal wounds upon the deceased, it is not possible to reject that evidence merely because the prosecution witnesses do not explain how the accused himself came by his injuries. The accused

has been properly convicted of the offence of murder and we cannot consider that the severe injuries which he himself received are a reason for mitigating his punishment. The attack upon the deceased was deliberate and was pursued to a fatal end. We confirm the conviction for murder and also the sentence of death and dismiss this appeal.

C.R.K./G.N. *Appeal dismissed.*

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LEACH C. J. AND HORWILL J.

Nedungadi Bank Ltd. — Appellant

v.

Doraikannu Ammal — Respondent.

Appeal No. 47 of 1939, Decided on 2nd September 1940, from judgment and decree of Venkataramana Rao J., D/- 4th August 1939, in C. S. No. 67 of 1936.

Deed — Surety bond — Continuing guarantee — In considering whether bond constitutes continuing guarantee surrounding circumstances must be considered unless wording of guarantee precludes it—Deed held continuing guarantee.

In deciding whether a surety bond provides a continuing guarantee the whole of the surrounding circumstances must be taken into consideration unless the wording of the guarantee is such that the Court is precluded from taking anything else into consideration. [P 283 C 1]

For the purpose of his business the husband opened a current account with the Bank and it was arranged that he should be allowed to overdraw it at any one time to the extent of Rupees 18,000 provided that his wife deposited with the Bank the title deeds of a house belonging to her as security for the overdraft. The wife was to be surety for her husband for this amount and to furnish security. The wife accordingly deposited the title deeds with the Bank on this footing. At the stage when the Bank had already advanced Rs. 18,000 to the husband the latter wanted further finance and the Bank agreed to allow him to overdraw to the extent of Rs. 25,000 provided that his wife executed a legal mortgage in respect of the house. The wife being agreeable to this course executed a legal mortgage in favour of the Bank for Rs. 25,000. The banking account was placed on no different basis when the limit of the overdraft was increased to Rs. 25,000. The security provided was for the total sum of Rs. 25,000 with interest or any amount for the time being owing and due to Bank from the wife "on the footing of the bond" which specifically referred to the husband's overdraft :

Held that the wording of the mortgage deed executed by the wife did not preclude the Court inquiring whether there was a continuing guarantee and that on the facts and the probabilities of the case the mortgage by the wife was a continuing security for her husband's liability on his overdraft account, limiting of course her own liability to the amount stated in the mortgage deed : (1869) L R 4 C P 595 ; (1843) 4 Q B 792 ; (1826) 5 B & C 165 and (1843) 63 E R 87, *Rel. on* ; (1816) 1 Mer 572 ; (1813) 105 E R 289 and (1837) 7 E R 99, *Disting.* [P 284 C 2]

K. Rajah Iyer, V. C. Veeraraghavachariar and P. S. Ramaswami Iyengar — for Appellant.

C. Padhmanabha Iyengar and T. V. Ramanathan — for Respondent.

Leach C. J.—Admittedly the only question which arises in this appeal is whether the respondent gave a continuing guarantee to the appellant Bank. The respondent is the wife of one A. Murugesa Mudaliar, an army contractor and merchant carrying on business in Madras. On 5th May 1926, for the purpose of this business, Murugesa Mudaliar opened a current account with the appellant and it was arranged that he should be allowed to overdraw it at any one time to the extent of Rupees 18,000 provided that the respondent deposited with the appellant the title deeds of a house belonging to her in Varadamuthiappan Street, Madras, as security for the overdraft. The respondent was to be surety for her husband for this amount and to furnish security. The respondent admittedly deposited the title deeds with the Bank on this footing. Her husband paid in and withdrew considerable sums of money, but he did not exceed the limit of Rs. 18,000. On 17th February 1927 the overdraft stood at Rs. 17,693-14-10, or allowing for further interest which had accrued due a little less than Rs. 18,000. At this stage Murugesa Mudaliar wanted further finance and the appellant agreed to allow him to overdraw to the extent of Rs. 25,000, provided that his wife executed a legal mortgage in respect of the house. In other words, instead of an equitable mortgage for Rs. 18,000 there was to be a legal mortgage for Rs. 25,000. The respondent was agreeable to this course and on 17th February 1927 she executed a legal mortgage in favour of the appellant for Rs. 25,000. In the deed it was recited that the respondent had already created an equitable mortgage over the property in favour of the appellant, that the appellant had already advanced the sum of Rs. 18,000 on the security of the equitable mortgage for the purpose of Murugesa Mudaliar's trade, that Rs. 7000 more was required by him for this purpose and that the respondent had agreed to execute a mortgage deed for the consolidated sum of Rupees 25,000 carrying interest at $9\frac{3}{4}$ per cent. per annum. The mortgage deed then proceeded :

This indenture witnesseth that in consideration of the consolidated sum of Rupees 25,000 (Rupees twenty-five thousand) which the mortgagor doth hereby acknowledge her liability to pay to the mortgagee, the mortgagor doth hereby covenant with the mortgagee to pay back to the mortgagee on demand being made the whole of the said sum

of Rs. 25,000 with interest at 9¾ per cent. per annum, or any amount for the time being owing and due to the mortgagee from the mortgagor on the footing of these presents with interest thereon at 9¾ per cent. per annum without claiming any deduction or abatement whatsoever for any reason as aforesaid.

Between 18th February 1927, and 24th February 1927, Murugesa Mudaliar paid into his account various sums which had the effect of reducing his overdraft to Rupees 14,220-8-2. After that there were drawings and payments in. The state of the account fluctuated, but it was always at debit and on 27th December 1934 the account was overdrawn by Rs. 19,482-8-9. The suit out of which this appeal arises was filed on 26th February 1936 to recover from the husband and the wife the sum of Rs. 15,259-6-11, the debit balance of that date. The suit was defended and the pleas raised were that the defendants had not been given credit for certain sum of money to which they were entitled, that the suit was bad for misjoinder of parties and cause of action and that it was barred by the law of limitation. The respondent did not plead that her guarantee was not a continuing one and that the rule in *Clayton's case*, (1816) 1 Mer 572 : 35 E R 767[1] applied. This contention was, however, raised during the hearing of the case and was accepted by the learned Judge (Venkataramana Rao J.) as freeing the respondent from all liability. Consequently, he passed a decree against her husband for Rs. 17,350-6-11 with costs, but dismissed the suit with costs as against her. In holding that the respondent was not liable the learned Judge had regard merely to the wording of the deed of mortgage of 17th February 1927. He considered that there was no evidence of any intention that the respondent's guarantee should be a continuing one and that in these circumstances he was bound to give effect to the rule in (1816) 1 Mer 572 : 35 E R 767.[1] It is common ground that if the rule in (1816) 1 Mer 572 : 35 E R 767,[1] does apply, the mortgage debt was discharged by 31st March 1927.

With great respect for the opinion of the learned Judge, we are unable to agree that there is no evidence on the record from which it can be concluded that there was here a continuing guarantee. The authorities indicate that in deciding such a question the whole of the surrounding circumstances must be taken into consideration unless the wording of the guarantee is such that the Court is precluded from taking anything else into consideration. The account was opened and Murugesa Mudaliar allowed to overdraw it on the condition that the respondent provided security for any sums which might be drawn from time to time by him not exceeding Rs. 18,000 and when he wanted further accommodation from the appellant, the appellant agreed to give on the security of the respondent's house provided that a legal mortgage was substituted for the equitable mortgage. The banking account was placed on no different basis when the limit of the overdraft was increased to Rs. 25,000. The security provided was for the total sum of Rs. 25,000 with interest or any amount for the time being owing and due to appellant from the respondent "on the footing of these presents," the deed referring specifically to the husband's overdraft. On behalf of the respondent, it is conceded that when the overdraft account was secured by the equitable mortgage the respondent's guarantee was a continuing one. The appellant would certainly not have agreed to free the respondent from her continuing guarantee. The very nature of the account would preclude this. Nor is it feasible to support that the respondent thought her position was in any way being altered, apart from the increase in the amount of her guarantee. The respondent has not ventured in the witness-box to support the case advanced on her behalf and the fact that there is no averment in her written statement based on the rule in (1816) 1 Mer 572 : 35 E R 767[1] is not without significance. Now what do the authorities say? In (1869) L R 4 C P 595,[2] the Court of common pleas had to consider whether there was a continuing guarantee where a document had been given in these terms :

I, John Meadows, of Barwick, in the County of Northampton, will be answerable for 501 sterling that William York, of Stamford, butcher, may buy of Mr. John Haffield of Donington.

It was held that the guarantee was a continuing one. Willes J. said :

It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee.

1. (1816) 1 Mer 572 : 35 E R 767 : 15 R R 161.

2. (1869) L R 4 C P 595 : 20 L T 746, Heffield v. Meadows.

After considering the facts Willes J. observed :

For these reasons I am of opinion that the guarantee in question is a continuing guarantee, as well upon the authorities as upon the common sense view of the matter.

Montague Smith J. said :

The consideration is defectively stated in this guarantee. It does not shew in what the supply is to consist. We may therefore look at the surrounding circumstances in order to see for what it was given and to what transactions or dealings it was intended to apply, not to alter the language, but to fill up the instrument where it is silent, and to apply it to the subject-matter to which the parties intended it to be applied.

In (1843) 4 Q B 792 : 114 E R 1095,[3] Lord Denman C. J. held that there was a continuing guarantee when the condition of a bond was simply for the repayment of £1000 with interest on or before 6th April 1837, the bond itself bearing the date 10th January 1837. It was pointed out that the precise nature of the agreement at the time the bond was given did not appear distinctly, but taking into consideration the conduct and language of the defendant or some of them, the Court came to the conclusion that there was no doubt that the bond was intended to be a continuing guarantee for advances made by a bank. A document in these words "the within warrant of attorney is given to secure the payment of the sum of £4000 with lawful interest thereon" was held to be a continuing guarantee in (1826) 5 B & C 165 : 108 E R 61,[4] because there was nothing on the face of the warrant of attorney or the defeasance to show that it was intended to secure the balance existing at the time when it was given. In the absence of anything to show such an intention, it was held that it must be construed as a continuing security. The judgment of Knight Bruce, Vice-Chancellor in (1843) 2 Y & C C C 199 : 63 E R 87,[5] also contains some apposite remarks so far as the present case is concerned. In that case a son executed a bond in favour of his father for £845. In the following year he executed another bond for £1200 and on the same date he created a mortgage in favour of his father for the amount of the bond. The Vice-Chancellor said :

Looking at the position in which the father stood towards his only son, a young man just entering the Army and requiring a provision looking at the character of the securities, and the many observations which occur with reference to the frame of the mortgage deed, perhaps answered in some degree by Mr. Wigram, but still important when coupled with this, that the father lived more than fifteen years after the latter security, and there is no evidence of any demand made upon either security or of any interest having been paid or demanded, the son having been wholly during that time maintained by the father — the probability, and I think I may say the fair inference, is that the bond for £1200 was rather meant as a running security, than as an absolute bond for that amount.

The wording of the mortgage deed executed by the respondent does not preclude the Court inquiring whether there is here a continuing guarantee. When the facts are examined and the probabilities considered, in our opinion the only conclusion consistent with commonsense is that the respondent gave this mortgage as a continuing security for her husband's liability on his overdraft account, limiting of course her own liability to the amount stated in the mortgage deed. Mr. C. Padhmanabha Ayyangar has pressed upon us (1813) 105 E R 289[6] and (1837) 7 E R 99,[7] but when examined these cases differ greatly from the one now before us. In the first of these two cases the bond was obviously one which was limited to a specific advance of £3000 and was not a guarantee of any running account. In the second case the Court expressly found that there was no evidence on which it could be held that the bond was given as security for floating balances. In the present case there is in our opinion ample evidence to support such a conclusion. For the reasons given the appeal will be allowed with costs to the appellant throughout. The interest allowed will not however be the interest allowed against the respondent's husband. As far as the respondent is concerned, the interest will be on the basis of the mortgage deed, namely at 9¾ per cent. per annum up to the date fixed for redemption, that is six months from today. As the appeal has been valued at only Rupees 13,039-6-11 the decretal amount will not exceed this sum except for interest at the contract rate between the date of the filing of the plaint and the date fixed for redemption.

C.R.K./G.N. *Appeal allowed.*

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3. (1843) 4 Q B 792 : 114 E R 1095 : D & M 160 : 7 Jur 1058, Henniker v. Wigg.
4. (1826) 5 B & C 165 : 108 E R 61 : 7 D & R 824 : 2 Kar & P 144, Woolley v. Jennings.
5. (1843) 2 Y & C C C 199 : 63 E R 87 : 60 R R 121, Melland v. Gray.
6. (1813) 2 M & S 18 : 105 E R 289 : 14 R R 573, Kirby v. Duke of Marlborough.
7. (1837) 4 Cl & F 258 : 7 E R 99 : 11 Bligh 292, Halker v. Hardman.

A. I. R. 1941 Madras 285

WADSWORTH J.

Chimakurti Seshayya — Petitioner

v.

Sait Hirachand Chunilal Firm, represented by Uttamchand — Respondent.

Civil Revn. Petn. No. 592 of 1939, Decided on 15th August 1940, to revise order of Dist. Court, Guntur, D/- 7th March 1939.

(a) Provincial Insolvency Act (1920), S. 72 (2) — Court should ordinarily give notice to insolvent before directing his prosecution.

Substantially the provisions of S. 72 (2), Provincial Insolvency Act, are analogous to those of S. 476, Criminal P. C., and the Insolvency Court should ordinarily give notice to the insolvent before directing his prosecution. [P 285 C 2]

(b) Provincial Insolvency Act (1920), Ss. 72 and 75 — Decision to prosecute — Insolvent has right of appeal.

An insolvent has a right of appeal similar to that provided by S. 476B, Criminal P. C., against the order of the Court directing his prosecution. [P 285 C 2]

(c) Provincial Insolvency Act (1920), Ss. 75 and 72—Court refusing to prosecute insolvent on creditor's application — It is doubtful whether creditor has right of appeal.

Where the Court refuses to prosecute the insolvent under S. 72 on a creditor's application, it is doubtful whether the creditor has a right of appeal. [P 286 C 1]

(d) Provincial Insolvency Act (1920), S. 72 (2) and (1) — Power to prosecute under S. 72 (2) is given to Court and not to interested party in order to prevent offence against insolvency law—Bar of res judicata cannot operate against Court—Insolvency Court can reconsider its decision not to prosecute in light of second application by creditor.

Section 72 (2) gives power not to the interested party, but to the Court itself on being satisfied that an offence of the kind contemplated had been committed, to send the case to the Magistrate. This power is conferred not in the interests of this or that party, but in order that the Court itself may prevent an offence against the insolvency law. Consequently there can be no question of a bar of res judicata operating against the Court and hence the Insolvency Court can reconsider a decision of its own not to prosecute in the light of a second application from the creditor, although the Court will not ordinarily prosecute on the strength of information on which it has previously declined to act. [P 286 C 1, 2]

(e) Civil P. C. (1908), S. 115 — Mere question whether Court's order is wise or unwise cannot be gone into in revision.

A mere question whether the order of the Court is wise or unwise cannot be gone into in revision. [P 286 C 2]

(f) Provincial Insolvency Act (1920), S. 72 (2) —Court prosecuting undischarged insolvent under S. 72 (2) — Before dismissal of his appeal insolvent obtaining discharge—Discharge cannot make proceedings against insolvent void.

Where the insolvency Court prosecutes an undischarged insolvent under S. 72 (2) and the insolvent obtains his discharge before the dismissal of his appeal against his prosecution, the discharge cannot render the proceedings against the insolvent void : A I R 1934 Cal 764, *Disting.* [P 286 C 2 ; P 287 C 1]

K. Kameswara Rao — for Petitioner.

K. Bhimasankaran — for Respondent.

Order.—This civil revision petition is preferred against a decision in appeal against an order directing the prosecution of an insolvent for an offence under S. 72, Provincial Insolvency Act. A preliminary objection was taken by the respondent on the ground that the appeal itself was incompetent. The objection is based on English decisions, *vide* (1876) 2 Ch D 786[1] and (1876) 2 Ch D 799,[2] where it is held that under the corresponding provisions of the English Bankruptcy Act, no notice should be given to the bankrupt before directing the trustee to prosecute for the offence of obtaining credit without disclosing the fact of bankruptcy and no right of appeal exists in favour of the person to be prosecuted. It seems to me that the above decisions throw very little light on the question which I have to decide. The provisions of the English Bankruptcy Act, though similar, are not identical with those of the Provincial Insolvency Act and the main reason which influenced the English Courts in denying a right of appeal or a right of notice to an insolvent are that the concession of such rights would be contrary to English criminal procedure and would imply that the person to be prosecuted had to state his defence and submit to decisions in appeal before his case was heard in the criminal Court. It cannot be urged that such a procedure is foreign to criminal procedure in India.

Substantially the provisions of S. 72 (2), Provincial Insolvency Act, are analogous to those of S. 476, Criminal P. C., and there is nothing unreasonable in supposing that the insolvency Court should ordinarily give notice to the insolvent before directing his prosecution or in holding that the decision to prosecute is a decision against which the aggrieved party has a right of appeal similar to that provided by S. 476B, Criminal P. C. I note that S. 75, Provincial Insolvency Act, gives a right of appeal to a person aggrieved not merely by an order made but by a decision come to. When the Court decides to prosecute an insolvent for an offence under S. 72 of the Act, does it not make a decision which aggrieves the person to be prose-

1. (1876) 2 Ch D 786 : 45 L J B K 141 : 34 L T 700 : 24 W R 714, In re Marsden.
2. (1876) 2 Ch D 799 : 45 L J B K 115 : 35 L T 10 : 24 W R 750, Ex parte Brown; In re Appleby.

cuted? Whether the creditor who moves the Court to prosecute has a grievance is another matter. There is a Nagpur decision reported in A I R 1933 Nag 9[3] to the effect that he has no right of appeal. But it is unnecessary for me to go into that question though it may be noted as a matter of interest that in the present case there had been a prior refusal to prosecute reversed on appeal at the instance of the creditor. However that may be, I hold that there was a right of appeal to the District Judge by the insolvent against the order of the Court directing his prosecution. It follows therefore that the correctness of the dismissal of the appeal by the District Judge can be canvassed in revision.

Two main grounds have been urged in revision. The first is that the application of the creditor is barred by res judicata by reason of the previous decision. On 6th September 1935 the creditor moved the Court to prosecute the insolvent for obtaining credit without disclosing that he was an undischarged insolvent. The then subordinate Judge refused to prosecute, directing the creditor first to establish the fact of his debt in a civil Court. The creditor appealed to the District Judge. As I have indicated, it is doubtful whether such an appeal lay. Nevertheless, it was entertained and the District Judge took the reasonable view that the subordinate Judge should himself have found out whether there was a prima facie case on the facts before refusing to order prosecution. The matter was therefore remanded to the subordinate Judge who was directed to hold an inquiry into the facts. On the day when the inquiry should have been commenced, the creditor was absent and on the insolvent denying his indebtedness, the petition was dismissed. An application for restoration was made by the creditor, but was rejected with an observation that perhaps it is open to the creditor to file a fresh petition. The creditor did file a fresh petition and the subordinate Judge held that there was no bar by reason of the previous order which was one for default. The reasoning of the learned subordinate Judge is perhaps defective, but his conclusion is, I think, sound. It was upheld by the District Judge in appeal.

The point, as I understand it, is not whether the previous application was dismissed in default or dismissed on the merits. Under S. 72 (2), there is a power given, not to the interested party, but to the Court itself on being satisfied that an offence of the kind contemplated had been committed, to send the case to the Magistrate. This is a power conferred not in the interests of this or that party, but in order that the Court itself may prevent an offence against the insolvency law. Presumably a creditor who has been wrongfully induced to give credit could himself complain to the Magistrate under S. 72 (1) without obtaining the leave of the insolvency Court. We are not therefore concerned with the question whether there is a bar of res judicata against the individual who gives the information on which the insolvency Court acts, but whether the Court should or should not reconsider a decision of its own not to prosecute in the light of further information. There can be no question of a bar of res judicata operating against the Court. The most that can be said is that the Court cannot prosecute for an offence of which an accused person has already been acquitted and the Court will not ordinarily prosecute on the strength of information on which it has previously declined to act. In the present case owing to the absence of the person who laid the information, the Court declined to proceed with the prosecution. On the subsequent occasion, the Court had before it far more materials and reasonably came to the conclusion that a prosecution was desirable in the interests of the maintenance of the insolvency law. It is no longer a question whether the creditor should succeed or the insolvent should succeed. It is the question whether the Court had materials before it which placed upon it a duty to take action. In such circumstances, no question of res judicata arises and if it is a mere question whether the order of the Court is wise or unwise, it is not a matter that should be gone into in revision.

The second contention is based on a decision of the Calcutta High Court reported in 61 Cal 605[4] to the effect that after an insolvent has obtained a discharge, the insolvency Court has no jurisdiction to direct prosecution under S. 72 (2), Provincial Insolvency Act. Assuming that this decision is correct—though there are criticisms which might be urged against the reasoning with which it is supported—it has to my mind no bearing on the present case. When the insolvency Court directed this complaint

3. ('33) 20 A I R 1933 Nag 9 : 141 I C 350 : 28 N L R 286, Pursingh v. Aladkhan.

4. ('34) 21 A I R 1934 Cal 764 : 151 I C 1026 : 61 Cal 605: 59 C L J 399, W. D. Jorden v. Mahadeo Lal and Bros.

to be filed, the present petitioner was an undischarged insolvent over whom the insolvency Court certainly had jurisdiction. The complaint therefore was filed by the Court empowered to institute proceedings. When the insolvent appealed to the District Judge, there was presumably a complaint pending before the Magistrate and that complaint had been regularly instituted. During the pendency of the appeal before the District Judge, the insolvent obtained his discharge. It is argued that the judgment of the District Judge dismissing the appeal amounts to an order under S. 72 (2), Provincial Insolvency Act, directing the filing of a complaint and that having been passed after the discharge of the insolvent, that order is without jurisdiction. I cannot accept this contention. We are not here concerned with a decree of the trial Court becoming merged in the decree of the appellate Court. We are concerned with the act of the insolvency Court in filing a complaint which act is subject to review by an appellate Court under S. 75, Provincial Insolvency Act. It cannot be contended that when the appellate Court declines to stop the proceedings instituted by the insolvency Court, it is for the first time instituting those proceedings. The proceedings have already been instituted, and all that has happened is that an attempt to get them stopped has failed. They were instituted when the Court directing them had jurisdiction and the subsequent discharge of the insolvent before the appeal was dismissed cannot make those proceedings void. In the result, therefore, I dismiss the civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 287

KING J.

Puligadda Venkatasubba Rao and others — Appellants

v.

Yellapragada Sivaramayya — Respdt.

Appeal No. 90 of 1939, Decided on 22nd August 1940, against order of Dist. Court, Guntur, in I. A. No. 139 of 1938.

(a) Jurisdiction—Appeal— Appellant unwisely conceding in lower Court point affecting its jurisdiction—Appellate Court cannot refuse to adjudicate upon it.

Where the decision of the point in appeal affects the jurisdiction of the lower Court, the appellate Court cannot refuse to adjudicate upon it merely because of an unwise and ill-advised concession made by the appellant in the lower Court. [P 287 C 2]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 73—Construction — S. 73 does not authorize suit to frame scheme.

Section 73 must be construed strictly. It does not on its very face, authorize a suit to frame a scheme : A I R 1934 Mad 115 and A I R 1934 Mad 126, *Rel. on.* [P 287 C 2]

V. Rangachari — for Appellants.

P. Somasundaram — for Respondent.

Judgment. — This appeal relates to a temple at Rajavole in the Guntur District which is an "excepted temple" within the meaning of that expression in the Madras Hindu Religious Endowments Act. Plaintiff as a worshipper at that temple filed a suit under S. 73 of the Act, to remove the defendant from his trusteeship, and appoint another trustee in his place. The suit was compromised, and as part of the terms of the compromise a scheme was framed for the future administration of the temple. Plaintiff then applied under O. 23, R. 3, Civil P. C., for a decree in the terms of the compromise, and the learned District Judge of Guntur, overruling defendant's objections to the application granted the decree. Defendant now appeals.

Of the grounds of objection only 2 need now be considered. The first was that defendant in consenting to the compromise, had been subjected to undue influence. No serious attempt has been made to substantiate this ground in appeal. I agree with the learned District Judge in rejecting it. The second ground is that the Court had no jurisdiction to frame a scheme and therefore no jurisdiction to incorporate in its decree a scheme framed by the parties. It appears from para. 4 of the learned District Judge's order that before him the proposition that the Court is entitled to frame a scheme under S. 73 of the Act was not disputed. Before me this question is the main subject-matter of the appeal, and as its decision is one affecting the jurisdiction of the Court I cannot refuse to adjudicate upon it merely because of what appears to me an unwise and ill-advised concession made in the District Court.

To my mind it is clear that the appeal must succeed on the very simple ground that S. 73 does not on its very face, authorize a suit to frame a scheme. That S. 73 must be construed strictly is laid down in 57 Mad 315,[1] where, on an interpretation of the section as it then stood, it was held that the Court had no power to direct "accounts

1. ('34) 21 A I R 1934 Mad 115 : 148 I C 1155 : 57 Mad 315, Vasudevan Adisarpad v. Bhavadasan Nambudiri.

and enquiries" and again in 57 Mad 362,[2] where the decision was that a suit in regard to the administration or management of a kattalai was not maintainable under the section. The scope of the section has been enlarged by amendments enacted as the result of these judgments but it still does not include any suit to settle a scheme. The reason appears to be obvious, viz., that provision has already been made for the framing of schemes in the case of excepted temple by Ss. 62, 63 and 65 of the Act. I accordingly allow this appeal, set aside the order of the learned District Judge and direct that the suit be restored to his file and disposed of according to law. As the appellant failed to present his case properly before the District Judge he must pay his own costs. Respondent's costs of the appeal will be costs in the suit.

C.R.K./G.N. *Appeal allowed.*

2. ('34) 21 A I R 1934 Mad 126 : 150 I C 448 : 57 Mad 362 : 66 M L J 98, Vythilinga Pandara Sannadhi v. Ranganatha Mudaliar.

A. I. R. 1941 Madras 288

WADSWORTH AND PATANJALI SASTRI JJ.

Sevugam Chettiar — Petitioner

v.

Ranganatha Mudaliar — Respondent.

Civil Revn. Petn. No. 1756 of 1939, Decided on 30th August 1940, to revise order of Dist. Munsif, Tirumangalam, D/- 30th March 1939.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 (1), (2), (3) and (4) and 12 — Ss. 8 (2), (3) and (4) being in nature of provisos to S. 8 (1) qualify and limit operation of S. 8 (1) — Sums remaining payable in respect of debts scaled down under S. 8 carry interest from 1st October 1937 under S. 12.

Sub-sections (2), (3) and (4) of S. 8 are in the nature of provisos to S. 8 (1) whose operation is limited and qualified by those provisions. It is true that S. 8 (3) does not mention the date upto which debts have to be scaled down thereunder, but the latter part of that sub-section clearly refers back to the result of applying sub-s. (1) under which all interest payable on 1st October 1937 is wiped out. Section 8 read as a whole indicates that the date mentioned in S. 8 (1) is the date upto which all debts falling under S. 8 have to be scaled down and consequently the sums which remain payable in respect of debts scaled down under S. 8 carry interest from 1st October 1937 at the rate mentioned in S. 12. [P 288 C 2]

T. S. Vaidhyanatha Iyer — for Petitioner.

V. S. Rangachari — for Respondent.

Patanjali Sastri J.—The only question for determination in this civil revision petition is, from what date a debt scaled down under S. 8 (3) of Madras Act, 4 of 1938 is to carry interest under S. 12 of the Act. The debt in this case was contracted on 14th September 1932 and the decree thereon was passed on 21st December 1936. It was scaled down to Rs. 298-14-11 being the amount by which the sums paid by way of principal, and interest fell short of twice the amount of the principal and there is no dispute before us regarding the amount.

In applying S. 12 of the Act, the Court below was of opinion that when a debt is scaled down under sub-s. (3) of S. 8 it has to be scaled down upto the commencement of the Act and the reference to 1st October 1937 in sub-s. (1) has no application to cases falling under sub-s. (3). We consider that this view is erroneous. It is true that sub-s. (3) does not mention the date upto which debts have to be scaled down thereunder, but the latter part of that sub-section which makes repayable the principal amount or such portion of the principal amount as is outstanding, if it happens to be smaller than the amount arrived at by the process indicated in the first part, clearly refers back to the result of applying sub-s. (1) under which all interest payable on 1st October 1937 is wiped out. As sub-s. (3) thus involves a comparison between the amount arrived at by applying sub-s. (1) and that arrived at by applying the first part of sub-s. (3), in order to ascertain which is smaller, it is clear that the amount payable under the first part of sub-s. (3) must be ascertained with reference to the same date, as otherwise there will be no proper basis for comparison. Sub-sections (2), (3) and (4) are, in our view, in the nature of provisos to sub-section (1) whose operation is limited and qualified by those provisions. We are therefore of opinion reading S. 8 as a whole, that the date mentioned in sub-s. (1) is the date upto which all debts falling under that section have to be scaled down. It follows that sums which remain payable in respect of debts scaled down under that section carry interest from 1st October 1937 at the rate mentioned in S. 12. The petitioner will thus be entitled to interest on Rs. 298-14-11 from 1st October 1937 at the decretal rate of 6 per cent. per annum. The revision petition is allowed and the order of the lower Court will be modified accordingly. The parties will bear their own costs throughout.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1941 Madras 289

WADSWORTH AND PATANJALI SASTRI JJ.

Rajoo and others — Defendants 3 to 5 — Petitioners

v.

Palaniyappa Chettiar and others — *Plaintiffs* — Respondents.

Civil Revn. Petns. Nos. 66, 433 and 434 of 1939, Decided on 16th September 1940, to revise order of Dist. Munsif, Periakulam, D/- 19th August 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii), Proviso A — Applicability — Criterion is date of assessment and not period in respect of which assessment is made.

The criterion for the application of S. 3 (ii), Proviso A is not the period in respect of which the assessment is made but the date of the assessment. Proviso A only disqualifies persons who have been assessed to income-tax in either of the two financial years ending 31st March 1938 and does not lay down any restrictions regarding the period in respect of which that assessment might have been made : A I R 1941 Mad 152, *Rel. on.* [P 289 C 2]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii), Proviso A — Assessee at time of assessment manager of joint Hindu family— Assessment cannot be assumed to be in respect of joint family income.

No doubt, where an assessee is assessed expressly as manager of a joint Hindu family, all the members of that family would be disqualified from claiming to be agriculturists but merely because the assessee was in fact the manager of a joint family at the time when he was assessed to income-tax, the assessment cannot be assumed to have been necessarily in respect of joint family income.

[P 289 C 2]

C. A. Seshagiri Sastri — for Petitioners.

T. P. Gopalakrishna Iyer — for Respondents.

Wadsworth J. — These revision petitions all arise out of applications by sons of the late Bommayya Goundan under S. 19 of Act 4 of 1938, to scale down decrees on promissory notes passed against their father. It is conceded that Bommayya Goundan was the manager of a joint family consisting of himself and his sons and that the debts in respect of which the decrees were passed were joint family debts. The learned District Munsif has found that the sons were not entitled to the benefits of the Act, because Bommayya Goundan was in the year 1936-37 assessed to income-tax at the time when he was the manager of the joint family. The main contention urged in these petitions was that proviso A to S. 3 (ii) of the Act did not apply in a case in which the assessment was made in the year 1936-37 but in respect of the income of the previous year. This contention cannot succeed having regard to the words of the proviso which are not identical with but substantially the same as those in proviso B in respect of which we have held in C. R. P. No. 1020 of 1939[1] that the criterion is not the period in respect of which the assessment is made but the date of the assessment. Proviso A only disqualifies persons who have been assessed to income-tax in either of the two financial years ending 31st March 1938 and it does not lay down any restrictions regarding the period in respect of which that assessment might have been made.

A further contention relates to the question whether Bommayya Goundan was assessed in his individual capacity or as manager of the joint family. No doubt, if he was assessed expressly as manager of the joint family, all the members of that family would be disqualified from claiming to be agriculturists. The Collector's certificate Ex. 1 does not state that he was assessed in his capacity as manager of the joint family. The actual order of assessment was not produced in the trial Court but we are informed that it shows Bommayya Goundan to have been assessed in his individual capacity. The learned District Munsif does not appear to have applied his mind to the distinction between the assessment of a person in his individual capacity and the assessment of that person as manager of a joint family. He seems to have assumed that, because Bommayya Goundan was in fact the manager of a joint family at the time when he was assessed to income-tax, the assessment was necessarily in respect of joint family income. It seems to us that this is a question which should be elucidated by the production of the actual order of assessment, and in view of the way in which the learned District Munsif has regarded the question we do not think it improper to allow the petitioners an opportunity to produce the order of assessment at this stage. We may point out that the revision petitions are filed only on behalf of the three of the sons, the other son being disqualified from claiming as an agriculturist on personal grounds. We therefore allow the three revision petitions and remit the applications so far as these petitioners are concerned to the lower Court for fresh disposal after allowing both parties to adduce evidence on the question whether Bommayya Goundan's assessment was in his individual capacity or in his capacity as manager of the joint family. The petitioners having failed on their main contention we think it proper

1. *Reported in* ('41) 28 AIR 1941 Mad 152:(1940) 2 M L J 841, Sarveswara Rao v. Umamaheswara Rao.

that each party should bear his own costs in revision.

C.R.K./G.N. *Petitions allowed.*

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* A. I. R. 1941 Madras 290

MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

In re Ravupalli Ramamurthy — Accused.

Referred Trial No. 45 and Criminal Appeal No. 212 of 1939, Decided on 16th June 1939, referred by Court of Session, Vizagapatam Division, D/- 10th March 1939.

(a) Evidence Act (1872), S. 27 — Statements under S. 27—Exact words of accused should be recorded—Judge should admit parts which he considers admissible and leave some record for consideration of appellate Court of words claimed by prosecution to be admissible.

Statements under S. 27 should be recorded in the first person, that is to say as far as possible in the actual words of the accused; they should not be paraphrased. The Judge should admit those parts which he considers admissible but leave some record for the consideration of the appellate Court of any other words which the prosecution claimed should be received in evidence. [P 293 C 2; P 294 C 1]

**(b) Evidence Act (1872), S. 27—Accused telling police officer that he would show spot where he threw knife with which he killed deceased—Police officer along with accused and other persons going to spot but no knife found — Police officer broadcasting that whoever had taken knife should return it—A coming forward and stating that he picked up knife from spot mentioned by accused but had thrown it away at other place—Knife found at place mentioned by A—Statement to police officer by accused held admissible under section 27.*

The accused told the police officer that he would show the spot where he had thrown the knife with which he killed the deceased. The police officer along with the accused and other persons went to the spot but no knife was found. Thereupon the police officer broadcast that whoever had taken the knife away should return it or houses would be searched. Then *A* came forward and stated, in the presence of the accused, that he had picked up the knife from the very spot mentioned by the accused at which he had seen it being thrown and that he had himself thrown it away at some other place. The knife was found at the place mentioned by *A*:

Held that the statement by the accused to the police officer was admissible under S. 27 since it led to the discovery of (1) the fact that a knife had been seen to be thrown away and was later found by *A* at the spot indicated, and (2) the knife itself and the fact that the knife was not actually found at the spot mentioned by the accused was immaterial: A I R 1935 Mad 528 (F B), *Ref.*; A I R 1920 Mad 109, *Not approved.* [P 294 C 1]

A. Gopalacharlu — for Accused.

Public Prosecutor — for the Crown.

Mockett J.—The accused has been convicted and sentenced to death for the murder of two women, Annapurna and Savitri. Savitri was his wife, and she was the daughter of Annapurna who had two sons, P. Ws. 15 and 16. The learned trial Judge has described at some length the history of Annapurna, and it is not necessary for us to repeat it. She apparently was at one time the concubine of P. W. 17, and Savitri and P. W. 16 were children of that union. Annapurna left P. W. 17 fourteen years before her death and appears to have become a prostitute, as a result of which habit P. W. 15 and another child were born. P. W. 17 married P. W. 9. The accused who was employed in the Bengal Nagpur Railway Workshop at Vizagapatam, married Savitri, with the approval of P. W. 17 and Annapurna. That was about three years before Savitri's death. Annapurna was the tenant of a house at Vizianagaram, at the time of her death, of which P. W. 17 was the owner. There are many allegations against the character of Annapurna in the evidence it being alleged that she was attempting to lead Savitri into a life of prostitution. The learned Judge, as we have indicated, has dealt fully with this aspect of the case.

So far as the facts in this appeal, which are material are concerned, they may be shortly stated. A few weeks before 18th October 1938 Annapurna and P. W. 15 visited the accused at Vizagapatam. Annapurna was receiving treatment for her eyes from the King George Hospital at Vizagapatam. She returned to Vizianagaram taking Savitri with the consent of the accused. On Saturday, 15th October, the accused came to Annapurna's house and according to the evidence asked for Savitri to return with him but was put off on the ground that her clothes were with the washerman, Annapurna saying that she would return on Tuesday the 18th. The accused, it is stated, left for Vizagapatam. He is supported to this extent by D. W. 5, who says that he was there on Monday the 17th. An examination of the plan Ex. M shows that the deceased's house is next door to P. Ws. 17 and 9, but a little to the north is the house of P. Ws. 11 and 18. It leads to the house in the south of P. W. 19, and further to the south is the house of P. Ws. 7 and 13. At about 1 A. M. both these women were stabbed to death, Savitri dying almost instantaneously, Annapurna surviving until next day. Their wounds, the doctor says, could have been caused with the dagger, M. O. 1.

As to the actual event, the evidence is as follows: P. W. 15, who is ten years old, says

that Annapurana and Savitri were sleeping on the same cot and he too was sleeping near by. He was awakened by hearing Annapurna cry out "ammo" and he says he saw the accused, his brother-in-law, running away. His mother told him, "Your brother-in-law has stabbed us and run away," to which he replied "I too saw him run away." In answer to a question from P. W. 16, Annapurna said he stabbed her with a dagger. P. W. 17 and other persons came. We disregard as inadmissible evidence of this witness and elsewhere where it appears that Savitri had shown M. O. 1 to Annapurna stating that the accused was threatening to kill her with it. These we do not consider as within S. 32, Evidence Act, as they do not relate to the circumstances of the transaction which resulted in her death. P. W. 15 said that there was some moonlight which enabled him to identify the accused. It appears from the calendar that the moon was new then and just rising. It certainly was not "round shaped" as P. W. 15 said in cross-examination. P. W. 15 said that on the Saturday and Sunday before the murder the accused and Savitri were talking together "lovingly." P. W. 16 who was also sleeping near him gives much the same evidence but does not claim to identify the accused. He says there was slight moonlight the moon having arisen. To him Annapurna said that the accused stabbed both her and Savitri and ran away, and P. W. 15, said, "Yes, I too saw him run away." Standing by itself, we should be reluctant to act on this identification of P. W. 15. It may well be that having been told by his mother who had been stabbed he thought he recognized him. But that there was any deliberate attempt dishonestly to implicate the accused seems to be negatived by the fact that P. W. 16 does not pretend to have seen him, and his evidence with regard to the moonlight is no doubt true.

It has been stated in the evidence that a great hubbub arose and it can well be understood that that would be so. Other people came to the spot. Some of them have been called. P. W. 9, the wife of P. W. 17, describes how she was sleeping in her house her husband having gone to a bhajana in a dancing girl's house. She says that when the night was well advanced she heard a cry, saw a number of people near the cot where Annapurna and Savitri were, and that Annapurna told her, "my son-in-law came here, stabbed us and ran away." We see no reason to suppose that P. W. 9 had any animosity towards Annapurna. Her husband's relationship with Annapurna ceased long before. She says also that there was a little moonlight. It appears from the evidence that the corpse of the deceased was in the shade. P. W. 17 can tell us no more than that he came back between 1 and 2 and discovered what had happened and that Annapurna also told him that the accused stabbed them both and ran away.

It is convenient here to mention that both P. W. 15 and P. W. 9 say that the inmates of the deceased's house took their food together just before the lamps were lit, but P. W. 16 states that they took their evening meal at 9 o'clock. It must be remembered that P. W. 15 was a little boy of ten years of age and was likely to have had his meal earlier and gone to bed before his elders. This difference in the evidence was made much of by the defence because it was suggested that if the food was last taken by the deceased Savitri at 7 o'clock the evidence of the doctor would go to show that she must have been killed at about 9 or 10 o'clock, when the accused was at Vizagapatam; in other words, that the murder did not take place after midnight at all. This argument may be dealt with at once. It is founded on a statement in text books that rice takes two to three hours to digest and P. W. 3 appears to accept that in cross-examination. But P. ws. 4 and 5 who are doctors used to rice diet are not prepared from their experience to accept this limited time for digestion. There are much more potent reasons however for us being satisfied beyond any doubt that these women were stabbed at about 1 o'clock. The body was still warm at 2-30, says P. W. 3, and death had only occurred within half to one hour before. It must be remembered too that all the witnesses who were upon the spot immediately after the occurrence are all unanimous that the time was after midnight. The moon did not rise till after 1 o'clock according to the calendar. P. W. 11 speaks to the event being after midnight; and so does P. W. 18. P. W. 3 describes how Annapurna and the dead body of Savitri were brought to him at 2-30 A.M. We have already given his view on examination then and there as to when death had occurred in the case of Savitri. P. W. 19 describes how the bhajana finished at 1 A. M. He went to the house of Annapurna hearing a noise and found Annapurna wounded. To him also Annapurna told what she told the others. And it must be added that P. W. 13 also said that it was the accused whom he

had seen running away. This aspect of the case presents no difficulty whatever. We are satisfied, and we agree with the learned Judge, that these murders took place at the time these witnesses say they took place, at about 1 A. M., on 18th October. It must be remembered that among these people watches do not figure very frequently and midnight is a wide term. So it is established beyond any doubt that at 1 o'clock or thereabouts these women were stabbed by some one and that, immediately after the stabbing, to several people Annapurna stated that it was the accused who had stabbed her and Savitri. P. W. 3, the doctor, took so serious a view of Annapurna's case that he thought it his duty, and we think rightly, to record a dying declaration, that is, EX. B. It clearly implicates the accused.

Before proceeding further with the history of this case, we will go back to the time of the occurrence and consider the evidence of two other witnesses, P. WS. 13 and 20. Their house is indicated in the plan. According to P. W. 13, he and P. W. 20 were sitting at his house preparing Deepavali sparklers or crackers. He describes the time as midnight. P. W. 13 heard a cry and coming into the street he says he saw the accused running from west to east. He gave chase but after running ten yards stopped. Then he says the accused threw something backwards and the thing fell with a metallic sound. He did not see what it was then. He and P. W. 20 went to Annapurna's house and he confirms the evidence of the other witnesses that she said that her son-in-law stabbed her and Savitri. P. W. 13 says he said, "I too saw him." Here again, if it were a matter of identification alone, while accepting generally the facts as given by P. W. 13 and as borne out by P. W. 20, we are unable to accept the identification of the accused by P. W. 13 because he subsequently told the police that he could not identify the runner. We do not attach much importance to whether the accused threw the knife away or threw it at him, or whether he searched for the knife then and there. It must be remembered that he must have been in a state of excitement. We are, however, satisfied that he did chase somebody and, as will later appear, that somebody threw away what subsequently was shown to be a knife. P. W. 20's evidence seems to negative the argument put forward with force that the whole of this case is the result of a conspiracy against the accused. This contention so far as it concerns P. W. 20 may be rejected as groundless. P. W. 20 does not pretend to identify the runner. Next morning at 6 A. M. these two persons, P. WS. 13 and 20, got up and went out for purposes of nature, and P. W. 13, corroborated by P. W. 20, states that he took up M. O. 1, the knife, lying some six yards to the east of his house. His conduct thereafter, although much criticised, is not really so surprising when viewed with any experience of the manner in which this class of persons behaves when a crime has been committed. He picked the knife up, but then thinking that it might lead to trouble for him threw it into a bush. He says then there was blood on the blade from the tip. He threw it away some 200 yards to the west of his house. The subsequent history of this knife and the part played by P. W. 13 will be dealt with later.

Annapurna was taken to the hospital after some little delay. She died the next day at Vizagapatam where she had been taken in an ambulance after an operation which failed to save her life. But, in the meanwhile, she had made a further dying declaration to P. W. 6, the stationary Sub-Magistrate of Vizianagaram, EX. F. That too implicates the accused very clearly. It will be noticed that both in EX. F and in EX. B, Annapurna states that the accused did not return to Vizagapatam at all but lurked at the station. In answer to a question "What sort of a knife was it?" she says, "It is a curved knife admitting of easy handling." In fact that is a fair description of M. O. 1. So, in addition to the statements of those who gathered at her house after the stabbing, in two more formal declarations to P. W. 3 and P.W. 6 respectively, this woman declared that the murderer was the accused. It is a well-accepted practice that dying declarations should be corroborated in material particulars and by independent testimony. We are therefore to see to what extent this woman's statement is corroborated. We have already dealt with the events earlier in the evening, and have indicated that from them alone we would be reluctant to hold that the statements have been corroborated. There were however events of great importance next day. An inquest was held on the body of Savitri by P. W. 21, the Sub-Inspector of Police. It is well to remember that at 3-30 on that morning he was aware of the nature of the declarations of Annapurna. The inquest report, EX. H dealing with the cause of death is a formal document entered on a form. It will be observed that the duration of the

inquest is stated to be two hours commencing at 7 A. M. and closing at 9 A. M. According to P. W. 21, at 7-15, that is a quarter of an hour after the inquest started, the accused came and appeared anxious to come in. He was brought in. When he stated that his name was Ramamurthi and that he was the son-in-law of Annapurna and the husband of Savitri, P. W. 21 arrested him and searched him but found no bloodstained weapons on him or blood marks on his clothes. In this connexion, P.W. 3 stated that blood need not have spurted out when these women were stabbed.

Then according to P. W. 21, the accused stated that he would show the knife with which he had stabbed Annapurna and Savitri which he had thrown away. The Sub-Inspector, the accused, and P. W. 12, who was requested to go with the Sub-Inspector, proceeded to a spot eight yards east of P. W. 13's house but no knife was found. The Sub-Inspector, one may say, broadcast that whoever had taken the knife away should return it or search would be made of the houses. Then P. W. 13 came forward and stated, the accused being present, be it remembered, that he had picked up the knife from that very spot. He took the party to the easing ground some 40 or 50 yards to the west of his house and showed the knife, the blade sticking in the earth. A panchayatnama Ex. J was made out and signed, one of the signatories being P. W. 12. P. W. 12 entirely bears out this story. Blood was not found on the knife, but as it was sticking in the ground and had been out all night this is not very strange. Here again the vagueness of these people about time is striking and has rightly been made much of by the defence. P. W. 12 said the knife was recovered between 10 and 11 A. M. In Ex. N, a list made out on the 20th, that is two days after, the time is put down as 10 and it is signed by the Sub-Inspector. But it must be remembered that the inquest report signed on the 18th by the Sub-Inspector says that the inquest closed at 9. P. W. 8 was one of the panchayatdars at the inquest. He says that the accused came at 7-15. It appears that a long statement was made by the accused to the Sub-Inspector, a greater part of which was rightly rejected by the learned Sessions Judge although there are parts of it which might well have been received under S. 27, Evidence Act, because we do not quite understand why the fact that he was arrested by the Sub-Inspector and that the accused told him and showed him the spot where he had thrown the knife with which he had murdered his wife and Annapurna could be receivable in evidence rightly, and yet the actual statement taken down should be rejected. It is obviously of importance to ascertain whether in fact the officer recorded the statement from the accused because it will be extremely dangerous to accept the fact when so important a statement was made if it was not recorded. We have therefore thought it right to exercise our powers in the interests of justice under S. 172, Criminal P. C., and look at the case diary. It is enough for us to say we are satisfied beyond any doubt that the learned Judge rightly believed the Sub-Inspector when he said that the accused told him that he would show the spot where he had thrown the knife with which he had stabbed Annapurna and Savitri. The portions of the case diary printed are of little assistance to us being only parts of the original.

It must be remembered the accused made a very long statement taking 20 minutes or more to record. We must observe that the learned Judge has overlooked the decision of a Full Bench of this High Court in I L R (1937) Mad 695[1] where the learned Chief Justice emphasizes that these statements under S. 27, Evidence Act should be recorded in the first person, that is to say, as far as possible in the actual words of the accused; they should not be paraphrased. But that is what has been done in this case. The statements made by the accused are given in the third person; that is, it is recorded in the Sub-Inspector's evidence in this form: "He stated that he would show me the knife with which he had stabbed etc.," and then later on in cross-examination, "I went with the accused as he offered to show the spot where he threw the knife." We have no doubt what the effect of the accused's statement was, namely that he said that he would show the Sub-Inspector the spot where he had thrown the knife with which he had stabbed these women. In this case there has been no cross-examination to suggest that the statement was in some other form. The defence is that no such statement was made at all. We feel no anxiety with regard to this part of the case. But in all these cases the exact words of the accused should be recorded in the first person and the learned Judge should admit those parts which he considers admissible

1. ('37) 24 A I R 1937 Mad 618 : 171 I C 245 : 38 Cr L J 1027 : I L R (1937) Mad 695 : (1937) 2 M L J 60 (FB), Athappa Goundan v. Emperor.

but leave some record for the consideration of the appellate Court of any other words which the prosecution claimed should be received in evidence. It has however been contended by the defence that the statement is not admissible under S. 27, Evidence Act as no discovery was made in consequence of information received from the accused. We do not agree.

Section 27 refers to a fact being discovered and S. 3 defines "fact" as meaning and including "anything, state of things, or relation of things capable of being perceived by the senses." It seems to us that these facts were discovered: (1) the fact that a knife had been seen to be thrown away and was later found by P. W. 13 at the spot indicated, and (2) the knife itself. It was the statement of the accused that led the party to the scene and we consider that the subsequent discoveries were directly in consequence of the information received from him. It would be strange if, for example, an accused person stated that the body of a person murdered by him would be found in a certain spot and on the police going to that spot not finding it there but in a mortuary to which it had by then been removed by, e. g., the village officers, it could be held that the ultimate finding of the body was not in consequence of the information received from the accused. A decision in 11 M L W 8[2] has been brought to our notice. With all respect to the learned Judges, we find some little difficulty in following the reasoning therein and are unable to follow it. It does not appear that there was any sort of discussion as to the meaning of the word "fact." This High Court in 58 Mad 642[3] has stressed the comprehensive meaning of the word "fact." Thus far, we have considered the admissibility of the accused's statement under S. 27, Evidence Act. So far as a consideration of whether the accused's statement is corroborated is concerned, and Annapurna's statements, it is established that the accused having made a statement that at a certain spot he had thrown away a knife, that statement is shown to be true by the appearance of a man who saw him throw a knife away, because the accused's case is that it was he himself who threw it away. Moreover, a knife was picked up at the very spot indicated by the accused. On these facts the prosecution claim that they have established the guilt of the accused. It is necessary to consider his own statements. It appears that at his request a statement was recorded from him under S. 164, Criminal P. C. In that statement he admits that he was questioned at the inquest at 8-30 but states that he was arrested at 11 A.M. This is wholly incredible. The police, of course, would at once, and we are satisfied that they did, arrest a man of whom it had been stated on all sides that he had murdered two women. He then proceeds :

> On the morning of 18th October 1938 I came to Vizianagaram from Waltair by the 6 A.M. train to take my wife back. I heard about this murder at the clock tower. By the time I arrived at the Municipal Hospital my wife's corpse was lying at the gate. I saw this and asked the police there to open the gate. They opened it. I went inside. They asked me who I was. I told them that I was the husband of the deceased. They said: "All right. Sit down." I accordingly sat down.

Then questions followed obviously put on the supposition that the accused desired to make a confession, which he definitely negatived. Before us two main points have been argued. First that these women were in fact murdered at 9 o'clock on the Monday night. We have already dealt with this. We think there is no basis whatever for it. We entirely accept the prosecution story that these women were murdered at 1 o'clock. It is then argued, although it is a little difficult to follow, that because of the variance in the times with regard to the discovery of the knife and the closing of inquest, no statement at all was made by the accused and therefore no discovery was made. We wholly decline to accept this position. We find no room in this case for supporting any suggestion of what is commonly known as a foisted case. Several witnesses were well disposed towards the accused. We wholly decline to believe that the police have been a party to an elaborate conspiracy to victimize an obscure worker on the railway. Our view is that this inquest started and ended at the time indicated in the inquest report and that thereafter no one was paying any great attention to actual times. We think that the Sub-Inspector's version is substantially true and that he signed Ex. G two days after carelessly. It is not the time of the end of this inquest so much as the beginning of it that is important. Obviously after it had started there was a long interval in which the statement was written down. The parties repaired to the spot where the knife was found and it

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2. ('20) 7 A I R 1920 Mad 109 : 54 I C 479 : 21 Cr L J 79 : 11 M L W 8, Ramasami Boyan v. Emperor.
3. ('35) 22 A I R 1935 Mad 528 : 158 I C 764 : 58 Mad 642 : 36 Cr L J 1442 : 68 M L J Sup 73 (FB), Emperor v. Ramanuja Ayyangar.

seems possible that no particular record of actual times was made. The safest guide is the inquest report written at the time with the times recorded. Any argument based on the accused's statement in EX. 4 that he was not arrested until 11 A.M., and that therefore he was not under arrest at the time of his statement to the police, can be summarily rejected for the reasons we have already indicated namely, that he must have been arrested immediately the police saw him.

In the Magistrate's Court the accused contented himself by saying that he was not guilty and would call witnesses at the Sessions. No application was made, says the learned trial Judge, for the summoning of any defence witnesses until the case was taken up for trial. Then D. WS. 2, 3 and 4 were called for proving uniform alibis at Vizagapatam late on the evening of Monday and his presence there early on Tuesday morning. We observe that everybody at the original trial being conversant with such local conditions as the times of trains no formal proof of the relevant time table has been made. We have directed that a time table shall be attached to this record and received in evidence. The following times are however accepted by both prosecution and defence before us. The evening train leaves Waltair at 9.50 P.M., and reaches Vizianagaram at 11-21 P.M. and the morning train leaves Waltair at 6-5 A.M. reaching Vizianagaram at 7-55 A.M. It was therefore possible for the accused to have caught the morning train provided that he did in fact go back to Vizagapatam on Sunday, in which case he could have been on the spot in time at the time of the murder. If however he was in Vizagapatam at 5 A. M. catching the early morning train and reaching Vizianagaram at 7-55 he could not have been at the inquest much before 8-30, the station being about one and half miles from the hospital. Therefore, he could not have been at the inquest at 7-15 A.M. as alleged by the prosecution. His alibi therefore at Vizagapatam is of importance. We do not propose to discuss, although we have examined, the alibi in full. It is enough for us to say that we have considered and wholly agree with the estimate of its value given by the learned Sessions Judge. We agree with him in rejecting it and do not consider that it is necessary to repeat the criticisms which he has directed towards it. There is however one striking feature regarding this alibi and that is that the detailed story told by the witnesses is not so much as mentioned by the accused in any of his statements. It is true that he states at the Sessions and in EX. 4 that he was at Vizagapatam, but there is no reference at all to any of the defence witnesses or any of the events spoken to by them.

The learned Sessions Judge has reviewed the evidence at great length. This is one of those cases where the evidence as a whole must be considered and weighed. There is ample material on the record to show that the accused might well have desired the death of his mother-in-law and wife. We have the fact that on this night Annapurna stated not once but many times that it was the accused who stabbed them. She is supported by P. WS. 13 and 15, although standing alone we have indicated we should hesitate to accept their evidence as to the identity of the accused. We have the fact also that this man so far from being at Vizagapatam was at Vizianagaram (they are 34 miles apart) soon after 7 o'clock on the morning of the 18th. In the course of a statement to the police he told them that the knife with which he had murdered these women was at a certain spot and he took the police there. At that very spot immediately after the murder the night before a man had been seen running and throwing away a knife. That knife was picked up from that spot by P. W. 13. Immediately these facts are known, we consider that by the accused's own conduct and words the statements of Annapurna and his own retracted statement are amply corroborated and the statements of P. WS. 13 and 15 receive added strength; and it must be remembered with regard to P. W. 15 that he had repeatedly said to all the persons that had assembled the night before that he had seen his brother-in-law running. All these matters have received from the learned Judge the fullest consideration. Agreeing with him we are satisfied that the facts lead to one conclusion only, namely that it was the accused that committed this act. We therefore confirm his conviction. It was a deliberate murder of two defenceless women and the learned Judge did his duty in passing the sentence of death. We accordingly also confirm the sentence and dismiss the appeal.

C.R.K./G.N. *Appeal dismissed.*

*** A. I. R. 1941 Madras 296**

KRISHNASWAMI AYYANGAR J.

In re K. Krishnan and another —

Accused.

Case No. 13 of Fourth Criminal Sessions of 1940, Decided on 27th September 1940.

**Criminal P. C. (1898), Ss. 287, 209 and 342 — Purpose for which Court is entitled to put questions to accused under S. 342 is identical with purpose under S. 209 — Written statement by accused in lieu of answers to questions to be put by Court under S. 209 is not record of examination by or before committing Magistrate within meaning of S. 287 and therefore is inadmissible in evidence.*

The purpose for which the Court is entitled to put questions to the accused under S. 342 is identical with the purpose indicated in S. 209, namely, to afford the accused an opportunity to explain such circumstances as appear in the evidence against him. The questions which are to be put are questions to be put by the Court and the answers to be recorded are the answers to those questions. There is no warrant for the accused or his advisers taking advantage of the occasion to prepare a written statement beforehand and put it in, in lieu of the explanation which is to be elicited and only to be elicited by questions by the Court. Such a written statement does not come within S. 287, as it cannot be said to be a document containing the examination of the accused duly recorded by or before the committing Magistrate and therefore it cannot be tendered in evidence.

[P 296 C 2; P 297 C 1]

E. A. Lobo and T. S. Venkataraman —

for Accused.

Crown Prosecutor — for the Crown.

Judgment.—It appears that in this case while the preliminary enquiry was being held by the committing Magistrate, the accused was put the following question after the evidence for the prosecution had been recorded: "Q.—You have heard the evidence of prosecution witnesses; what have you to say?" The accused gave the following answer: "A.—I am filing my written statement." That written statement appears to be a long document consisting of 24 pages of typed matter. The question now arises as to whether this long typed statement filed by accused 1 before the Magistrate comes within S. 287, Criminal P. C., and whether it is a document containing the examination of the accused duly recorded by or before the committing Magistrate. If the document contains the record of the examination by or before the committing Magistrate, it is the duty of the prosecutor to tender it and read it as evidence. But for reasons which will be mentioned, it does not appear to be such a document. The written statement was filed in place of the answers to be given by the accused, at the stage at which the Magistrate had to question him under S. 209, Criminal P. C. Section 209, Criminal P. C., defines the purpose for which the Magistrate is authorized to interrogate the accused, and the stage at which he is to do so. Section 209 (1) says:

When the evidence referred to in S. 208, subss. (1) and (3), has been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate, that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

What the committing Magistrate is called upon to do by the terms of the section is to place before the accused the circumstances appearing in the evidence against him and afford him an opportunity, if he likes to take advantage of it, to explain those circumstances. Far from the section conferring any privilege on the accused to file a written statement, it merely casts a duty upon the Magistrate to question the accused and record his answers, if any, for the limited purpose specified in the section. There is another section relating to the matter under consideration in Chap. XXV containing the general provisions as to inquiries and trials, namely S. 342. Cl. (1) of this section says:

For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

Clause (2) says:

The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

Clause (3) says:

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into or trial for, any other offence which such answers may tend to show he has committed.

On the face of it, this section indicates the general procedure to be followed in the matter of judicial interrogation of an accused person and the extent to which the answers elicited are to be made use of, for deciding upon the guilt or innocence of the accused. The purpose for which the Court is entitled to put questions to the accused under this section is identical with the purpose indicated in S. 209, namely to afford the accused an opportunity to explain such circumstances as appear in the evidence

against him. The questions which are to be put are questions to be put by the Court and the answers to be recorded are the answers to those questions. There is no warrant for the accused or his advisers taking advantage of the occasion to prepare a written statement beforehand and put it in, in lieu of the explanation which is to be elicited and only to be elicited by questions by the Court. I am aware of the practice that has been sometimes followed, of allowing the accused to file written statements in inquiries and trials. Written statements so prepared and filed are generally, as is well known, prepared with the assistance of the friends and legal advisers of the accused in order to present the case in as favourable a light as possible, with a view to exculpate the accused or minimize his guilt. The Code does not contemplate such a procedure. What it contemplates and what would be in fact really useful for the decision of the case is what the accused can himself say by way of explanation, and not what others can say for him. There is no warrant in the Code for the outcome of the labours of more capable and brainy persons being considered by the Court under S. 287. The practice has been time and again condemned but does not appear to have wholly disappeared. I now add my protest also in the hope that it will be laid to rest. The written statement of accused 1 in this case is an extreme type and I must exclude it from the records of the case. For the same reasons, the written statement of accused 2 though less objectionable in point of length must also be excluded.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. 1941 Madras 297

SOMAYYA J.

Official Assignee — Petitioner

v.

Secretary, M. & S. M. Railway Employee's Co-operative Urban Bank Ltd. — Respondent.

Insolvency Petn. No. 230 of 1936, and Appln. No. 271 of 1939, Decided on 16th January 1940.

* *(a) Presidency Towns Insolvency Act (1909), Ss. 49, 17 and 60 — Insolvency law does not recognize preference of one creditor over another — Insolvent's property comprises also after-acquired property— Payments by insolvent before adjudication to creditor without notice of insolvency are protected—Insolvent prior to adjudication obtaining loan from bank and undertaking to repay it by instalments — Insolvent authorizing and requesting employer to pay instalments out of his salary — No completed assignment or charge held created in favour of bank— Contract held revoked by insolvent's adjudication — Held further that only amount ordered by Court under S. 60 (2) vested in Official Assignee and balance belonged absolutely to insolvent and that official receiver could not recover amount paid to bank out of such balance— Held also that Official Assignee's letter authorizing Bank to recover amount from insolvent's salary amounted to voluntary payment.*

The policy of the insolvency law is an equal and rateable distribution of the property of the insolvent among the creditors who are entitled to prove their debts in insolvency without any preference of one creditor over another. The property of the insolvent comprises also what is known as the after-acquired property and the payments made by the insolvent to any of his creditors are protected provided they are made before his adjudication and the creditor has no notice of the insolvency. [P 299 C 2]

Some time prior to his adjudication, the insolvent obtained a loan from the bank during the pendency of a prior insolvency proceeding. The insolvent undertook to repay the loan in monthly instalments each out of his salary and authorized and requested his employer, the Railway Company, to pay the said instalments to the bank out of his salary and the bank, which had no notice of the insolvency, as per contract continued to recover the instalments even after the adjudication of the insolvent until the debt was fully satisfied :

Held that on the date of the insolvency, there was only an authority or direction and request by the debtor to his employer to pay a portion of his salary to the bank or at best a contract to assign the future salary as and when it was earned and that there was no completed assignment or charge. The aforesaid contract was revoked by the insolvent's adjudication and therefore the liability of the insolvent or his estate for breach of such contract was only in damages and the creditor was not entitled to enforce the transaction as against his subsequent salary at any rate not against the assignee in bankruptcy:(1878) 10 Ch D 615; (1881) 19 Ch D 342; (1869) 4 C P 660; (1883) 22 Ch D 782 and (1897) 1 QB 17, *Rel. on.* [P 300 C 2; P 301 C 1]

Held further that although any dealing by the insolvent with reference to after-acquired property was protected if the assignee acted bona fide and paid value, no matter that he had knowledge of the insolvency, a distinction had been made between the insolvent's after-acquired property in general and his pay, salary or other income, by reason of the provisions contained in S. 60 and that only the amount ordered by the Court under S. 60 (2) vested in the Official Assignee and the balance being at the absolute disposal of the insolvent, he was free to pay any one of his creditors in full and therefore the Official Receiver could not recover the amount paid by the insolvent to the bank out of such balance subsequent to his insolvency:(1882) 21 Ch D 85, *Ref.*; (1892) 1 Q B 522 and 19 Bom 232, *Rel. on.* [P 301 C 2; P 302 C 1, 2]

Held also that the letter of the Official Assignee permitting the bank to collect the amount from the Railway Company according to the terms of the contract amounted to a voluntary payment. [P 302 C 2]

(b) Presidency Towns Insolvency Act (1909), S. 60 (2) — Rule for fixing amount under S. 60 (2) stated.

The first one hundred rupees of the insolvent's salary and a half of the excess over one hundred being exempt from attachment there is no reason why the balance at least should not be required to be paid for the benefit of the creditors. That should be the ordinary rule in fixing the amount under S. 60 (2). [P 302 C 2]

T. R. Venkatarama Sastri —
for Petitioner (Official Assignee.)

Order.—This application has been taken out by the Official Assignee under S. 7, Presidency Towns Insolvency Act, for an order directing the Secretary, the M. & S. M. Railway Employees Co-operative Urban Bank, Ltd., to refund to him all sums recovered by the said Bank by way of deduction from the salary of the first insolvent towards refund of the loan taken by the said insolvent from the bank. The facts are briefly as follows :

The first insolvent who was employed as a chargeman in the M. & S. M. Railway workshops, Perambur, was adjudicated on 29th April 1936. He was at that time drawing a salary of Rs. 202-8-0. Some time prior to his adjudication, i. e., on 19th October 1935 he obtained a loan of Rs. 1500 from the bank during the pendency of a prior insolvency proceeding. The insolvent undertook to repay the loan in 36 monthly instalments of Rs. 41-10-0 each out of his salary and authorized and requested the M. & S. M. Railway Co., to pay the said instalments to the bank out of his salary and the bank was so recovering the loan from the monthly salary of the insolvent until April 1939, when the loan account was closed and the sureties discharged.

The Official Assignee by his letter dated 8th October 1935, Ex. D-2, in the case, permitted the raising of the loan and by his letter dated 15th November 1937, Ex. D-1, addressed to the bank permitted it to recover the amount of the loan from the salary of the insolvent. The terms on which the loan was granted by the bank were, inter alia, that it should be guaranteed by two sureties and that the amount was recoverable from the borrower's salaries or any other money which might be due to him from the M. & S. M. Railway Co., who were authorized and requested to deduct the amount from out of his salary and to pay it over to the bank. Exhibit D-3, which is a form of Loans Passed Register, provides :

I . . . . the borrower hereby authorize and request the M. & S. M. Railway Co. Ltd., to deduct from my monthly salary or any other money that may be payable to me by the M. & S. M. Railway Co. Ltd., such instalment or instalments of principal of the loan, or interest due on such loan, or, any other sum or sums which the M. & S. M. Railway Employees Co-operative Urban Bank, Ltd., Adam's Park, Madras, may claim as due from me to the said bank.

Exhibit D-5 which is the application for loan also contains a similar clause. The service agreement Ex. D-4 also contains a similar provision :

I also agree to deductions from my salary or any other moneys payable to me by the company being made on account of dues to the M. & S. M. Railway Co-operative Society and the M. & S. M. Railway Employees Co-operative Urban Bank for the use of railway schools and railway institutes for services rendered by railway medical officers and for diets supplied in railway hospitals.

Rule 44 of the bye-laws of the bank, Ex. D-6, provides :

It shall be competent for the board of directors to refuse to grant a loan unless the applicant shall agree in writing to permit the officer disbursing the pay to deduct instalments from his monthly pay to discharge the whole or part of the loan.

Rule 48 provides :

The amount of paid up share capital, deposit and any other money to the credit of a member or a past member shall be subject to a first charge in favour of the bank in respect of any moneys due to the bank from such member or past member.

The loan in question was not recovered as provided by this rule. On the above facts the questions that arise for consideration are : (1) What is the nature of the transaction between the insolvent and the M. & S. M. Railway Employees Co-operative Urban Bank Ltd.? Whether the transaction amounts to an equitable charge or assignment in favour of the said bank, in respect of so much of the future salary of the insolvent as is necessary for the payment of the monthly instalments? (2) What, if any, is the effect of the insolvency of the debtor on the said transaction? (3) Whether in any event the bank having recovered the loan in pursuance of the agreement such payments are protected and the bank cannot be ordered to refund the amount recovered?

The contention of the bank is that the transaction amounted to an equitable charge or assignment in favour of the bank in respect of so much of the salary as was necessary to pay up the monthly instalments and interest thereon, and that the transaction was not in any way affected by the subsequent insolvency of the debtor. It was also contended that the salary of the insolvent did not vest in the Official Assignee in the absence of an order of Court made under S. 60, Presidency Towns Insolvency Act, that the insolvent was at liberty to deal with it in any manner he pleased and that in any case the Official Assignee having permitted the raising of the loan and the recovery thereof from out of the insolvent's salary

and the recovery having been made with the full consent of the insolvent and the Official Assignee and in pursuance of an agreement with the insolvent authorizing such recovery, it was no longer open to the Official Assignee to claim a refund of the amount. It was stated that the bank had no notice of the insolvency till 12th September 1939 and that it acted perfectly bona fide.

Before proceeding to deal with the various points it will be useful to notice the provisions of the Presidency Towns Insolvency Act which have a bearing on the said points and the general scheme of the Act. The policy of the insolvency law is equal distribution of the assets of the insolvent among the creditors who are entitled to prove their debts in insolvency, and it expressly provides against preference of one creditor to another. Section 17 of the Act lays down that the property of the insolvent shall vest in the Official Assignee and shall become divisible among his creditors and that thereafter, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency, shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent, in respect of the debt. It saves the right of the secured creditor to realize or otherwise deal with his security in any manner.

Section 49 provides for the distribution of the property of the insolvent and lays down that all debts shall rank equally between themselves and shall be paid rateably "and without any preference." Section 52 defines the property of the insolvent and it comprises all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge. Section 57 protects bona fide transactions and saves any payment by the insolvent to any of his creditors and any contract or dealing by or with the insolvent for valuable consideration, provided that any such transaction takes place before the date of the order of adjudication and the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor. Section 60 deals with the pay or salary or other income of the insolvent and clause 2 provides :

> Where an insolvent is in receipt of a salary or income other than aforesaid, the Court may at any time after adjudication and from time to time, make such order as it thinks just for the payment to the Official Assignee, for distribution among the creditors of so much of such salary or income as may be liable to attachment, the execution of a decree or of any portion thereof.

It will be apparent from the foregoing provisions that the insolvency law aims at equal and rateable distribution of the property of the insolvent among the creditors who are entitled to prove their debts in insolvency without any preference of one creditor over another, that the property of the insolvent comprises also what is known as the after-acquired property, and that payments made by the insolvent to any of his creditors will be protected provided they are made before his adjudication and the creditor has no notice of the insolvency. I shall now proceed to deal with the several questions that arise in the case in the order set out by me. First, as regards the nature of the transaction between the insolvent, the bank and the M. & S. M. Railway Co., the question is whether an equitable charge or assignment is created in respect of the insolvent's future salary. This depends upon the construction of Exs. D-3, D-4, D-5 and D-6. Exhibits D-3 and D-5 employ practically the same language and they contain an authorization and request to the M. & S. M. Railway Co., to deduct the instalments from out of the insolvent's salary every month. By the service agreement, Ex. D-6, the insolvent agrees generally to such deductions. The documents do not contain any promise to the bank to pay the loan . . . . out of the future salary. They merely authorize and request the M. & S. M. Railway Co., to withhold the amount of the monthly instalments and to pay it over to the bank. Reference may be made to R. 48 of the bye-laws of the bank, Ex. D-5, which expressly provides for a charge on certain amounts standing to the credit of the insolvent, viz., share capital, deposit, etc. The language of R. 44 is different and does not like R. 48 provide in express terms that a charge is created. But apart from the contrast with the language of R. 48, and taking R. 44 by itself, it does not appear that the documents disclose anything more than a "pay order." Rule 44 speaks of an agreement in writing to permit the officer disbursing the pay to deduct the instalments from his monthly pay to discharge the whole or part of the loan. The expression "to permit" is significant and that taken along with the expression "authorize and request" in Exs. D-3 and D-5 lends support to the view that the transaction amounts to nothing more than a mere authority or request by the debtor to his employees to pay the bank.

The decision in (1878) 10 Ch D 615[1] may be usefully referred to in this connexion. In that case a customer borrowed £200 from his bankers on an agreement that the loan should be paid out of the rent of a farm which would become due to him in Michaelmas and he gave a letter to the bank addressed to the tenant by which he authorized and requested the tenant to pay £200 to the bankers when the Michaelmas rent became due. The bankers forwarded the letter to the tenant. Meanwhile, the customer was adjudicated bankrupt. It was held in that case that the letter amounted only to a revocable authority to pay the rent to the bankers and that it was revoked by the bankruptcy. Jessel M. R. says in that case:

> The only thing we can look at is the letter itself which authorizes and requests the tenants to pay £200 to the bankers. It amounts to nothing more than a request to pay the bankers. On the face of it, it is simply an authority revocable at any time and of course it was revoked by the bankruptcy.

There is also another aspect of the matter which may be considered, viz., that the agreement in the case does not relate to a fund in existence but to a future contingent fund which may or may not come into existence even at a future date. It has no doubt been held that a promise to pay a debt out of a specific fund in existence at the time, whether payable in præsenti or in futuro, amounts to an equitable assignment of the fund so as to entitle the assignee of the fund to claim payment out of that fund. But that principle applies only to cases where the fund was in existence on the date of the assignment though payable on a future date and will not apply to a future contingent fund. "A man cannot in equity, any more than at law, assign what has no existence:" *see* (1881) 19 CH D 342.[2] It has been held in (1869) 4 C P 660,[3] that a promise to pay out of moneys when received, i. e., a promise to pay when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment so as to charge the debt in the hands of such third person. I therefore hold there was no charge or completed assignment in this case. Though "a man cannot in equity, any more than at law, assign what has no existence," he

> can contract to assign property which is to come into existence in the future, and when it has come into existence equity, treating as done that which ought to be done, fastens upon that property and the contract to assign thus becomes a complete assignment.

That is, in the case of future property, though the assignment may not operate in præsenti, it may operate as and when the property comes to existence. Until then the assignment constitutes only a contract in respect of the future property and equity attaches to it as soon as the property comes into existence, when the contract to assign becomes a completed assignment. As was observed by Jessel M. R. in (1881) 19 Ch D 342[2]:

> The assignment in fact constituted only a contract to give him the after-acquired chattels and until the property comes into existence the contract remains only a contract by which the party entering into it will be bound, and when the property comes into existence it is a contract for the breach of which he will incur liability.

In that case there was a bill of sale by the debtor transferring for value to a creditor all the chattels at his place of business and all other chattels which may at any time be brought thereon. The creditor did not prove in bankruptcy but claimed certain chattels which were brought into the premises after the insolvent's adjudication. To the same effect are the following observations of Lindley L. J. in (1883) 22 Ch D 782,[4] which was a case of an assignment by a trader of the future receipts of his business:

> It is an agreement to assign to Younger & Co., not property of Jones and Barber, but money which would become due to them under the arrangement between them and the Railway Company. It is a mere agreement for the breach of which no doubt an action would lie.

If therefore a person agrees to pay his creditor out of his future salary or income which is contingent on his earning the same, the transaction amounts to a mere contract to assign until the salary or income comes into existence and will become complete only after the salary becomes due or after the income accrues and not before. Applying that principle to the present case, it will be seen that in respect of salary accruing subsequent to insolvency there was only a contract to assign as and when it was earned and that there was no completed assignment on the date of the adjudication. If that is so, the liability of the insolvent or his estate for breach of such contract will be only in damages and the creditor will not be entitled to enforce the transaction as against his subsequent salary, at any rate not against the assignee in bankruptcy.

The result of the foregoing discussion is that on the date of the insolvency there was only an authority or direction and request by

1. (1878) 10 Ch D 615 : 48 L J Bk 79 : 40 L T 179 : 27 W R 385, Ex parte Hall; In re Whiting.
2. (1881) 19 Ch D 342: 51 L J Ch 14: 45 L T 567: 30 W R 70, Collyer v. Isaacs.
3. (1869) 4 C P 660, Field v. Megaw.
4. (1883) 22 Ch D 782: 52 L J Ch 635: 48 L T 492: 31 W R 661, Ex parte Nichols; In re Jones.

the debtor to the M. & S. M. Railway Co., to pay a portion of his salary to the bank or at best a contract to assign the future salary as and when it was earned. There was no completed assignment or charge. What then is the effect of the insolvency on such direction to pay or contract to assign? Is it sufficient to give the creditor a right to the fund which will prevail over the rights of the Official Assignee? As was pointed out in (1878) 10 Ch D 615,[1] already referred to 'it is simply an authority revocable at any time and of course it was revoked by the bankruptcy.' Treating it as a contract to assign, even then, as pointed out in (1881) 19 Ch D 342,[2] when the party who contracts becomes bankrupt the liability in respect of the contract is a liability provable in bankruptcy.

The observations of Lindley L. J. in (1883) 22 Ch D 782[4] may also be usefully referred to :

> It is mere agreement for the breach of which no doubt an action would lie but which cannot prevail against the title of the trustee so far as regards payments received by the Railway Company under it after his title accrued.

To the same effect are the observations of Lopes L. J. in (1897) 1 Q B 17[5]:

> If the amount in question had been a debt which had accrued due at the date of the bankruptcy the case would have been different. But that was not so. In order to determine the right which was assigned to the plaintiff it is necessary to consider the terms of the contract. Having regard to those terms it appears to me clear that there was only a debt which might or might not become due to the assignor in future according as the conditions of the contract were or were not fulfilled. That being so the case appears to me to come directly within the decision in (1883) 22 Ch D 782.[4]

The position is well summed up by Mulla in his book on the Law of Insolvency at p. 348, S. 520:

> The effect of the subsequent insolvency of an assignor of future or after-acquired property may now be considered. If after-acquired property comes into existence prior to the insolvency of the assignor, the equitable assignment is complete and the Official Assignee will take the property subject to the assignment. If the property comes into existence subsequently to the insolvency and before the discharge of the insolvent, the Official Assignee will take the property subject to the assignment if the right of the assignor to recover that which is claimed by the assignee had become complete prior to the insolvency but not if the right had not become complete before then. In the latter case the assignee has no right to the property. Thus if a debt which is to fall due at a future time is assigned and the debt only falls due after insolvency the assignee has no right to it.

This takes me to the next point, viz., how far the insolvent was competent to deal with his subsequent salary in the absence of an assignment or charge in favour of the bank and how far can the bank claim protection in respect of the payments made to it from out of the subsequent salary. It was argued that the insolvent was absolutely entitled to his after-acquired properties and can deal with and dispose of them as he pleased unless and until the Official Assignee intervened and that all dealings and transactions had or entered into by the insolvent before such intervention were valid and cannot be questioned by the Official Assignee or by the creditors. It was further argued that so far as the salary was concerned, under the special provisions of S. 60, Presidency Towns Insolvency Act, it did not vest at all in the Official Assignee in the absence of an order of Court fixing such portion of the salary as it thinks fit for payment to the Official Assignee for distribution among his creditors, and that at any rate when an order has been made by the Court fixing what proportion of the salary should be paid to the Official Assignee month after month the balance of the salary was at the absolute disposal of the insolvent and that the Official Assignee cannot claim anything more. The law in regard to after-acquired properties is that any dealing by the insolvent with reference to such property will be protected if the assignee acts bona fide and pays value, no matter that he has knowledge of the insolvency. In the present case, it cannot be denied that the bank had paid value. It is also claimed by the bank that it had no notice of the insolvency until April 1939 and that it advanced the loan in the ordinary course of business prior to the insolvency. The averments are not controverted on behalf of the Official Assignee.

We have next to consider whether the payments made to the bank are protected. No doubt a distinction has been made between the insolvent's after-acquired property in general and his pay, salary or other income, by reason of the provisions contained in S. 60 which corresponds to S. 51, English Bankruptcy Act of 1914 and S. 53, Bankruptcy Act of 1883. What then is the position of the Official Assignee and the creditors with reference to his subsequent salary? Does the whole of it vest in the Official Assignee subject to the insolvent's retaining a sufficient portion necessary for the maintenance of himself and his family or is it only so much of it as is liable to attachment in execution of a decree which vests in him or is it that no part of it vests

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5. (1897) 1 Q B 17: 66 L J Q B 42: 45 W R 113: 4 Manson 17, Wilmot v. Alton.

in the Official Assignee until an order is made by the Court fixing so much of it as it considers proper ? Judicial opinion on the subject is not uniform. It was held in (1882) 21 Ch D 85,[6] by the Court of appeal on a construction of the Bankruptcy Act of 1869 that the effect of Ss. 15 and 17 was to vest in the trustee all property including those dealt with by Ss. 87 to 95 which relate to salaries, income, etc., (corresponding to S. 60, Presidency Towns Insolvency Act), but subject to the qualifications and exceptions introduced by those sections. But the decision in (1892) 1 Q B 522,[7] seems to point in the other direction. That was a case in which an actor agreed to act in a theatre on a salary of £30 a week payable weekly and became bankrupt. He entered into an agreement with the theatre manager that he should retain £20 of his salary and discharge all his debts. The question was raised as to how far the arrangement was operative as against the trustee in bankruptcy. In upholding the arrangement, Esher, M. R. says :

> With regard to the particular salary or income which does not pass to the trustee the bankrupt had a right, notwithstanding the receiving order to make any bargain he chose.

Bowen L. J., remarks dealing with section 53 (2) :

> Until the sub-section was put in force against him by diverting to the use and advantage of the creditors that which was prima facie up to that moment his own, he had a perfect right, although he was bankrupt, to make any bargain he pleases with any person as to the remuneration which he was to receive for his personal services.

The only Indian decision directly bearing on the point is the decision of a single Judge in 19 Bom 232,[8] which turned on the construction of 11 and 12 Vict., Chap. 21, Ss. 7 and 27. It lays down that the Official Assignee is not entitled to the subsequent salary or income except by means of an order obtained under S. 27 (corresponding to S. 60). I am of opinion that only so much of the salary as is ordered by the Court under S. 60 (2) to be paid to the Official Assignee vests in him. In this case an order having been made under S. 60 (2) of the Act, only the amount ordered by the Court vests in the Official Assignee; at any rate the balance was at the absolute disposal of the insolvent. Assuming that the rest of the income did not vest in the Official Assignee, can the insolvent pay one creditor in full out of his subsequent salary ? No doubt, the insolvency law aims at equal and rateable distribution of the assets of the insolvent among his creditors without any preference of one creditor over another. The bank in the absence of any assignment or charge is only in the position of an ordinary creditor entitled to prove in the insolvency for its debt. It is opposed to the very spirit of the insolvency law that a creditor who is entitled merely to share equally with the other creditors in the distribution of the assets of the insolvent should receive payment in full of his amount. He cannot be allowed to have any such advantage by any act of the insolvent. But the allocation under S. 60, cl. (2) of the Act, has been made and the rest of the salary is absolutely at the disposal of the insolvent. If he had spent the whole of it himself the Official Assignee cannot complain. On this ground, I think the Official Assignee cannot recover from the respondent the moneys in question.

There is one other aspect, viz., that the letter of the Official Assignee, Ex. D-1, may amount to a voluntary payment. By this letter the Official Assignee permitted the bank to collect the amount from the railway company and the bank did so. Suppose the Official Assignee had collected the whole amount and that he afterwards paid the sums to the bank they would be voluntary payments which the Official Assignee cannot recover. I am of opinion in this case the Official Assignee's conduct does bring the case within the rule that a voluntary payment cannot be recovered.

* * * *

The allocation was evidently fixed very low by the master on the representation that the payment to the respondent bank should be taken into account when fixing the allocation. I have held that the respondent had no preferential right to be paid these sums from the salary. The first one hundred rupees and a half of the excess over one hundred are exempt from attachment; and there is no reason why the balance at least should not be required to be paid for the benefit of the creditors. That should be the ordinary rule in fixing the amount under S. 60 (2). In the result this application is dismissed but without costs as the respondent has failed in many of its contentions. The Official Assignee will have his costs out of the estate.

C.R.K./G.N. *Application dismissed.*

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6. (1882) 21 Ch D 85 : 51 L J Ch 935 : 47 L T 659 : 30 W R 878, Ex parte Huggins; In re Huggins.
7. (1892) 1 Q B 522 : 61 L J Q B 253 : 66 L T 146 : 40 W R 386 : 9 Morrell 40, In re Shine; Ex parte Shine.
8. ('95) 19 Bom 232, In the matter of C. M. J. Donaghue.

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WADSWORTH AND PATANJALI SASTRI JJ.

Athipatte Manakkal Karnavan and Manager Krishnan Nambudiri's son, Itteeri Nambudiri — Petitioner

v.

Pachilangottil Narayana Amma's son Sankunni Nair and others —

Respondents.

Civil Revn. Petn. No. 2189 of 1939, Decided on 12th September 1940, to revise order of Dist. Munsif, Walluvanad, D/- 22nd June 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 15—Alienee of whole of tenant's interest in portion of his holding is entitled to benefits of S. 15 provided he is agriculturist.

An alienee of the whole of the tenant's interest in a portion of his holding is a person who is liable to pay rent in respect of that portion and provided that he is an agriculturist, is entitled to the benefits of S. 15 : C. R. P. No. 854 of 1939, *Ref.*

[P 303 C 2; P 304 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), Ss. 16 and 15 — S. 16 saves landholder's right to recover any sum paid by him which tenant should have paid—S. 16 does not make aforesaid sum part of deposit under S. 15—S. 16 does not provide machinery for recovery but leaves landholder to his right of suit.

Section 16 saves the landholder's right to recover from his tenant anything which the landholder has paid which should have been paid by the tenant. But it does not make these sums part of the deposit contemplated in S. 15. All that it does is to safeguard the landholder's right to recover these sums in addition to that which is recoverable under S. 15. It does not provide a machinery for the recovery but leaves the landholder to his ordinary right of suit. [P 304 C 1]

(c) Madras Agriculturists' Relief Act (4 of 1938)—"Michavaram" in S. 3 (q), Malabar Tenancy Act, includes Government revenue agreed by kanomdar to be paid on behalf of jenmi—Consequently deposit under S. 15 includes arrears of Government revenue payable by kanomdar.

Having regard to the definition in S. 3 (q), Malabar Tenancy Act, "michavaram" includes a payment of Government revenue agreed by the kanomdar in the kanom deed to be made on behalf of the jenmi and therefore the deposit under S. 15 must be a deposit of arrears of rent for the specified faslis including any arrears of Government revenue payable by the kanomdar under the terms of his agreement in respect of those faslis. [P 304 C 2]

(d) Madras Agriculturists' Relief Act (4 of 1938), S. 15—Jenmi filing revision against order reducing rent under S. 15—Contention by jenmi that deposit under S. 15 includes arrears of revenue payable by tenant under terms of agreement raised in course of arguments and accepted —Tenant's petition under S. 15 for reducing rent held could not be rejected on ground that deposit under S. 15 was not made as aforesaid.

In revision filed by the jenmi against an order reducing rent under S. 15 the contention of the jenmi, raised for the first time in the course of arguments, that the deposit under S. 15 included arrears of revenue payable by the tenant under the terms of his agreement, was accepted. On the further contention of the jenmi that the tenant's petition for reducing rent under S. 15 should be rejected as the deposit by the tenant under S. 15 was not made as aforesaid :

Held that it was very undesirable in revision to give effect to the landholder's contention which would result in the complete defeat of the tenant's application under S. 15, a result which would not have been achieved had the contention been taken at the proper time in the trial Court. [P 305 C 1]

(e) Madras Agriculturists' Relief Act (4 of 1938), Rules under, R. 1 (a)—Failure of agriculturist to pay full rent owing to mistaken comprehension of law — Whether Court can grant extension of time under R. 1 (a).

It is extremely doubtful whether R. 1 (a) can be taken to authorize an extension of time owing to the failure of agriculturist to pay the full rent by reason of a mistaken comprehension of the law as to what was the rent. [P 305 C 1]

K. P. Ramakrishna Iyer and D. H. Nambudripad — for Petitioner.

P. Govinda Menon — for Respondents.

Wadsworth J. — This revision petition raises questions under Ss. 15 and 16 of Madras Act 4 of 1938. The petitioner here is the jenmi. The application filed in the lower Court was made by a number of persons claiming to represent the whole of the interest in the kanom right. The original kanom demise was made on 10th June 1919 under EX. A to the tarwad of which some of the present applicants were then members. There was a partition in the tarwad of the kanomdars and various tavazhis became entitled to portions of the kanom right. Some of these tavazhis alienated their rights and the present application under S. 15 was made by all the persons interested in the kanom right whether as representing the tavazhis of the original kanomdars' tarwad or as alienees from such tavazhis. The trial Court held that the application was valid and reduced the rent payable in accordance with the terms of S. 15. Two contentions were argued on behalf of the jenmi before us. Firstly it was contended that the application was bad in that it was a joint application made by a number of persons some of whom were alienees of portions of the land from the original kanomdars, while others were interested in the kanom right as a result of the partition. We have had to deal with a similar question in disposing of C. R. P. No. 854 of 1939 in which judgment is to be pronounced shortly and we are of opinion that an alienee of the whole of the tenant's interest in a portion of his holding is a person who is liable to pay rent in respect of that portion and provided that he is an agriculturist, is entitled to deposit the arrears of the holding for

faslis 1346 and 1347 and obtain the benefits of Section 15.

A further contention raised was based on the provisions of S. 16 on the strength of which it was argued that the deposit to be made under S. 15 should include not only the rent for the two faslis named but also any arrears of land revenue paid by the landholder which the tenant was bound to pay by reason of contract. It seems to us that this contention, in the way in which it was put, has no merits. Section 16 saves the landholder's right to recover from his tenant anything which the landholder has paid which should have been paid by the tenant. But it does not make these sums part of the deposit contemplated in S. 15. All that it does is to safeguard the landholder's right to recover these sums in addition to that which is recoverable under S. 15. It does not provide a machinery for the recovery but it leaves the landholder to his ordinary right of suit. In the course of arguments, however, it was suggested that though S. 15 relates only to that which is payable as rent and requires a deposit only of the rent for faslis 1346 and 1347, having regard to the definitions in Madras Act 4 of 1938 and the Malabar Tenancy Act, the rent payable by a kanomdar includes the land revenue which the kanomdar has undertaken to pay on behalf of the jenmi. The argument may be put in this way. By S. 3 (iv) of Madras Act 4 of 1938 'rent' means, among other things, rent or michavaram as defined by the Malabar Tenancy Act, 1929. 'Michavaram' is defined in S. 3 (q), Malabar Tenancy Act, as

> whatever is agreed by a kanomdar in a kanom deed to be paid periodically, in money or in kind, or in both, to or on behalf of the jenmi.

By the terms of EX. A, the kanom deed in the present suit, it is clear that the kanomdar is required to pay the land revenue on behalf of the jenmi and that the amount of this land revenue is deducted in arriving at the balance payable to the jenmi who is given a right to charge the kanomdar's interest for arrears of sircar kist recovered from the jenmi himself. It does not appear that we are concerned with a case of the kind contemplated in Ss. 14 and 15, Malabar Land Registration Act, under which the kanomdar may be registered as a joint pattadar and be given a direct liability to pay the rent to Government. We will assume that the rent in this case has been calculated on the basis that the landlord is liable for the land revenue but that this is to be paid on behalf of the landlord by the tenant out of the produce of the land, and a deduction is made on this account from the rent actually paid in kind to the landlord. It seems to follow that the michavaram payable by the kanomdar includes the land revenue which he has undertaken in the kanom deed to pay on behalf of his jenmi.

It has been argued by Mr. Govinda Menon for the respondent that the definition of 'michavaram' must be taken to exclude payments of land revenue made on behalf of the jenmi by the kanomdar. The argument is based mainly on the terms of S. 17, Malabar Tenancy Act, which provides for a calculation of the renewal fee on the basis of deductions (1) of the revenue payable by the kanomdar under the deed, (2) of the interest, and (3) of the michavaram. The argument is that in this section 'michavaram' is clearly used as excluding the revenue and that from this fact, we must read into the definition in S. 3 (q) the words 'except land revenue.' This seems to us rather a drastic way of dealing with the statute, particularly as the definition S. 3 begins with the words 'unless there is something repugnant in the subject or context.' The repugnancy in the context can be clearly seen in S. 17 of the Act and it seems to us quite unnecessary to make an interpolation in the definition section as the saving clause at the beginning of the definition section is sufficiently effective to deal with the apparent discrepancy. It does appear from the definition in the Malabar Tenancy Act that 'michavaram' would include a payment of Government revenue agreed by the kanomdar in the kanom deed to be made on behalf of the jenmi and it would therefore seem that the deposit which is to be made under S. 15, Agriculturists' Relief Act, must be a deposit of arrears of rent for the specified faslis including any arrears of Government revenue payable by the kanomdar in respect of those faslis. It remains to consider whether the application has to be rejected on the ground that a deposit has not been made on the terms of S. 15, when this result is reached by means of an interpretation of the Act which was only suggested in the course of arguments on this revision petition. The counter-affidavit filed by the jenmi in the lower Court states in para. 10:

> Government revenue of the properties is in arrears for a long time. Failure to deposit the same is not proper. The said arrears have also to be deposited.

It seems to us quite clear from the arguments addressed to us here and from the

wording of this paragraph, that it was intended to cover a plea that by reason of S. 16 of the Act, the deposit under that section must include the whole of the arrears of revenue payable by the tenant on behalf of the landlord. That is quite a different contention from the contention that the rent payable by the tenant which has to be deposited under S. 15 includes any arrears of revenue payable by the tenant under the terms of his agreement in respect of the particular faslis mentioned in that section. We must, we think, take it that the point now under consideration was not raised in the Court below nor was it raised here until the arguments had progressed some way. The result of permitting the jenmi to succeed on this contention would be that the application would have to be rejected, unless R. 1 (a) of the rules framed under the Act can be taken to authorize an extension of time owing to the failure of the agriculturist to pay the full rent by reason of a mistaken comprehension of the law as to what was the rent. It is extremely doubtful whether under R. 1 (a) such an extension of time could be granted. Assuming that it could not, the effect of allowing the petitioner to succeed in revision on this belated contention would be to deprive the respondent of a remedy which would have been available to him had the contention been taken at the proper time in the Court below. The Court below disposed of this matter on 22nd June 1939. If it had then been decided that the applicants had to deposit not only the rent payable in cash to the jenmi for fasli 1347 but also any arrears of land revenue payable by them in respect of that fasli as a condition precedent to receiving the benefits of this section, there would have been time for the applicants to make good the deficiency before the statutory date 30th September 1939. That is no longer the position and it seems to us very undesirable in revision to give effect to a contention which would now result in the complete defeat of the application, a result which would not have been achieved had the contention been taken at the proper time in the trial Court. In this view, we dismiss the petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 305

KING J.

Udumbanthala Nalupurappatti Mammad — Appellant

v.

Vyagram Narayana Pattar and others — Respondents.

Appeal No. 51 of 1940, Decided on 6th September 1940, against appellate order of Dist. Court, South Kanara, D/- 3rd January 1940.

Madras Agriculturists' Relief Act (4 of 1938), S. 3, Proviso D—Jenmi also ryotwari pattadar—Total land revenue payable by jenmi exceeding Rs. 500 though land revenue payable as jenmi less than Rs. 500—Jenmi is not agriculturist.

Section 3, Proviso D does not restrict the land revenue payable by a jenmi to the revenue payable only on the land held by him as jenmi. Consequently, a jenmi who is also a ryotwari pattadar and whose total payments to Government on account of land revenue exceed Rs. 500 cannot be regarded as an agriculturist notwithstanding that the revenue payable by him as jenmi is less than Rs. 500. [P 305 C 2]

K. Kuttikrishna Menon — for Appellant.

O. T. G. Nambiar — for Respondents.

Facts. — This civil miscellaneous second appeal arises on a claim made by the appellant to be given relief under the Madras 'Agriculturists' Relief Act (Act 4 of 1938). The lower Court on evidence found that the total payments made by the appellant to the Government as jenmi and as a ryotwari pattadar was more than Rs. 500 and therefore excluded him from being an agriculturist under the Act. In the civil miscellaneous second appeal it was contended that the land revenue paid by him as a jenmi is less than Rs. 500 and therefore he should be included as an agriculturist and given relief.

Judgment. — It is a plausible argument that as ryotwari pattadars are entitled to the benefits of this Act, no matter how much land revenue they pay, a jenmi who is also a ryotwari pattadar and who in the former capacity pays less than Rs. 500 should also be so entitled. But there are no words in the proviso restricting the land revenue payable by a jenmi to the revenue payable only on the land so held by him and taking the clause in its plain meaning we have here a jenmi whose total payments to Government on account of land revenue exceed Rs. 500. I cannot therefore hold that the Court below have wrongly construed the proviso. The appeal fails and is dismissed with costs of respondent 2.

C.R.K./G.N. *Appeal dismissed.*

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* A. I. R. 1941 Madras 306

BURN AND MOCKETT JJ.

In re Singampilli Yerranna and others — Accused.

Referred Trial No. 78 and Criminal Appeal No. 291 of 1940, Decided on 18th July 1940, referred by Court of Session, Vizagapatam Division, in C. C. No. 7 of 1940.

(a) Evidence Act (1872), S. 30—Confession by accused that he killed deceased because other accused promised to give him certain amount is admissible under S. 30 — But it is not evidence against other accused.

A confession by an accused to a prosecution witness that he killed the deceased because the other accused had promised to give him a certain amount is admissible under S. 30 but it would naturally require the strongest independent evidence if any reliance can be placed upon it at all. But it cannot be treated as evidence against the other accused. [P 308 C 1]

**(b) Evidence Act (1872), S. 27 — Accused describing murder and part played by other accused and almost simultaneously producing deceased's ear-rings—Statement is inadmissible under S. 27.*

Under S. 27 cases where a discovery is made in consequence of information given and a disclosure by an accused accompanying a statement must be distinguished. [P 308 C 2]

Where an accused makes a statement to a police officer describing the murder and the part played by the other accused and almost simultaneously produces ear-rings identified as those worn by the deceased, the discovery of the earrings cannot be said to have been made in consequence of the information given by the accused and therefore the statement is inadmissible in evidence under S. 27. [P 308 C 2]

(c) Criminal trial — Evidence — Sufficiency— Accused persons proved to have been in accused's company shortly before his death — Co-accused stating complicity of aforesaid accused persons in murder — No evidence that more than one hand was responsible for deceased's death—Presence of accused persons with deceased held suspicious but not enough to warrant conviction.

Certain accused persons were proved to have been in the deceased's company shortly before his death but the only statement that they took part in the murder was made by a co-accused. Moreover, owing to the decomposed condition of the body, it was not even possible to infer that more than one hand was responsible for the deceased's death:

Held that the presence of the accused persons with the deceased was no doubt suspicious but not enough to warrant their conviction. [P 308 C 2]

(d) Penal Code (1860), Ss. 302 and 404 — Accused in murder case charged with misappropriation of deceased's articles — Procedure is not desirable.

It is not desirable to charge an accused in a murder case with an offence under S. 404 for misappropriating the articles of the deceased. [P 309 C 1]

Kasturi Seshagiri Rao and E. T. Chockammal — for Accused.

Public Prosecutor — for the Crown.

Mockett J.—The four appellants and one Killadi Dali Naidu who was accused 5 before the Sessions Court were charged in the case of accused 2, 3 and 4 with the murder of one Sriramulu on 1st November 1939; accused 1 was further charged with abetment of the murder by accused 2, 3 and 4, at the place of the murder, and accused 5 with abetment of accused 2 by waiting near-by presumably with the object of co-operating. Accused 1 and 2 were further charged with dishonest misappropriation of property of the deceased. Accused 1 is the wife of the deceased and there can be little doubt that—to put it no higher—the married life of accused 1 and the deceased was not happy. The father of Sriramulu deposes that the deceased and his wife had not slept together after their marriage until actually the night of the occurrence. It is not necessary to investigate the relations between these two further than that. The prosecution relied on the ill-feeling alleged to exist between them as being at least the motive for the murder owing to the part said to have been taken in the murder by accused 1. Accused 3 and 4 are the brothers of accused 1. Accused 2 is a farm servant employed by a person who did not give evidence in this case. The conviction of these persons has rested almost entirely on a statement made by accused 2 to the police which statement the learned Sessions Judge held admissible as coming within the provisions of S. 27, Evidence Act. That statement combined with other evidence in the case satisfied the learned Sessions Judge of the guilt of accused 1 to 4. It is convenient, however to observe here that for reasons which will later appear, if that statement should be inadmissible, there is virtually no evidence whatever against accused 1, 3 and 4. Naturally, the position of accused 2 will be different because apart from the statement, his actions accompanying that statement may be very relevant in considering whether the evidence as a whole is sufficient to establish the case against him.

Now the story is easy to relate because it depends on one or two witnesses and one or two facts. The learned Sessions Judge has set out the history of the case fully. On the night of 1st November 1939 there was a quarrel between accused 1 and the deceased because accused 1 shut the deceased's room and it is stated that the deceased slapped his wife. On the night when he was last seen, i. e., on the night of 1st November 1939 the deceased was wearing ear-rings M. O. 2

in this case. On that night he went out and apparently went out for the purpose which will later appear of getting leaves for the purpose of treating the mother of accused 3 who suffered from boils. That at least is said to be the reason why he went out although the real reason may never be satisfactorily proved. He went out and never returned. All that is known of his movements appears from the evidence of P. Ws. 7, 8 and 10 in this case. P. W. 7 states that he saw accused 1, 2, 3 and 4 and the deceased going towards the Golukonda road which is apparently in the north of the plan some time after midnight. He was quite near to them and claims to be able to identify them. Later, this witness communicated this fact to P. Ws. 4 and 5, because it came to his knowledge that the deceased had met a violent death. In fact he was told that accused 1 to 4 had murdered him. P. W. 8 had been to a festival and was returning to his village which is Pappuchettipalem. He says that at a point identified by him on the plan, he sat down for the purpose of easing himself. One Pothirazu was sitting near. This witness (P. W. 8) almost saw four men and a woman passing near-by and one of the men called out "Sriramulu, come quickly." The man replied, "I am coming." Now this witness knows the deceased Sriramulu and he was the man who was there and he asked him where he was going and Sriramulu replied he was going to get Gatcha leaves as a relation of his wanted them. The witness says that he spoke to Sriramulu and he knew his wife but he did not know the four people who were with Sriramulu.

The next who knows of the movements of the deceased was one P. W. 10. P. W. 10 had also gone to the festival and he was driving home with his bulls late at night and coming to the main road, according to him, the bulls turned to go as they were accustomed to do towards the paddy fields whereas their owner (P. W. 10) wanted them to go in the opposite direction. It was necessary therefore for him to dismount from the bandy and turn the bulls round. He says he saw the deceased, accused 1 and 2 and the deceased's two brothers-in-law, that is to say, accused 3 and 4, near the culvert. He asked the deceased what they were doing there. The deceased replied they were going to get Gatcha leaves for his mother-in-law. The witness got on to his bandy and saying—as no doubt correctly translated by the learned Sessions Judge—"Very well, you get your leaves. I am going off" and he went away to Pappanapeta returning to Jagampeta on the following Saturday. He there heard of the death of Sriramulu and reported in the village what he had seen. He identified accused 3 and 4 before the Tahsildar. That is the evidence as regards the movements of the deceased.

The deceased was found on the 3rd in a watercourse near where he had been seen by the witnesses. His head was under water but the water was not deep enough to cover the body. A post-mortem was held and the medical officer (P. W. 1) was unable to say how the deceased met his death because of the advanced stage of decomposition. He could not find signs of drowning and he found no signs of violence. It was not possible for him to say that the lobes of the ears which were missing had disappeared naturally or had been turned out. It is important because certain ear-rings (M. Os. 2) in this case were identified as having been worn on the ears of the deceased. But some light is thrown—if it is to be accepted—by a statement made by accused 2 to P. W. 5. P. W. 5 is a cousin of the deceased. He heard of Sriramulu being missing and he looked for him. He states that he questioned accused 2 as he and accused 1 were on very friendly terms. Accused told him a long and detailed story about the death of the deceased. He said that after the festival he went and slept and that the deceased had waken him up and asked him to follow him as his brothers-in-law were waiting under a peepal tree; that he and the deceased went to the peepal tree and there saw accused 1 and accused 3 and 4. Accused 3 asked him (accused 2) to show him where he could get a Gatcha leaf as his mother was ill. All of them, i. e., the deceased, accused 2 himself, accused 4 and 1 then proceeded to the road where they found accused 5 sitting on a culvert holding a cycle. Accused 3, 4 and 5 talked together. Then accused 5 went with them for some distance and stopped. He, i. e., accused 2, accused 1, 3 and 4 then took the deceased to Dara Gedda which is the watercourse and there killed him after striking him. Accused 2, 1, 3 and 4 after killing Sriramulu got on to the road and met accused 5 there. Then accused 3, 4 and 5 went along the road which leads to Mallampeta, while accused 2 and 1 returned to Jagampeta. When asked by P. W. 5 why he had killed Sriramulu accused 2 replied that accused 5 had promised to give him Rs. 50.

It will be observed that that statement implicates the other accused but it would naturally require the strongest independent evidence if any reliance can be placed upon it at all. Under S. 30, Evidence Act, such a confession can be taken into consideration; it is not evidence against the other accused. A statement on which the prosecution rely under S. 27 was made by this witness in the presence of P. Ws. 14 and 15 and P. W. 20, the Sub-Inspector. According to the Sub-Inspector of Police, a statement (EX. E) was made, part of which has been admitted in evidence by the learned Sessions Judge. That statement describes the murder of the deceased and the part played in it by the other accused. But there is no doubt from the evidence that what happened was the following. The accused made this statement and almost simultaneously—if not actually simultaneously—produced M. O. 2, the two ear-rings. That that is so is quite clear from the evidence of P. Ws. 14 and 15 who witnessed (EX. E). P. W. 14 states:

> Accused 2 made a statement before the Sub-Inspector. It was reduced to writing. I signed it. It is Ex. E. Accused 2 then took the ear-rings, M. O. 2, from his waist cloth and handed them over to the Sub-Inspector.

P. W. 15 stated:

> He made a statement. It was written down, I signed it. Ex. E is that statement. He handed over the jewels to the Sub-Inspector taking them from his waist cloth.

The Sub-Inspector who, we feel, was conscious of the difficulty surrounding the admissibility of the statement, stated before the lower Court: "I recovered the ear-rings from accused 2 as a result of the statement which he made." No doubt, bearing in mind the precise wording of S. 27, Evidence Act, which provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The learned Judge has considered this aspect but we think that he has overlooked the actual facts. We are satisfied that these ear-rings were not discovered in consequence of any information given by accused 2. They were discovered by accused 2 himself combined with a statement. They were not found by the police upon him after he made this statement which is the nearest approach to a compliance with this section which might be possible under the circumstances before us. This topic is dealt with in the latest edition of Amir Ali's Evidence Act at p. 282 and this Court has on numerous occasions distinguished between cases where a discovery is made in consequence of information given and a disclosure by an accused accompanying a statement. In this particular case, we are quite satisfied that the statement is inadmissible—is not admissible under S. 27, Evidence Act, and should not have been allowed to appear on the record. But, quite apart from this question, it is obvious that the convictions of accused 1, 3 and 4 cannot stand. Even if it could be taken into account it is obvious that there is virtually no adequate evidence on which a conviction could be based. Had accused 2 been examined as an approver, his evidence would have required corroboration implicating the other accused in material particulars. There is no doubt evidence that accused 1, 3 and 4 were in the deceased's company shortly before his death but the only statement that they took part in the murder comes from accused 2 who, be it remembered, was soon after in possession of the deceased's property. Moreover, owing to the condition of the body, it is not even possible to infer that more than one hand was responsible for the deceased's death. Their presence is no doubt suspicious but suspicion is not enough. Consequently, their convictions must be set aside and they will be set at liberty.

But the position with regard to accused 2 is different. We have his association on the night in question with the deceased clearly proved. There is no reason to disbelieve the evidence of P. Ws. 7, 8 and 10. Neither do we disbelieve the evidence of P. W. 5. We consider that the confession made to P. W. 5 by accused 2 was made as stated. The conduct of P. W. 5 and P. W. 4 immediately after accused 2 made his confession is consistent with the fact: *vide* EX. C. There is furthermore the all-important fact that, as we believe, the accused did produce from his person, on 3rd November, that is to say, within two days of the death of the deceased his articles of jewellery. His explanation of his possession of these articles was not considered satisfactory by the trial Judge, with which view we agree. There is not the slightest ground in this case for doubting that the deceased met his death by violence and that accused 2 took part in that violence. No one suggests that the deceased was not a healthy man. Accused 2 told P. W. 5 that he assisted to murder him for a reward of Rs. 50 and we are satisfied—corroborated by other

evidence—that he at least is guilty. Consequently, we see no reason to interfere with the conviction of accused 2. His conviction for murder and the sentence of death are confirmed. It may be that accused 1, 3 and 4 have been fortunate, but a Court can only act upon evidence as it affects the individual. A somewhat unusual procedure was followed in this case—a case of murder — charging accused 1 and 2 with misappropriation of articles of the deceased (S. 404). In a case of murder, it is not a desirable procedure and one not within the experience of this Court. In any case, there is no evidence of misappropriation and these convictions are also set aside in the case of accused 1 and 2.

C.R.K./G.N. *Order accordingly.*

** A. I. R. 1941 Madras 309

Full Bench

LEACH C. J., VENKATARAMANA RAO, ABDUR RAHMAN, KRISHNASWAMI AYYANGAR AND HORWILL JJ.

Chinnasami Pillai — Appellant

v.

Annamalai Chetty, minor by guardian, Head Clerk, District Munsif's Court, Dindigul, and another—Respondents.

Appeal No. 72 of 1938, Decided on 6th December 1940, against appellate order of Sub-Judge, Dindigul, D/- 18th August 1937.

** *(a) Limitation Act (1908), Art. 182 (5) — Application to British Indian Court to transfer decree for execution to Native State Court is step-in-aid of execution :* 40 Mad 1069 = A I R 1918 Mad 580=42 I C 294 (FB), OVERRULED.

An application made to a British Indian Court to transfer its decree for execution to a Court of a Native State between which and the British Government there exists an agreement to execute each other's decrees, is a step-in-aid of execution within the meaning of Art. 182 (5) : 40 Mad 1069=A I R 1918 Mad 580=42 I C 294 (FB), *OVERRULED*; A I R 1918 Bom 236, *Foll.*; A I R 1923 Mad 72, *Ref.* [P 310 C 2]

(b) Civil P. C. (1908), S. 39 — Word "Court" means Court in British India.

The word "Court" throughout the Code of Civil Procedure, unless it is preceded by the adjective "foreign" means prima facie a Court in British India because the Code of Civil Procedure can only govern procedure in British India. [P 311 C 2]

*(c) Limitation Act (1908), Art. 182 (5) — Application to British Indian Court to transfer its decree to Pudukottah Court on 21st January 1932—Application granted on 25th January 1932 — Execution application to Pudukottah Court within three years of 25th January 1932—Decree re-transferred to British Indian Court—Application to British Indian Court filed on 10th October 1936 to execute decree held in time (*Per *Full Bench; Horwill J.*, Contra*).*

An application to the British Indian Court for transfer of its decree for execution to the Chief Court of Pudukottah (Native State) between which and the British Government there is an agreement to execute each other's decrees was made on 21st January 1932. The final order granting the application was passed on 25th January 1932. An application was made to the Pudukottah Court for execution of the decree within three years of 25th January 1932. The proceedings in the Pudukottah Court having proved infructuous the decree-holder caused the decree to be retransferred to the Court in British India. On 10th October 1936 the decree-holder made an application for execution in that Court but was met by the plea that the application was time-barred :

Held that the application to the British Indian Court made on 10th October 1936 was within time. [P 311 C 2]

C. A. Seshagiri Sastriar — for Appellant.

A. V. Viswanatha Sastri and N. S. Srinivasan — for Respondents.

Leach C. J. — This appeal has been placed before a Full Bench of five Judges because it involves the consideration of the question whether 40 Mad 1069[1] was rightly decided. In that case it was held by a Full Bench of three Judges of this Court that an application to a Court in British India to send a decree passed by it to a Court in a Native State for execution was not a step-in-aid of execution within the meaning of Art. 182, cl. 5, Limitation Act, and therefore did not give a fresh starting point for the period of limitation. The facts were these. On 21st August 1911 a decree for money was passed by a British Court in Cochin. On 7th October 1912, the decree-holder applied for an order transferring the decree to a District Court in the State of Travancore for execution. The application was granted and on 13th November 1912 the decree was transmitted to the District Court named in the application. As the execution proceedings there proved to be infructuous, the decree-holder filed an application for execution in the Court which had passed the decree. This application was filed on 5th January 1915 and the Full Bench held that it was out of time because the application of 7th October 1912 for the transfer of the decree to the Travancore Court could not be taken into consideration.

The position in the present case is exactly the same. On 26th October 1931, the appellant obtained a money decree against the respondents in the Court of the District Munsif of Dindigul. On 21st January 1932 the appellant applied to the District Munsif of Din-

1. ('18) 5 AIR 1918 Mad 580 : 42 I C 294 : 40 Mad 1069 : 33 M L J 130 (FB), Pierce Leslie & Co. Ltd., Cochin v. Perumal.

digul for an order transferring his decree to the Chief Court of the State of Pudukottah for the purpose of execution, and on 25th January 1932 his application was granted. The execution proceedings in Pudukottah led to nothing and the decree-holder caused the decree to be re-transferred to the Court of the District Munsif of Dindigul. On 10th October 1936, the decree-holder filed an application for execution in that Court and was met by the plea that the application was time-barred. As the case clearly fell within the decision in 40 Mad 1069[1] the District Munsif upheld the objection and on appeal the subordinate Judge of Dindigul concurred. The decree-holder has now appealed to this Court. It is conceded on behalf of the respondents that if the application which the appellant filed on 21st January 1932 in the Court of the District Munsif of Dindigul for the transfer of the decree to the Chief Court of Pudukottah is a step-in-aid of execution the application of 10th October 1936 was within time. The appeal in 40 Mad 1069[1] came before Oldfield and Bakewell JJ. who referred to a Full Bench the following questions :

(1) Whether the Courts in British India have power to send their decrees to the Courts of the State of Travancore for execution. (2) If they have this power, whether proceedings thereunder fall within Art. 182, Limitation Act, so as to give a fresh period of limitation for further proceedings in execution.

Section 39, Civil P. C., permits a Court which has passed a decree to send it for execution to another Court. Bakewell J. considered that there was no ground for limiting the expression "another Court" to a Court situate in British India, and construed it as meaning "a Court in which the decree is executable." In this opinion Oldfield J. concurred. The Full Bench was composed of Wallis C. J., and Oldfield and Kumaraswami Sastri JJ. The learned Chief Justice answered the first question by saying that Courts in British India had no power to send their decrees for execution to the Travancore Courts, but might and should send to those Courts the documents they required to enable them to execute decrees passed in British India under the powers conferred upon them by the legislative authority in Travancore. There was no provision in the Code of Civil Procedure which permitted this being done, but it was a case in which the Court could exercise its inherent powers. The second question was answered in the negative. The reasons given were that the Limitation Act extends only to British India ; that it prescribes periods of limitation with regard to the filing of suits and the execution of decrees in British India; that when the Limitation Act makes an application in accordance with law to a proper Court a fresh starting point, it must be taken to mean an application in accordance with the provisions of law in British India to be found in the Code of Civil Procedure to which the article refers or elsewhere; and that it could not have been the intention of the Legislature to make an application for execution to a Court in a foreign State under the law of that State and governed by the law of limitation there in force a fresh starting point under the Limitation Act for the execution of the decrees of Courts in British India. Oldfield and Kumaraswami Sastri JJ., agreed.

The decision in 40 Mad 1069[1] was given in 1917. In the following year the same question arose in the Bombay High Court in 42 Bom 420[2] and Beaman and Heaton JJ., had no hesitation in holding that an application made to a British Indian Court to transfer its decree for execution to a Court of a Native State between which and the British Government there existed an agreement to execute each other's decrees, was a step-in-aid of execution within the meaning of Art. 182, Limitation Act. The decision in 40 Mad 1069[1] was rejected in a very forcible judgment by Beaman J. who considered that it was contrary to common sense to say that an application to a Court to transfer its decree elsewhere for execution was not a step-in-aid of execution, and proceeded to give reasons why it was contrary to law. While I am not prepared to express my dissent in the same words, I am bound to say, with the greatest respect to the opinions expressed by the learned Chief Justice in 40 Mad 1069[1] and concurred in by Oldfield and Kumaraswami Sastri JJ. that I agree entirely with the reasons given by Beaman J. for refusing to follow that decision.

Now let us examine cl. (5) of Art. 182, Limitation Act. It says that for an application for the execution of a decree or order of a civil Court not provided for by Art. 183 or by S. 48, Civil P. C., 1908, the period of limitation shall be three years (unless a certified copy of the decree or order has been registered in which case the period is six years) and that time shall begin to run from the date of the final order passed on

2. ('18) 5 A I R 1918 Bom 236: 46 I C 56: 42 Bom 420 : 20 Bom L R 421, Janardhan Govind v. Narayan Krishnaji.

an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution. Therefore an order on an application to take a step-in-aid of execution comes within this clause when the application is made in accordance with law and presented to the proper Court. There exists and at all material times has existed, an arrangement between the State of Pudukottah and the Government of India whereby the decrees of the State shall be executed by Courts in British India and the decrees of British Indian Courts shall be executed by the Courts in the State, and it is admitted that the Code of Civil Procedure in force in the State of Pudukottah contains a section corresponding to S. 43 of our Code. Consequently, the appellant was in order in applying to the District Munsif's Court of Dindigul to transfer his decree to the Chief Court of Pudukottah and, as was recognized in 40 Mad 1069,[1] the District Munsif had full power to grant the application. The requirements of cl. (5) of Art. 182 were fully complied with. In my judgment it is going to a length altogether unwarranted to say that because there is no express provision in the Code of Civil Procedure for such an application a Court in British India is precluded from giving to cl. (5) of Art. 182, Limitation Act, its plain meaning. If the application which the appellant made to the District Munsif's Court of Dindigul on 21st January 1932 is not a step-in-aid of execution I fail to see what else it can be. The judgment in 40 Mad 1069[1] goes to the extreme lengths of the technicality, but even on technical grounds I consider that it cannot be supported and should be overruled.

In 45 Mad 1014,[3] a Bench of this Court (Schwabe C. J. and Wallace J.) had to consider whether an application filed in a Court of the State of Mysore for the transmission of a decree to this Court for purposes of execution was a step-in-aid of execution. That question does not arise in the present appeal and therefore does not call for discussion, but Schwabe C. J. in deciding 45 Mad 1014[3] indicated his disapproval of the decision in 40 Mad 1069[1] and said that if the same point arose again he would wish to have it re-considered. That opportunity has arisen in the present case. While it is not necessary to decide whether an application made to a Court in a Native State for the transfer of a decree to a Court in British India is a 'step-in-aid of execution within the meaning of Art. 182, it may be mentioned that in 53 Bom 844[4] it was held that an application made by a decree-holder for the return of his decree from a Court in a Native State to a Court in British India was a step-in-aid of execution under that article.

Neither is it necessary to decide whether the opinion expressed by Bakewell J. in 40 Mad 1069,[1] that the words "another Court" in S. 39, Civil P. C., apply to a Court outside British India is well founded, but if this was the only argument open to the appellant it is obvious that there would be great difficulty in his way. The word "Court" throughout the Code of Civil Procedure, unless it is preceded by the adjective "foreign" — "foreign Court" is defined in S. 2 (5)—means prima facie a Court in British India because the Code of Civil Procedure can only govern procedure in British India. But the appellant's case does not rest on this argument. It rests on much firmer ground, as I have indicated, and I hold that his application of 21st January 1932 to the District Munsif of Dindigul for the transfer of his decree to the Chief Court of Pudukottah was a step-in-aid of execution and therefore the order on the application started a fresh period of limitation, which means that his application for execution presented to the District Munsif of Dindigul on 10th October 1936 was within time. For the reasons indicated I would allow the appeal with costs and remand the case to the District Munsif to hear and determine in the light of this judgment the application which the appellant has filed for the execution of his decree.

Venkataramana Rao J. — I agree.

Abdur Rahman J. — I concur.

Krishnaswami Ayyangar J. — I agree.

Horwill J. — Despite the trenchant criticism of the decision in 40 Mad 1069[1] by Beaman J. in 42 Bom 420,[2] I am unable to find any flaw in the reasoning of Sir John Wallis C. J. in the former case which leads him and the learned Judges who sat with him to the conclusion that Courts in British India have no power to send their decrees for execution to a foreign Court, that an application to a foreign Court to execute the decree of a British Court under powers conferred upon it by the legislative authority of

3. ('23) 10 A I R 1923 Mad 72 : 69 I C 932 : 45 Mad 1014 : 43 M L J 700, Srinivasa Iyengar v. Narayana Rao.

4. ('29) 16 A I R 1929 Bom 418 : 123 I C 507 : 53 Bom 844 : 31 Bom L R 1105, Fatechand Rampratap v. Jitmal Rupchand.

a foreign State would not be an application in accordance with law to the proper Court for execution, and that an application to a British Court to take a step-in-aid of the execution by a foreign Court of the decree would not be a step-in-aid of execution within the meaning of cl. 5 of Art. 182, Limitation Act. The reasons for this decision may be highly technical; but the decision has been the law of this province for 33 years, and yet the Legislature has not seen fit to enact a section complementary to S. 45, Civil P. C.

Section 38, Civil P. C., permits execution only by the Court that passed the decree and by the Court to which it is sent for execution. If the word 'Court' in the Code of Civil Procedure means only a British Court, then it would follow from this section that a foreign Court cannot execute a British decree and that what is termed 'execution' by a foreign Court is not recognized as such by the Code of Civil Procedure as far as British decrees are concerned. With regard to foreign decrees the position is different, because S. 45 permits the execution of foreign decrees in British Courts as if they were British decrees. When a foreign decree is so recognized and can be executed in British Courts, it may seem unreasonable, and not in consonance with the spirit of S. 45, if it were held that British Courts could not give recognition to the execution by foreign Courts of their own decrees. However, that point does not arise for decision here. It is fully discussed in 45 Mad 1014,[3] to which my Lord the Chief Justice has made reference. I do not however think that from those findings of the Full Bench in 40 Mad 1069[1] set out above it necessarily follows that an application in a British Court to transfer the decree to a foreign Court for execution is not a step-in-aid of execution made according to law. In due course, after proceedings have been conducted in a foreign Court, the decree will be returned to the British Court; and to the extent that the decree-holder has been paid out of the assets of the judgment-debtor as a result of those proceedings satisfaction will be recorded in the British Court. The application to transfer the decree to the foreign Court may therefore be regarded not merely as a step-in-aid of the proceedings in the foreign Court, but as a step-in-aid of the execution in the British Court after the decree is returned.

It would follow from what I have said above that the application of 21st January 1932 to transfer the decree to the Chief Court of Pudukottah was a step-in-aid of execution. This however would not help the appellant because, in my view, the next application for execution was not until 10th October 1936, more than three years after the final order of 25th January 1932, passed on the application of 21st January 1932. It cannot now be denied that there was an application in the Pudukottah Court to execute the decree within three years of 25th January 1932; but that application was not, in my opinion, one that can be recognized by British Courts as made in accordance with law. This means that I have reluctantly to disagree with my Lord the Chief Justice and my learned brothers and to express the opinion that this appeal should be dismissed with costs.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1941 Madras 312

HORWILL J.

In re Muniratna Gurukkal—Petitioner.

Civil Revision Petn. No. 218 of 1940, Decided on 26th February 1940, to revise order of Dist. Court, North Arcot, D/- 28th August 1939.

Madras Hindu Religious Endowments Act (2 of 1927), S. 84 (1)—Since 1904 villagers actively managing temple—Presumption is that they had right to manage even prior to 1904— By merely allowing archakas to manage small temple property villagers held did not lose their right of management.

The villagers were managing the suit temple since 1904 though prior to that date they had allowed the archakas to manage the small property of the temple for some years :

Held that the presumption was that even before 1904 the villagers had the right of management and by merely allowing the archakas for some years before 1904 to manage the small property of the temple, the villagers did not lose their right of management of the institution, or even of its property. [P 313 C 1]

K. Umamaheswaran — for Petitioner.

Facts.—Petition under S. 84 (2), Madras Hindu Religious Endowments Act, to set aside the order of the Board declaring that the Selva Vinayakar Temple at Shevpakkam is a non-excepted temple on the ground that the petitioners have been in the management of the temple and its properties, including a piece of land, endowed for specific purposes not connected with the temple, that some of the leading members of the village were enlisted by the petitioner's father along with him some time back only for the conduct of Brahma Utsavam. On evidence it was found by the District Judge that there was a dharmakartha in 1904, and in the sub-

sequent period also and that petitioner and his ancestors were only styled as archakas and that therefore they were not hereditary trustees and the temple was therefore not an excepted temple within the meaning of the Madras Hindu Religious Endowments Act.

Order. — There can be no doubt that after 1904, the villagers have been actively managing the suit institution. The presumption is, therefore, that even before that year they had the right of management—or the petitioners would not have acquiesced in the loss of their authority. Moreover, the petitioners have on more than one occasion described themselves only as archakas, and have allowed others to be called dharmakarthas. The villagers, by allowing the archakas for some years before 1904 to manage the small property of the temple, did not lose their right of management of the institution, or even of its property. The petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

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* A. I. R. 1941 Madras 313

VENKATARAMANA RAO J.

Balavenkatrama Chettiar and others — Appellants

v.

Maruthamuthu Chetty and another — Respondents.

S. R. Nos. 28997, 28981 and 28984 of 1938, Decided on 11th August 1939.

* *Court-fees Act (1870), Sch. 2, Art. 17B — Essentials to be proved for applicability of Art. 17B stated — Suit on pro-note decreed against trustees in their personal capacity — Trustees in appeal contending that they were liable as trustees and not personally — Ad valorem court-fee must be paid on decretal amount—Case does not fall under Article 17B.*

Before a subject-matter in dispute can be said to be incapable of valuation it must be established that it is not even possible to state approximately what would be the money value of the liability which a person seeks to get rid of by the judicial decision, that is, by no possibility could it be stated approximately what would be the money value of the detriment that a person may suffer by reason of the adverse decision against him. [P 314 C 1]

Where the trustees against whom a suit on a pro-note has been decreed in their personal capacity contend in appeal that they are liable only as trustees and not personally, they in fact seek to get rid of their liability to the extent of both their person and property in respect of the amount that has been decreed against them and therefore it cannot be said that the subject-matter of the appeal is incapable of valuation within the meaning of Art. 17B. Consequently, the appellants must pay ad valorem court-fee on the decretal amount: A I R 1934 Lah 865 and A I R 1935 Bom 111, *Disting.* [P 313 C 2; P 314 C 2]

B. V. Viswanatha Aiyar — for Appellants.

Order. — The question for decision in this reference is, what is the correct court-fee payable on the three memoranda of second appeals preferred against the decrees of the learned District Judge of Coimbatore in A. S. Nos. 290 and 291 of 1937 and 174 of 1938? The suits out of which these second appeals arise were brought on three promissory notes. The main defence was that the appellants were not liable on the notes as the amounts were borrowed for the benefit of Kannika Parameswari Amman Temple of Peria Nagamam by them as trustees thereof and that a decree ought to be passed against the properties of the said temple in their hands. The decision of the learned District Judge was that two of the promissory notes purported to be executed by them in their individual capacity and not as trustees on behalf of the said temple and though there was a reference to the trust in the body of the third promissory note, the executants did not sign the said note as trustees and therefore they were personally liable on all the three notes. The legal effect of this decision of the learned Judge is that the executants are not only liable to be arrested in execution of the decrees against them, but also the properties they own and possess are liable to be proceeded against for the satisfaction of the said decrees. Thus, they seek to get rid of their liability against their person and property to the extent of the amount that has been decreed against them. On these facts the learned Master took the view that an ad valorem court-fee has to be paid on the value mentioned in the memorandum of appeals, that is, the amount of the decrees which have been passed against them.

It is contended by Mr. Viswanatha Iyer, the learned counsel for the appellants, that the subject-matter of the appeals is incapable of valuation and that the correct court-fee has been paid under Art. 17B of Sch. 2, Court-fees Act. He submits that he was not bound to pay the ad valorem court-fee because the appellants were not disputing the amount of liability but were only contending that they were not personally liable. He relied on 59 Bom 439[1] and A I R 1934 Lah 865,[2] in support of his contention. Article 17B of Sch. 2, Court-fees Act, runs thus:

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1. ('35) 22 AIR 1935 Bom 111 : 154 I C 330 : 59 Bom 439 : 36 Bom L R 1220, Jagannath v. Laxmibai.
2. ('34) 21 AIR 1934 Lah 865 : 155 I C 752 : 36 P L R 104, Bulaqi Das v. Lalchand.

Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act.

The question therefore is, is it not possible to estimate at a money value the subject-matter in dispute in these appeals? Before a subject-matter in dispute can be said to be incapable of valuation, it must be established that it is not even possible to state approximately what would be the money value of the liability which a person seeks to get rid of by the judicial decision, that is by no possibility could it be stated approximately what would be the money value of the detriment that a person may suffer by reason of the adverse decision against him. What is really contended for in these appeals is that the appellants ought to have been made liable in the capacity of trustees in which case only the trust property in their hands could be held liable but they are sought to be made liable in their individual capacity which has the result of affecting their individual person and their individual property. As aforesaid by the appeals they seek to get rid of their liability to the extent of both their person and property in respect of the amount that has been decreed against them. The contention therefore that the subject-matter is incapable of valuation is unsustainable. Mr. Viswanatha Iyer relied very strongly on S. 28, Negotiable Instruments Act, which is to the following effect:

An agent who signs his name to a promissory note without indicating thereon, that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

He contends that one of the defences of the appellants was that the plaintiff was aware of the fact, that the borrowing was made on behalf of the trust, that they were induced to sign the promissory notes in the belief that the temple only would be held liable and that if this defence is upheld in their favour, it would result in the passing of a decree against the trust property and not against them personally and what they are now seeking to do in these appeals is only to get rid of their personal liability. This contention does not appear to me to be sound. If the defence which they have raised is upheld, it would involve the dismissal of the appeal and not the passing of a decree against the trust property in their hands. Even assuming that a decree could be passed against the trust property in their hands, the decree in so far as it negatives their personal liability in that their person and personal property will not be proceeded against is a decree which will be passed in their favour not as trustees but in a different capacity and therefore it cannot be said that it is incapable of valuation. If the appellants had been sued as trustees and a decree had been passed against them personally and also against the trust property in their hands and an appeal was preferred against the said decree on the ground that they could not be rendered liable personally in the sense that they could not be arrested in execution of the decree, it may be urged that it is not possible to estimate the liability they are seeking to get rid of. But the case here is different and I do not propose to examine the soundness of this view. Both the cases on which Mr. Viswanatha Ayyar relied are distinguishable on the facts of these cases and it is not necessary to canvass the correctness or otherwise of those decisions.

In 59 Bom 439,[1] a decree was passed against the defendant personally though he was sued as the heir of the original debtor. The defendant did not dispute the liability of the property which came into his hands after the death of the debtor but contended that he was not liable to be proceeded against in the sense that he could not be arrested in execution of the said decree nor the property which he owned and possessed, apart from the property which he inherited from the debtor, is liable to be proceeded against. Murphy Offg. C. J., took the view that as the assets in that case were sufficient to enable the decree-holder to recover the full amount due, it was not possible to estimate the money value of the liability which would remain after the exhaustion of the decree-holder's remedy against the said assets. This case therefore is distinguishable from the present appeals. A I R 1934 Lah 865[2] is also a similar case where a person admitted his liability in respect of his share in the joint family property but disputed the personal liability in respect thereof. The view of the learned Master that the appellants should pay ad valorem court-fee is sound and I therefore confirm his decision. Time six weeks for payment of court-fee from today.

C.R.K./G.N. *Order accordingly.*

*A. I. R. 1941 Madras 315

MOCKETT J.

Kadirvelu Chettiar — Petitioner

v.

Kempu Chettiar and others — Respondents.

Civil Revn. Petn. No. 820 of 1939, Decided on 3rd October 1940, to revise order of Sub-Judge, Chingleput, D/- 27th February 1939.

***Civil P. C. (1908), S. 144 — Object — S. 144 should be widely construed — Word "party" is not confined to original parties to suit but applies to persons subsequently becoming concerned—Assignee from decree-holder realizing amount due under decree — Right to restitution arises against both original decree-holder and his transferee.**

Section 144 should be widely construed. Its object is to put right what was originally an error of the Court and to restore the parties to the position they would have occupied. The word 'party' in S. 144 is not confined only to the original parties to the suit, but applies also to persons who become subsequently concerned. When a decree-holder, after having obtained a decree, assigns it to a third party, he is presumed to have the benefit of the decree and, when the third party to whom he has assigned the decree realizes the amount, the right to claim restitution arises against both the original decree-holder as well as his assignee : A I R 1916 Mad 745; 23 Mad 306 and A I R 1922 All 238, *Rel. on.* [P 315 C 2 ; P 316 C 1]

V. T. Rangaswami Iyengar and K. Ramaswami Iyengar — for Petitioner.

M. S. Venkatarama Iyer — for Respondents.

Order.—The point to which Mr. Rangaswami Ayyangar has directed a very interesting and careful argument does not appear to have been decided in any reported case. It can be very simply stated. On 20th September 1933, there was a decree in favour of the present petitioner against respondents 1 to 3 in this petition for Rs. 320-7-0. The respondents (the defendants in the suit) preferred a civil revision petition early in 1934. It is numbered, I am told, 92 of 1934, and so it must obviously have been very early in the year. On 31st March 1934 the decree-holder transferred his decree. On 20th September 1934 the transferee decree-holder was recognized by Court. On 6th May 1936 the civil revision petition was heard and decided. The decree of 20th September 1933 was set aside and a retrial was ordered. Before the civil revision petition was decided, the transferee decree-holder had realized the amount of the decree from the judgment-debtors, the present respondents 1 to 3. On the rehearing, only Rs. 75, with proportionate costs, was decreed. The present respondents 1 to 3 then applied under S. 144, Civil P. C., for the recovery of the amount paid by them to the transferee decree-holder and they made as respondents to that application both the original decree-holder and the transferee. It was mentioned to me that the transferee decree-holder was not made a party to the civil revision petition which resulted in the rehearing. It is against the order of the learned subordinate Judge on the application for restitution that this civil revision petition comes before me.

The learned Judge took the view that when a decree-holder, after having obtained a decree, assigns it to a third party, he is presumed to have the benefit of the decree and, when the third party to whom he has assigned the decree realized the amount from the defendant, the right to claim restitution as against the original decree-holder arises. He therefore made an order for restitution against both the original decree-holder and the transferee decree-holder for an amount which may be said to represent the original decree after deducting the amount of the second decree and making allowances for costs and interest. Mr. Rangaswami Ayyangar has argued that that order is an illegal order and that the only person against whom restitution can be made is the transferee decree-holder and not the original decree-holder. Section 144 which has been frequently discussed in cases is worded in the most comprehensive terms, and I think the result of the cases is that it should be widely construed. Its object is to put right what was originally an error of the Court and to restore the parties to the position they would have occupied. It is argued that, after the transfer has been made, the original decree-holder ceased to be a party. In my view, that position is covered exactly by S. 144. In the decision reported in 38 Mad 36,[1] the more difficult position, as to whether the transferee decree-holder can be made the subject of an order under S. 144 has been decided and decided against the transferee decree-holder. It seems to me that the case before me is precisely covered by S. 144 and that the word 'party' should be given a wide meaning, because it is clear that it is not confined only to the original parties to the suit, but applies also to persons who would become subsequently concerned. That, I think, may be derived from the observations in two cases. The first is 23 Mad 306.[2] At page 310, Subrahmania Ayyar J., states :

> The principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who re-

1. ('16) 3 AIR 1916 Mad 745 : 17 I C 420 : 38 Mad 36: 23 M L J 513, Govindappa v. Hanumanthappa.
2. (1900) 23 Mad 306 : 10 M L J 307, Doraiswami Ayyar v. Annasami Iyer.

ceived the benefit of the erroneous judgment to make restitution to the other party for what he had lost . . . . That obligation it is the duty of the Courts to enforce unless it is shown that restitution would be clearly contrary to the real justice of the case.

Now the present party, the original plaintiff, unquestionably received the benefit from the erroneous judgment because he was able to sell his decree to the transferee decree-holder. In the Allahabad case 44 ALL 555[3] at p. 560, Walsh J., after reiterating that S. 144 is very wide in its terms, says that the word 'party' is not used in that section in the sense 'party to the suit,' the expression ordinarily found in other parts of the Code, but must mean 'party to the application.' I think that what the learned Judge intends is that it is not confined to the expression 'party to the suit' but may include any other persons who are parties to the application. In my view, the fact that a party to a suit who has obtained a decree wrongly against another person prefers to get the immediate benefit of it by a sale, that is to say, a transfer, rather than waiting to execute against the party, in no way affects the rights of the original party to recover in restitution what he has paid over under pressure of the original erroneous decree. The fact that he has paid it over to a nominee of the original plaintiff seems to me wholly irrelevant to his right to recover against the person who caused him to make that payment, namely the original plaintiff. I think that any other view might open the door to fraudulent transfers to men of straw and might defeat the very object of S. 144. I think the order of the lower Court was a proper order and I do not propose to interfere with it in any way although it was at one time suggested that the order might be varied by directing that the remedy should be first exhausted against the transferee decree-holder. That however is not a matter for consideration in revision. This petition will be therefore dismissed with costs of respondent 4. I should like to add, and counsel agree, that the references in 38 Mad 86[1] to 23 Mad 203[4] are evidently printing errors and that throughout that case the references were intended to be to the case of *Doraiswami Ayyar* v. *Annasami Iyer*, reported in the same volume at page 306.[2]

C.R.K./G.N. *Petition dismissed.*

3. ('22) 9 A I R 1922 All 238 : 66 I C 545 : 44 All 555 : 20 A L J 456, Brij Lal v. Damodar Das.
4. (1900) 23 Mad 203 : 1 Weir 687, Tangi Joghi v. Hall.

A. I. R. 1941 Madras 316

BURN AND LAKSHMANA RAO JJ.

In re Abdul Basha Sahib — Accused.

Referred Trial No. 25 and Criminal Appeal No. 121 of 1940, Decided on 1st April 1940; referred by Court of Session, Chingleput Division, D/- 27th January 1940.

(a) Evidence Act (1872), Ss. 27 and 30—Provisions of S. 27 must be observed strictly—Only those portions of information given by accused which relate to facts discovered thereby are admissible under S. 27—Accused's statement involving other accused but not relating to aforesaid facts—Statement is inadmissible against other accused.

It is necessary to observe strictly the provisions of S. 27 by which the only portions of the information given by an accused which are admissible are those which relate distinctly to the facts discovered thereby. Consequently, statements by an accused which do not relate to aforesaid facts but involve other accused are inadmissible under S. 27 against the latter. [P 318 C 2]

(b) Penal Code (1860), Ss. 300 and 201—Murder — First accused found guilty — Second accused meeting first accused on evening of date of murder and knowing where certain articles belonging to deceased which she carried with her on fateful evening were to be found—Facts raise grave suspicion against second accused but not enough to warrant his conviction under S. 300 or S. 201.

Where an accused is found guilty of the offence of murder, the facts that 2nd accused met the first on the evening of the date of murder and knew the place where certain articles belonging to the deceased which she had carried with her on that fateful evening were to be found lead to grave suspicion against accused 2 but are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence. [P 319 C 1]

R. Narasimham — for Accused.

Public Prosecutor — for the Crown.

Burn J. — On the morning of 13th October 1939, an Adi Dravida named Mandan (P. W. 9) who lives in Poonamallee found a corpse floating in a well called Mangadu Mudaliar's well. He saw a crowd of people searching in a neighbouring well and he told them what he had seen. Amongst that crowd was Mahadeva Chettiar (P. W. 8). He and the other people with him were looking for his mother Kanniammal who had left home the previous evening at about 6-30 to deliver some oil at the house of one Abdul Wahab Sahib and had not returned. P. W. 8 had reported the disappearance of his mother at the police station in Poonamallee at 1-10 A.M. on the 13th (*vide* EX. F) and had requested the police to make enquiries about her disappearance. He mentioned there that his mother was in the habit of wearing valuable jewels consisting of a gold chain made out of twenty sovereigns, gold bangles and kammals set with red stones. P. W. 8, on hearing what P. W. 9 had discovered, went to the

well of Mangadu Mudaliar and saw that the corpse in the well was the corpse of his mother. He therefore went again to the police station at 7 A. M. and reported this fact. The police had the body lifted out of the well and held an inquest which showed that the woman had been brutally murdered. No jewels were found upon the body except a nose screw. After the inquest the body was sent to the doctor in charge of the Poonamallee hospital and on the afternoon of 13th October he made a post mortem examination. He found that the woman's lower jaw had been fractured, that there was a contused wound on her face, abrasions on her face and neck, that the lobes of both ears had been torn through and that seven ribs on either side of the chest had been fractured. All these injuries had been inflicted before death and were the cause of death. There were no signs of drowning.

The two appellants were tried by the learned Sessions Judge of Chingleput for the murder of Kanniammal. The unanimous opinion of the assessors was that accused 1 was guilty of murder and that accused 2 was guilty of an offence under S. 201, Penal Code. The learned Sessions Judge agreed with the assessors and convicted accused 1 of murder and sentenced him to death. He convicted accused 2 under S. 201, Penal Code, and sentenced him to three years rigorous imprisonment. Accused 1 is the brother-in-law of Abdul Wahab Sahib, and the evidence of P. Ws. 4 and 5, the granddaughter and grandson of the deceased was that on the evening of 12th October accused 1 came to their house to tell their grandmother Kanniammal that oil was required at the house of Abdul Wahab. Both these witnesses say that their grandmother picked up the vessel containing oil and the other implements of her trade and went off to deliver oil as requested. The police in their investigation found that she had actually delivered oil at the house of Abdul Wahab that evening. A dhobi (P. W. 6) said that he had seen the deceased going in the direction of Abdul Wahab's house followed by both the accused. Narasamma (P. W. 7) who lives on the way between the house of the deceased and the house of Abdul Wahab also said that she had seen the deceased going in the direction of Abdul Wahab's house followed by the two accused.

The most important evidence is connected with the discovery of Kanniammal's gold chain, gold bangles and ear ornaments. Accused 1 was arrested after the inquest and on the morning of 14th October he made a confession to the Circle Inspector (P. W. 14). The portions of this confession admissible under S. 27, Evidence Act, relate to M. Os. 1, 6, 7 and 8. He alleged that Kanniammal had been beaten with a brick by accused 2 and offered to show the place where the murder had taken place. He showed in the backyard of Abdul Wahab's house a piece of brick (M. O. 1) upon which stains of blood were found. These stains were afterwards proved to be stains of human blood. Accused 1 further said that after Kanniammal has been murdered he and accused 2 had robbed her of her bangles, kammals and chain and had concealed them in a place which he offered to show. He took the police Inspector and Sub-Inspector and three other witnesses (P. Ws. 10, 11 and 12) to a piece of waste ground in front of the Dharmaraja Koil and there dug up a spot which he had marked. He produced a piece of rag (M. O. 19) which when untied was found to contain a gold chain necklace, a pair of gold bangles and a pair of kammals (M. Os. 6, 8 and 7). These have been identified as the jewels of Kanniammal which she was in the habit of wearing and which she was wearing on the evening of 12th October when she went out. Moreover, on the kammals the Chemical Examiner found blood though the stains were so far disintegrated by the time the kammals reached the Imperial Serologist that it was not possible to say for certain that the blood was human blood.

Accused 2 was arrested on 15th October after the confession made by accused 1 in which he was involved. He is then said to have made a statement which led to the discovery of the oil vessel, the funnel, the ollock measure and the ladle that Kanniammal was in the habit of using. These are M. Os. 2, 3, 4 and 5 and they were found in consequence of information given by accused 2 in two ruined wells about half a mile away from the well in which Kanniammal's corpse was found. Some evidence also was let in about some articles of clothing which it was said had been left by accused 1 in the house of his brother Ismail. Blood was found on one of these garments but this item of evidence cannot be taken into consideration against accused 1 because no one has been examined as a witness to prove that they were left in the house of Ismail by accused 1.

Both the accused denied that they had anything to do with the murder. Accused 2 pleaded alibi and examined eight witnesses in support of his plea. Accused 1 alleged

that on the evening of the 12th he had been engaged in his shop until 8-30 or 8-45 P.M. and that after that had gone home and gone to bed. He said that the Chettis, namely the relations of Kanniammal, had been to his house during the night to enquire about her and that he had joined them in the search. He did not examine any witnesses to prove that he was engaged in his shop till 8-30, and when P. W. 8 was in the witness box no suggestion was put to him that accused 1 had joined in the search. The alibi of accused 1 was therefore clearly not established. The alibi of accused 2 need not be discussed in detail since we are of opinion that he must be acquitted on the evidence adduced for the prosecution.

Learned counsel for appellant 1 has contended that the evidence of the witnesses who say they saw accused 1 come to fetch Kanniammal on the evening of 12th October is unreliable, and that the confession said to have been made by accused 1 to the police is inadmissible in evidence. We can find no reason whatever for rejecting the evidence of P. Ws. 4, 5, 6 and 7. No facts were elicited from them in cross-examination from which it could be inferred that they had any reason to give false evidence against either of the accused. Narasammal (P. W. 7) was mentioned by P. W. 8 in his first complaint to the police (Ex. F) which was made at 1-10 A.M. several hours before the corpse of Kanniammal was found. With regard to the statement made by accused 1 to the police learned counsel's argument is based upon an assumption that before accused 1 made any statement to the Inspector on the morning of 14th October he had already disclosed to the police what he knew. This argument is an attempt to apply the principle of decisions recently given to the effect that if the police got incriminating information from an accused person and then called upon him to repeat that information in the presence of witnesses, the statements made in the presence of witnesses would not be admissible under S. 27, Evidence Act. In the present case, however, there is no foundation for that argument because the Inspector has said quite clearly that the information given by accused 1 which led to the discovery of the jewels was disclosed to him only on the morning of the 14th in the presence of the Village Munsif (P. W. 10) and two other witnesses (P. Ws. 11 and 12). We cannot find any reason to suspect the Inspector of telling falsehood in this matter. The jewels undoubtedly belonged to the deceased woman; she was wearing them when she went out to her death; the earrings had blood on them; they were found in consequence of what accused 1 said. Accused 1's statement, so far as it relates to the discovery of these jewels, is therefore admissible under S. 27, Evidence Act. There can be no doubt that accused 1 is guilty and has been properly convicted of the murder of Kanniammal. We confirm his conviction for murder and the sentence of death passed upon him by the learned Sessions Judge.

The case of accused 2 is very different. He did not make any confession involving him in the murder. All that he said was that he had met accused 1 at about 7-30 on the night of 12th October and that accused 1 had given him M. Os. 2, 3, 4 and 5 and had asked him to throw them away in any well that might be on his path. The learned Sessions Judge considers that accused 2 must have known that Kanniammal had been murdered and must have disposed of these articles in order to screen accused 1 from punishment. It cannot be said that this conclusion follows from the mere fact of accused 2 complying with the request made by accused 1. Accused 2 can only be convicted if the statement of accused 1 is taken into consideration as against him. The learned Public Prosecutor suggested that this could be done under S. 30, Evidence Act. One great difficulty in accepting this contention is that if the statement of accused 1 is taken into consideration as against accused 2 and if it is believed, accused 2 also should be convicted for the murder of Kanniammal. In fact, if accused 1 was telling the truth to the police, it was accused 2 who inflicted on Kanniammal the injuries that caused her death. Accused 1 says that it was accused 2 who sat upon the old woman's chest and beat her on her face and neck with a brick. We are of opinion that it is not possible to take the statement of accused 1 into consideration as against accused 2. It is necessary to observe strictly the provisions of S. 27 by which the only portions of the information given by accused 1 which are admissible are those which relate distinctly to the facts discovered thereby. The facts discovered thereby, as we have already said, are the jewels of the murdered woman and the blood-stained brick (M. O. 1) which was used to beat her about the face. It cannot be said that statements made by accused 1 involving accused 2 relate in any way to these

facts. All that is established as against accused 2 therefore is that he met accused 1 on the evening of 12th October and that he knew where M. Os. 2, 3, 4 and 5 were to be found. These facts lead to grave suspicion against accused 2 but they are not sufficient to warrant his conviction either for murder or for intentional concealment of evidence. Accused 2 must therefore be acquitted. We set aside his conviction under S. 201, Penal Code, and the sentence of three years rigorous imprisonment and direct that he be set at liberty forthwith.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. 1941 Madras 319

Full Bench

LEACH C. J., GENTLE AND KRISHNASWAMI AYYANGAR JJ.

Sri Kasikananda Gnanacharya Swamigal — Appellant

v.

Saravanaperumal Pillai and another — Respondents.

Letters Patent Appeal No. 70 of 1939, Decided on 9th December 1940, against judgment of Wadsworth J., in C. M. A. No. 260 of 1938, D/- 25th August 1939.

* *Limitation Act (1908), S. 14 — Onus to prove good faith is on person seeking benefit of S. 14:* 1937 M W N 465, OVERRULED.

A person who claims the benefit of S. 14 must show that in pursuing his remedy in other proceedings he acted in good faith. The burden is not on his opponent to show lack of good faith. This is made clearer by the provisions of O. 7, R. 6, Civil P. C. and S. 103, Evidence Act: 1937 M W N 465, *OVERRULED*; 21 W R 97 (P C) and 18 W R 76 (P C), *Expl., and Disting.* [P 320 C 2]

K. Rajah Iyer and P. P. Ramabhadra Iyer — for Appellant.

V. Ramaswamy Iyer — for Respondents.

Leach C. J. — The only question which arises in this appeal is whether a person who claims to come within S. 14, Limitation Act, has to show that in pursuing his remedy in other proceedings he acted in good faith or whether the burden of showing lack of good faith is on his opponent. The appellant obtained a decree on a promissory note against one Nataraja Pillai on 22nd October 1930. On 10th December 1931, Natraja Pillai sold certain immovable properties to the respondents. On 12th August 1932 the appellant attached these properties in execution of the decree which he had obtained on the promissory note and at the sale, which was held on 15th January 1935, he purchased the properties. When he desired to enter into possession he was obstructed by the respondents, who claimed title by reason of their purchase of the properties on 10th December 1931. On 27th June 1935 the appellant applied to the District Munsif of Manamadura, in whose Court the execution proceedings had taken place, for an order against the respondents under O. 21, R. 97, Civil P. C., requiring them to deliver possession to him. This application was dismissed by an order of the District Munsif passed on 14th October 1935. The appellant preferred an appeal to the subordinate Judge of Sivaganga, who dismissed it on 26th November 1936, on the ground that the appellant's remedy was by suit and not by an appeal. Rule 103 of O. 21 provides that a party, not being a judgment-debtor, against whom an order is made under R. 98, R. 99 or R. 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of a suit the order is conclusive.

On 7th December 1936 the appellant instituted the suit out of which this appeal arises. He asked for a declaration that the sale of the properties to the respondents was invalid and for an order requiring them to vacate. The respondents pleaded that the suit was barred by the law of limitation, and clearly it was if the time taken up by the appeal from the order of the District Munsif dismissing the appellant's application under O. 21, R. 97, was not to be excluded. The District Munsif held that the respondents' plea was well founded and dismissed the suit, but his decision was reversed on appeal by the subordinate Judge. The respondents appealed to this Court and their appeal was allowed by Wadsworth J. who however gave a certificate which has permitted the filing of the present appeal under Cl. 15 of the Letters Patent.

There is nothing on the record which shows the circumstances under which the appellant filed the appeal against the dismissal of his application under O. 21, R. 97 and the decision in this appeal must turn on the question on whom lies the burden of proof. Section 14, Limitation Act, says:

> In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Then follow three explanations, but it is not necessary to set them out. Section 2 (7) defines "good faith" for the purposes of the

Act. The definition is that nothing shall be deemed to be done in good faith which is not done with due care and attention. I should have thought that when a person is claiming the benefit of S. 14, Limitation Act, he must prove that he acted in good faith in instituting the earlier proceedings. Order 7, R. 6, Civil P. C., states that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. This must mean that when a suit has been filed beyond the period allowed by law the burden of proving that there is ground for exemption from limitation is on the plaintiff, but apart from this the wording of S. 14, Limitation Act, seems to me to be here quite clear.

But a different opinion has been expressed by a Bench of this Court. In 1937 M W N 465,[1] Varadachariar J. sitting with Mockett J. discussed S. 14, Limitation Act, and it would appear that he was of the opinion that Privy Council in deciding 21 W R 97[2] had placed the burden of proof on the defendant and not on the plaintiff. With the greatest respect to all that was said in the judgment of Varadachariar J., I am unable to agree that the Judicial Committee can there be taken to have laid down a rule that a person seeking the benefit of S. 14, Limitation Act, is not required to show that he acted bona fide in the previous proceedings and that it is incumbent on his opponent to prove mala fides. In that case, the Privy Council were considering the effect of S. 10, Limitation Act of 1859 and not S. 14 of that Act, which corresponds to S. 14 of the present Act. Section 20 of the Act of 1859 corresponds to Art. 182 of the Act of 1908 and it reads as follows:

> No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order or to keep the same in force within three years next preceding the application for such execution.

It was alleged in 21 W R 97[2] that certain proceedings in execution had not been instituted bona fide and therefore the decree-holder was not entitled to claim a fresh starting point of limitation by reason of his application. There was nothing in the Limitation Act of 1859 which required the decree-holder to show bona fides, but in resisting the proceedings the person concerned set up a specific charge of mala fides. The Judicial Committee decided that in such circumstances the person who alleged mala fides ought to prove his allegation. There is nothing in the judgment in that case or in the judgment of the Privy Council in the earlier case in 18 W R 76,[3] the earlier case referred to in 21 W R 97[2] which can, in my opinion, be taken as supporting the interpretation placed upon S. 14, Limitation Act, in 1937 M W N 465.[1]

As I have already indicated, a person who asks the Court to hold that he is entitled to the benefit of S. 14 must in my judgment show that he comes within it. To the reasons I have given I may add that S. 103, Evidence Act, expressly states that the burden of proof of any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by law that the proof lies elsewhere. I have no hesitation in holding that in this case the burden of proving that he acted bona fide in his earlier action rests on the appellant. He has not made any attempt to show that in filing the appeal against the claim order he was acting on advice and the Court is left in entire ignorance why he appealed from the order on his application under O. 21, R. 97 before he filed the present suit. As the appellant has not shown that in filing the appeal he acted in good faith he is not entitled to the benefit of S. 14, Limitation Act. For these reasons I consider that the decision of Wadsworth J. was correct and that the appeal should be dismissed with costs.

Gentle J. — I agree.

Krishnaswami Ayyangar J. — I also agree but I desire not to be understood as expressing any opinion on the question whether an appeal lay to the subordinate Judge in the prior proceedings or not. The matter was argued on the assumption that no such appeal lay and that the remedy was by way of suit only.

C.R.K./G.N. *Appeal dismissed.*

1. ('37) 1937 M W N 465, Alagappa Chettiar v. Somasundara Chettiar.
2. ('74) 21 W R 97 : 13 Beng L R 169 (P C), Benodram Sen v. Brojendro Narain Roy.
3. ('72) 18 W R 76 : 11 Beng L R 23 : 3 Sar 131 (P C), Roy Dhunput Singh v. Madhomotee Dabia.

A. I. R. 1941 Madras 320

LAKSHMANA RAO J.

In re T. S. Ananthanarayana Iyer and another — Petitioners.

Criminal Revn. Case No. 713 and Petn. No. 672 of 1940, Decided on 11th September 1940, to revise judgment of the City First Class Magistrate, Madura, in Criminal Appeal No. 42 of 1940.

Madras Prevention of Adulteration Act (3 of 1918), S. 5 (1) (b)—Master convicted for storing ghee for sale — Servant cannot be said to have "stored ghee for sale."

Servant of a person who is convicted under S. 5 (1) (b) cannot be said to have stored ghee for sale and therefore his conviction under S. 5 (1) (b) cannot be sustained. [P 321 C 1]

N. S. Srinivasan — for Petitioners.

Public Prosecutor — for the Crown.

Order. — The ghee was stored for sale by petitioner 1, the hotel keeper and his guilt under S. 5 (1) (b) of Act 3 of 1918 admits of no doubt. But petitioner 2 the servant cannot be said to have stored the ghee for sale and his conviction is unsustainable. The conviction and sentence of petitioner 2 are therefore set aside and the petition is dismissed as regards petitioner 1.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 321

WADSWORTH AND PATANJALI SASTRI JJ.

Varadarajam Pillai, minor by guardian Malayaperumal pillai — Petitioner

v.

Krishnamurthi Pillai — Respondent.

Civil Revn. Petition No. 1088 of 1939, Decided on 21st August 1940, to revise order of Dist. Munsif, Chidambaram, D/- 20th September 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 and 19 — Word "creditor" in Act does not include person beneficially entitled to sum lent—Negotiable Instruments Act, Ss. 8 and 78 and Civil P. C., O. 21, Rr. 16 and 53 cannot be ignored in interpreting term "creditor" or "the same creditor" in relation to pronote or decree debt — Mortgage by A in favour of B manager of joint Hindu family—Subsequent pronote executed by A in favour of B's son C in lieu of interest due on mortgage — C obtaining decree against A on pronote — Held that creditor under pronote and mortgage could not be said to be same person and therefore pronote was not renewal in favour of same creditor of earlier liability to pay interest on mortgage debt and therefore interest on pronote from 1st October 1937 alone could be scaled down.

The word "creditor" in the Act does not include persons beneficially entitled to the sum lent. The provisions of the Negotiable Instruments Act namely Ss. 8 and 78 or those of the Civil Procedure Code namely O. 21, Rr. 16 and 53 cannot be ignored in interpreting the term 'creditor' or "the same creditor" in relation to a promissory note or a decree debt. [P 323 C 1]

A mortgage was executed in favour of the manager of a joint Hindu family. The mortgagor subsequently executed a promissory note in favour of the manager's son in lieu of the interest due on the mortgage loan. The son obtained a decree on the pronote and sought to execute it by attachment and sale of the mortgaged property. The mortgagor applied for scaling down the debt under S. 19 and claimed to be relieved from his liability in respect of the amount due under the pronote :

Held that it was not open to the petitioner to contend that the creditor under the promissory note or under the decree was not the person whose name appeared as the payee on the note and the decree-holder on the decree, and that therefore the promissory note could not be regarded as a renewal in favour of the same creditor of the earlier liability to pay interest on the mortgage debt and therefore the decree could be amended by scaling down only the interest from 1st October 1937 to the statutory rate of 6 per cent. per annum: 30 Mad 88 (F B), *Rel. on*; A I R 1940 Mad 52 and C. R. P. No. 963 of 1939, *Dissent.* [P 322 C 1]

(b) Negotiable Instruments Act (1881), Ss. 120 and 121 — Construction—Ss. 120 and 121 enact rule of estoppel against denying original validity of instrument and capacity of payee to endorse—They do not relate to question as to who is entitled to sue on instrument.

Sections 120 and 121 enact a rule of estoppel against denying the original validity of the instrument in the one case and the capacity of the payee to endorse in the other and do not relate to the question who is entitled to sue on the instrument and can thus be regarded as the creditor under it. [P 323 C 1]

(c) Madras Agriculturists' Relief Act (4 of 1938)—Construction — Scope should not be extended by benevolent construction.

The Madras Agriculturists Relief Act is designedly expropriatory in its effect and the scope of its provisions ought not to be extended under the guise of what is sometimes called a benevolent construction : A I R 1940 Mad 910, *Foll.* [P 323 C 2]

R. Desikan — for Petitioner.

T. R. Srinivasan — for Respondent.

Patanjali Sastri J.—This civil revision petition arises out of an application by the petitioner under S. 19, Madras Agriculturists' Relief Act, to amend the decree in O. S. No. 775 of 1932 on the file of the lower Court by scaling it down in accordance with the provisions of that Act. The decree was passed on a promissory note for Rs. 2350 executed in favour of the respondent on 12th April 1932. The sum represented the interest due on an earlier mortgage for Rs. 10,000 executed by the petitioner in favour of the respondent's father on 1st September 1926. The respondent applied for execution of the decree by attachment and sale of the mortgaged properties but the application was resisted by the petitioner on the ground that by virtue of O. 34, R. 14, Civil P. C., the mortgaged property could not be brought to sale as the claim was one arising under the mortgage and the decree-holder must be deemed to be the mortgagee himself as the respondent obtained the decree as well as the promissory note on which it was based as a mere benamidar for his father for interest due on the mortgage. This dispute was carried to this Court in C. M. S. A. No. 59 of 1938 and was decided by King J. in favour of the respondent in the decision reported in (1939)

1 M L J 680[1] where the learned Judge observed:

It has been strenuously urged that both the mortgagee and the decree-holder are in essence the joint family consisting of the father and the son, and that therefore the mortgagee and the decree-holder are identical, and then it is argued that the son can be described as the mortgagee as he has some interest in the mortgage or that the father can be described as the decree-holder because it is found as a fact that the promissory note was realy taken benami for him. It seems to me impossible to accept any of these propositions.

A Letters Patent Appeal No. 100 of 1938 was preferred against this decision and it was dismissed on the ground that the decree based on the promissory note could not be regarded as having been obtained on a claim arising under the mortgage, the learned Judges expressing no opinion on the point decided by King J. On these facts, the Court below held that it was not open to the petitioner herein to contend that the creditor under the promissory note or under the decree was not the respondent whose name appears as the payee on the note and the decree-holder on the decree, and that therefore the promissory note could not be regarded as a renewal in favour of the same creditor of the earlier liability to pay interest on the mortgage debt. It accordingly amended the decree by scaling down only the interest from 1st October 1937 to the statutory rate of six per cent. per annum.

Learned counsel for petitioner contended before us that neither the provisions of the Negotiable Instruments Act nor those of the Civil Procedure Code which precluded a debtor from showing that a person other than the one whose name appeared as payee or decree-holder was the real creditor were applicable to proceedings for scaling down debts under the Madras Agriculturists' Relief Act, that a person beneficially entitled to a debt was also a 'creditor' within the meaning of the latter Act and that there was nothing in its provisions to bar an inquiry as to who is the real creditor. The respondent on the other hand attempted to support the decision of the Court below on an alternative ground also, namely that even if the creditor under the promissory note and the mortgage were to be regarded as the same person, the promissory note should be treated as a distinct debt in respect of which the sum of Rs. 2350 should be regarded as the principal, and as the application to scale down related only to this debt, the interest alone payable under the note could be reduced to six per cent. per annum under S. 8 of the Act. We may state at once that this point is covered by our judgment in C. R. P. No. 1729 of 1938[2] and must be rejected for the reasons there indicated.

Turning to the petitioner's contention, we are of opinion that it is untenable. The debt in question having been incurred before 1st October 1932 it has to be scaled down in accordance with S. 8 of the Act. Under sub-s. (1) of that section, all interest outstanding on 1st October 1937 "in favour of any creditor" of an agriculturist has to be wiped out. This applies, of course, to the interest payable under the promissory note. But the petitioner also claims to be relieved from liability in respect of the sum of Rs. 2350 for which the promissory note was given. It was said that the promissory note was but a renewal of the original liability to pay interest on the mortgage and the explanation to S. 8 applied. But was it a renewal "in favour of the same creditor?" 'Creditor' is not defined in the Act except as including "his heirs, legal representatives and assigns." It has to be noted that it does not include persons beneficially entitled to the sum lent. 'Creditor' in the ordinary sense of the term signifies a person to whom money is due. The creditor under the mortgage is the respondent's father or the joint family of which he was the manager. But the creditor in respect of the promissory note, having regard to Ss. 8 and 78, Negotiable Instruments Act, is and can be only the respondent. The family or its manager could not sue to recover the amount due on the note even assuming that the respondent took it on behalf of the family, *see* 30 Mad 88,[3] and therefore could not be regarded as the creditor though, as between the family and the respondent, it may be beneficially entitled to the amount. This position has become still more emphasized by a decree having been passed in favour of the respondent. Under the provisions of the Civil Procedure Code, it is only the decree-holder or other persons specifically empowered in that behalf (e. g. under O. 21, R. 16 and R. 53) that can recover the decree amount by execution but not others although they may be beneficially interested in the amount. It is therefore difficult to see how the cre-

1. ('39) 26 A I R 1939 Mad 436 : 189 I C 390 : (1939) 1 M L J 680, Varadarajam Pillai v. Krishnamurthi Pillai.

2. *Reported in* ('41) 28 AIR 1941 Mad 193 : (1940) 2 M L J 874, Sankara Aiyar v. Yagappan Servai.

3. ('07) 30 Mad 88 : 16 M L J 508 : 1 M L T 377 (F B), Subba Narayana Vadhiyar v. Ramasami Iyer.

ditor under the mortgage and the promissory note can be said to be the same person.

Petitioner's learned counsel placed reliance on the decision of Pandrang Row J. in (1939) 2 M L J 658[4] and of Stodart J. in C. R. P. No. 963 of 1939 which no doubt lend support to his contention, but with all respect we are unable to agree with them. In the former case, the learned Judge laid stress on the words "in a suit thereon" in Ss. 120 and 121, Negotiable Instruments Act, and held that the special rule of exclusion or estoppel laid down therein operates only in suits on the negotiable instrument and should not be extended to applications by debtors to obtain relief under Act 4 of 1938. In the first place, it is difficult to see what bearing Ss. 120 and 121 have on the point under consideration. They enact a rule of estoppel against denying the original validity of the instrument in the one case and the capacity of the payee to endorse in the other and do not relate to the question who is entitled to sue on the instrument and can thus be regarded as the creditor under it. The important and relevant provisions are those of Ss. 8 and 78 of that Act. The learned Judge does not explain why these provisions or the decision in 30 Mad 88[3] should be ignored in determining who is a 'creditor' in an enquiry under the Agriculturists' Relief Act. He observes :

> The object of the new Act was to give relief to agriculturist debtors and it did not matter for the purpose of granting that relief whether the original debt was incurred under a negotiable instrument or otherwise.

This is true, but is no justification in our view, for ignoring the provisions of the Negotiable Instruments Act or those of the Civil Procedure Code in interpreting the term 'creditor' or 'the same creditor' in relation to a promissory note or a decree debt. In the case before Stodart J., a mortgage was originally taken by an uncle in his own name in respect of moneys belonging to his minor nephew and it was renewed in favour of the nephew after the latter attained majority. The learned Judge thought that it was "not unreasonable" to hold that the renewal was in those circumstances in favour of "the same creditor." This decision favours an extended interpretation of the term 'creditor' as including a person beneficially entitled to the amount lent, which is not warranted by the definition in S. 3 (v) of the Act. As we had occasion to point out in (1940) 2 M L J 202,[5] the Act is designedly expropriatory in its effect and the scope of its provisions ought not to be extended under the guise of what is sometimes called a benevolent construction. The revision petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

4. ('40) 27 A I R 1940 Mad 52 : 186 IC 458:(1939) 2 M L J 658, Anandam v. Muthukumarasami Mudali.

5. ('40) 27 A I R 1940 Mad 910 : ILR (1940) Mad 1023 : (1940) 2 M L J 202, Kotayya v. Venkatapunnayya.

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LAKSHMANA RAO J.

In re Guruswami Chettiar and others — Petitioners.

Criminal Revn. Case No. 227 and Petn. No. 218 of 1940, Decided on 8th August 1940, to revise order of Town Sub-Magistrate, Coimbatore, D/- 5th March 1940.

Criminal P. C. (1898), S. 476—After proceedings under Legal Practitioners Act against A *charge under S. 403, Penal Code, framed against him* — B, *not party to proceedings, charged with offence under Ss. 467 and 193, Penal Code— Complaint of Court for offence under S. 193 held not necessary as* B *could be prosecuted for graver offence under S. 467 without Court's complaint.*

After proceedings under the Legal Practitioners Act against *A* for misappropriation, he was prosecuted under S. 403, Penal Code, and *B* who was not a party to those proceedings was charged with offences under Ss. 467 and 193, Penal Code, for helping *A* by fabricating a forged receipt for being used by *A* in the proceedings against him :

Held that a complaint by the Court for the offence under S. 193, Penal Code, was not necessary because *B* was not a party to the proceedings under the Legal Practitioner's Act and also because he could be prosecuted for the graver offence under S. 467, Penal Code, without the Court's complaint : A I R 1936 Mad 89, *Disting.* [P 324 C 1]

Dr. V. K. John and D. Noronha — for Petitioners.
Public Prosecutor — for the Crown.

Facts — V, a woman filed a complaint against G a pleader (who was struck off the list for misappropriation of moneys belonging to V) and three others for an offence against G under S. 403, Penal Code, for misappropriation and against accused 2 to 4 for an offence under Ss. 467 and 471, Penal Code, for helping accused 1 by fabricating for being used in Court in a proceeding before the District Judge against accused 1 under the Legal Practitioners Act a forged receipt for certain moneys alleged to have been paid by accused 1 to the complainant. The Town Sub-Magistrate, Coimbatore, to whom the complaint was given, dismissed the complaint against accused 2 to 3 on the ground that no complaint of the Court was filed as the offence is one which fell under S. 193, Penal Code. Against this order, the Sessions Judge, Coimbatore, in revision held that an

offence under S. 467 for which accused 2 to 4 were charged was triable without a complaint from the Court and that the offence under S. 193 was a minor one and therefore directed that the complaint may be enquired into. When the trial was commenced after summons to the accused, accused 2 to 4 took up the objection of want of complaint from the Court, and the Magistrate held that no complaint was necessary. Against this decision the present criminal revision case was filed.

Order. — The complaint against accused 1 is only under S. 403, Penal Code, and accused 2 to 4 were not parties to the proceedings under the Legal Practitioners Act. A complaint of the Court is not necessary for prosecuting these accused for an offence under S. 467, Penal Code, nor does any question of evading the provision of S. 195, Criminal P. C., arise as in 59 Mad 165.[1] The Court was moved to make a complaint against them and the making of a complaint by the Court for an offence under S. 193, Penal Code, was considered unnecessary as accused 2 to 4 could be prosecuted for the graver offence under S. 467, Penal Code, without a complaint of the Court. There is therefore no ground for interference and the revision petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

1. ('36) 23 AIR 1936 Mad 89 : 159 I C 853 : 37 Cr L J 159 : 59 Mad 165 : 69 M L J 812, In re Appadurai Nainar.

A. I. R. 1941 Madras 324

KRISHNASWAMI AYYANGAR J.

In re B. K. Narayana Reddi—Accused.

Application in Case No. 6 of the Fourth Criminal Sessions, 1940, Decided on 2nd October 1940.

(a) Criminal P. C. (1898), S. 286—Prosecution is not confined to witnesses examined before committing Magistrate — But prosecution is not entitled to have fresh witnesses summoned for purpose of their evidence being taken and considered in trial.

Under S. 286 the prosecution is not confined to the witnesses examined before the committing Magistrate but may examine other witnesses as well in the Sessions Court. But the Crown is not entitled to have fresh witnesses summoned for the purpose of their evidence being taken and considered in the trial. If the prosecution have additional witnesses ready and available to them for giving evidence, their evidence can be taken and there is no legal objection to this course. [P 324 C 2]

(b) Criminal P. C. (1898), S. 540—Discretion under first portion of S. 540 should be exercised judicially.

The first portion of S. 540 leaves a discretion in the Court to summon any person as a witness, a discretion which should as a matter of course be exercised judicially. [P 325 C 1]

(c) Criminal Trial—Evidence — Evidence of accomplices—Value of.

Evidence of accomplices must be received with caution and not ordinarily to be accepted without corroboration in material particulars. [P 325 C 2]

Crown Prosecutor — for the Crown.

B. T. Sundararajan, C. S. Rajappa and C. S. Soman — for Accused.

Order. — The accused B. K. Narayana Reddi was tried along with two others, namely Devanai Ammal and Ethiraja Pillai on 15th, 16th and 19th August last. The trial resulted in the conviction of Devanai Ammal and Ethiraja Pillai and they are now serving their respective terms of imprisonment. So far as Narayana Reddi is concerned, the jury brought in a verdict of not guilty by 5 against 4 with the result that I ordered the discharge of the jury. I decided that it was a fit case for Narayana Reddi to be tried again on the charge framed against him. At the request of his counsel I ordered his retrial by myself during this sessions. The case comes on for trial tomorrow, 3rd October 1940. Today the Crown Prosecutor makes an application for production before Court of the two prisoners aforesaid, namely Devanai Ammal and Ethiraja Pillai so that they may be examined and their evidence taken. The first question that arises is whether it is permissible for the Crown to examine these two persons as witnesses for the prosecution. That they were not examined — as they could not have been examined—before the committing Magistrate during the preliminary enquiry is not by itself an objection to the Crown having their evidence taken. Under S. 286, as construed by a Full Bench of the Lahore High Court in 17 Lah 176,[1] the prosecution is not confined to the witnesses examined before the committing Magistrate but may examine other witnesses as well in the Sessions Court. But I am not satisfied that the Crown is entitled to have fresh witnesses summoned for the purpose of their evidence being taken and considered in the trial. If the prosecution have additional witnesses ready and available to them for giving evidence, their evidence can be taken, and so far as I can see there is no legal objection to this course. In view however of the fact that without the intervention of the Court the evidence of these two witnesses cannot be made available to the prosecution, the learned Crown Prosecutor is thrown back on the provisions

1. ('36) 23 A I R 1936 Lah 533 : 162 I C 976 : 17 Lah 176 : 37 Cr L J 742 : 38 P L R 421 (FB), Mt. Niamat v. Emperor.

of S. 540, Criminal P. C., on which he relies for the purpose of persuading me to summon and examine the two witnesses named by him as court witnesses. Section 540 runs as follows :

> Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

The first portion of the section leaves a discretion in the Court to summon any person as a witness, a discretion which should as a matter of course be exercised judicially. The second and the latter portion of the section lays a duty on the Court to summon and examine any such person if it appears to the Court that the evidence of such person is essential to the just decision of the case. I have therefore to put myself the question whether this is a fit case in which in the exercise of my discretion I should summon these two prisoners who are now undergoing terms of imprisonment or whether I am satisfied that their evidence is essential to the just decision of the case. The relevant facts which I must remember in this connexion are these : According to the case for the prosecution Ethiraja Pillai, one of the two witnesses now sought to be summoned, stole the two postal orders in respect of which the offences charged are alleged to have been committed and passed them on to Narayana Reddi and Narayana Reddi in his turn got the orders cashed through Devanai Ammal, the other witness whose production is now sought. All the three, namely Devanai Ammal, Narayana Reddi and Ethiraja Pillai were tried together with the result I have already mentioned. In the course of the trial it appeared that Ethiraja Pillai had made a statement in the nature of a confession first to the investigating inspector Mr. Mahalinga Aiyar which statement he repeated in substance before Mr. Raghunath Rao, the Presidency Magistrate who recorded his confession under S. 164, Criminal P. C. In the statement before Mr. Mahalinga Ayyar he stated :

> The two orders shown to me were taken out from a cover. I secreted that cover and opened it in the dark behind the privy. I showed them to Narayana Reddi some two days after that and asked him if they will fetch any money. Narayana Reddi took them from me and said that he will get money for them. He did not pay me anything. I asked him and he replied that he threw them away.

In his statement before the Magistrate he said :

> Narayana Reddi would ask us to bring some letters in covers received by post so that if there were notes in any of them they can be extracted. About six months ago one day I gave two such letters from the inland mail to that Narayana Reddi. There were two shilling notes in one envelope. I saw the number "20" on each of the notes. I handed over that letter to him and I do not know what happened to it subsequently. I gave him the other letter also. I was not present when he opened that letter. I do not know what he did with those notes and I never questioned him about them.

I may also add that immediately after Ethiraja Pillai made his statement to Mr. Mahalinga Ayyar he was taken to Mr. Byrne, the Presidency Postmaster, and he again confirmed the statement he had earlier made to Mr. Mahalinga Ayyar. When the case was before the committing Magistrate he retracted from these confessional statements and asserted that those statements were the result of inducements offered to him by Mr. Mahalinga Ayyar and by the police. The same attitude was taken up by him in this Court when he was being tried here. Devanai Ammal was also examined by Mr. Mahalinga Ayyar. She then stated that the two postal orders had been received by her from her brother Manicka Mudaliar and that she cashed them at the Vepary Post Office receiving Rs. 26-8-0 therefor. She said nothing to indicate that Narayana Reddi had anything to do with the postal orders. In fact her story was a contradiction of the case for the prosecution that it was Narayana Reddi who gave her the postal orders for their being cashed. That story she stuck to during the inquiry before the committing Magistrate though there was some difference with regard to the details of the transaction as spoken to by her.

It will be clear from what I have said that both these persons who are now sought to be produced before the Court for being examined as witnesses are, even according to the prosecution, accomplices whose evidence must be received with caution and not ordinarily to be accepted without corroboration in material particulars. So far as Ethiraja Pillai is concerned, he definitely went back upon the statements he made to Mr. Mahalinga Ayyar and to the Presidency Magistrate who recorded his confession. His statements made at the various stages leave no room for doubt that he is a person having little regard for truth and who for his own ends would not hesitate to tell lies. As regards Devanai Ammal it is plain that her case is totally at variance with that of the

prosecution. She disassociated herself entirely from Narayana Reddi, and far from admitting the receipt of the postal orders from Narayana Reddi, she made the assertion that she got them from a different person, namely her own brother. The difference regarding the details of the story she gave before the committing Magistrate and that given here struck me at the time as a serious infirmity tending to show that her exculpatory statements were pure inventions. Evidence coming from such an untruthful person cannot but be regarded as extremely unreliable.

I have therefore little hesitation in holding that I should not summon either of these two persons or examine them in the trial of the accused in the exercise of my discretion under S. 540. I am equally unable to come to the conclusion that the evidence of such untruthful and unscrupulous witnesses is essential to the just decision of the case. I cannot imagine that justice will be advanced by introducing into the trial the evidence of persons with the antecedents mentioned above; far from advancing justice their evidence might very likely tend in the opposite direction. I must decline to have these two persons, namely Ethiraja Pillai and Devanai Ammal, produced before the Court for their evidence being taken.

C.R.K./D.S. *Application dismissed.*

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* A. I. R. 1941 Madras 326

KING J.

on difference between

GENTLE AND PATANJALI SASTRI JJ.

In re Sankappa Shetty — Accused.

Referred Trial No. 53 and Criminal Appeal No. 225 of 1940, Decided on 5th August 1940, referred by Court of Session, South Kanara Division, D/- 11th March 1940.

(a) Penal Code (1860), S. 84 — Brutal assault by husband on wife—Absence of deep-seated motive — Husband cannot be presumed to be insane (*Per* Gentle J.)

Where a husband brutally and violently assaults his wife which results in her death, it cannot be said that in the absence of a deep seated motive the husband must have been insane : A I R 1937 Pat 368, *Rel. on.* [P 329 C 1 ; P 332 C 1]

(b) Penal Code (1860), S. 84 — Conflicting statement is not necessarily sign of insanity (*Per* Gentle J.)

A conflicting statement by a person is not necessarily a sign of insanity. [P 331 C 2]

(c) Penal Code (1860), S. 302—Accused inflicting grievous injuries on wife with wooden plank — Persistence of attack evidenced by number of injuries and grievous nature thereof held showed intention to kill (*Per* Gentle J.)

The accused inflicted grievous injuries upon his wife with a wooden plank which was, by the way in which it was used, a dangerous weapon :

Held that the persistence of the attack evidenced by the number of injuries and the grievous nature of at least two of them showed that when he was beating his wife, the accused intended to kill her and therefore the offence which he committed was murder. [P 332 C 2]

(d) Penal Code (1860), S. 302—Murder—Absence of motive is material in considering question of sentence — Offence not premeditated but result of impulse or temper—Proper sentence held transportation (*Per* Gentle J.)

The absence of an apparent motive on the part of the accused in a murder case is material when the question of sentence is considered, and where the offence is not premeditated in any way but is the result of impulse and temper, transportation for life must be regarded as a proper sentence though the assault may have been violent. [P 332 C 2]

(e) Criminal trial—Evidence — Doctor conducting autopsy opining that nature and number of deceased's injuries indicated that murderer must either have deep motive or he must have been insane — Opinion is admissible in evidence (*Per* Patanjali Sastri J.)

The deliberate opinion of a doctor who conducted the autopsy to the effect that from the nature and the number of injuries on the body of the deceased which he had examined there must have been some deep seated motive for the murder or the murderer must have been insane, is admissible in evidence: (1843) 10 Cl & F 200, *Rel. on.* [P 333 C 2]

(f) Criminal trial — Evidence — Prosecution witness not cross-examined on accused's behalf before committing Magistrate — Aforesaid witness stating incident indicating accused's insanity in Sessions Court—Omission to state it before committing Magistrate held could not affect his veracity (*Per* Patanjali Sastri J.)

A prosecution witness who had not been cross-examined on behalf of the accused in the committing Magistrate's Court stated an incident indicating the accused's insanity in the Sessions Court for the first time :

Held that no adverse inference against the veracity of the witness could be drawn from his omission to refer to the incident before the committing Magistrate though he might have voluntarily placed the information before the Magistrate. [P 334 C 1]

(g) Penal Code (1860), S. 84—Plea of insanity —Total lack of motive along with other facts may, in some cases, lead to inference of accused being insane — Nature of act or mode of its perpetration can be considered in proper case—Court is not bound to look outside act itself for evidence of accused's knowledge—Principle to be applied to cases of insanity stated (*Per* Patanjali Sastri J.)

It is true that a mere lack of apparent motive for the deed does not necessarily or always lead to an inference of intellectual aberration or insanity but a total lack of an apparent motive may in some cases taken along with other facts legitimately give rise to an inference that the act was done under an insane impulse. It is also true that a crime is not excused by its own atrocity, but it cannot be said that the nature of the act or the mode of perpetrating it can under no circumstances be taken into account in considering a plea of

insanity. It may be that as a rule of prudence Courts will be slow to infer from such material that the person committing the act was not conscious of its criminality. But there is no warrant for laying down, as a rule of evidence, that one must look outside the act itself for the evidence as to how much the accused knew about it. The truth is that in dealing with all such cases no general rule can be applied and the only proper course to adopt is to decide each case on its own peculiar facts bearing in mind, of course, that the point for determination is whether the evidence before the Court is sufficient to establish that the person charged with the offence was not conscious of the nature of the act he was doing or that he was doing what was wrong or contrary to law: A I R 1937 Pat 363 and A I R 1925 Mad 1238, *Ref.* [P 335 C 1, 2]

(h) Penal Code (1860), S. 84—Plea of insanity —Burden is on accused under S. 105, Evidence Act (*Per* King and Patanjali Sastri JJ.)

The burden of proving insanity is cast upon the accused by S. 105, Evidence Act, and under S. 84, Penal Code, he must prove that at the time of the killing he was by reason of unsoundness of mind, incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law. [P 332 C 2; P 337 C 2]

**(i) Penal Code (1860), Ss. 84 and 302—Husband on affectionate terms with wife suddenly killing her in closed room by brutally battering her head with sitting plank and inflicting twenty wounds — Room broken open by five persons — Accused making no attempt to escape but appearing dazed—During three days prior to occurrence accused shown to have been strange and eccentric —Plea of insanity held not established — Accused held guilty of murder—Transportation for life held proper sentence* (*Per* King and Gentle JJ.; Patanjali Sastri J., *Contra.*)

A loving husband and an affectionate father who had never been known to have beaten or ill-treated his wife on any previous occasion suddenly killed her in a closed room, which was bolted from inside, by battering her head and body brutally and violently with a sitting plank and inflicting as many as twenty wounds and bruises. There was complete lack of motive on the part of the accused who pleaded insanity. The accused was shown to have been strange and eccentric during about three days prior to the occurrence. He was labouring under a delusion that some relation of his had given him drugs and that krutrim (witch-craft) had been practised upon him. After the room was broken open by five persons the accused made no attempt to escape but appeared dazed:

Held that in the circumstances of the case the plea of insanity was not established and the accused was guilty of murder. [P 332 C 2; P 339 C 1]

Held further that the case did not call for the extreme penalty of the law and that transportation for life was a proper sentence inasmuch as the offence had been committed without premeditation and the accused must have received what he considered to be considerable provocation before he attacked his wife in the way he did. [P 332 C 2; P 339 C 1]

P. Sivaramakrishnan — for Accused.

Public Prosecutor — for the Crown.

Gentle J.—The appellant has been convicted by the learned Sessions Judge of South Kanara of the offence of murder under S. 302, Penal Code, and has been sentenced to death. The appellant is Sankappa Shetty and the deceased was his wife, Kaveri. They had been married for eight years and had four children, issues of the marriage, of the ages between seven years and 18 months. The offence is alleged to have taken place in the house of Honnaya Hegde who is the uncle of the mother of the deceased. P.W. 2, Hoovamma, is the wife of Honnaya Hegde. In the community to which the accused and the deceased belonged, it is the custom for the husband to bear the expenses of the wife's confinement. Eighteen months before the death of the deceased, as her parents were dead, the deceased went to the house of P. W. 2 in Kuthavoor village for her confinement. The appellant was unable to bear the cost of the confinement or for his wife to return to him at his own village about 11 miles distant, and during the period of 18 months following her last confinement she remained at her relation's house where he visited her from time to time.

On 28th November 1939, the appellant arrived at the house. The deceased, P. W. 2 and her son, P. W. 3, were then present. He spent the night with his wife and children in a room in the house. On 29th November 1939, P. Ws. 2, 3 and 5, the brother of the deceased who also lived in the house but had been absent the previous night, took their food with the appellant and the deceased at about 10 A. M. The appellant asked the deceased to give him Rs. 25 and she replied that if he returned her jewellery which he had previously taken, she would let him have that amount. It was said that upon her marriage she had jewellery worth about Rs. 200 which the appellant had taken and upon which he had raised some money. About noon, P. Ws. 2, 3 and a servant, P. W. 4, went to a building about 45 feet away from the room which the deceased, the appellant and their children occupied, in order to pound paddy. About two hours later, these three witnesses heard the deceased cry "killing" and the children shouting "father is killing mother." They went to the room in the house and found the door shut and bolted or locked from inside. P. Ws. 2 and 3 went to an open window and saw the appellant inflicting a blow with a plank, upon which food was served, upon the deceased's temple. P. W. 5 was not then in the house, having gone out. P. W. 2 immediately raised an alarm which brought two neighbours, P. Ws. 6 & 7. P. W. 3 fetched

P. Ws. 9 and 10 who were working near-by. P. W. 6 forced open the door with a crow-bar. The deceased was lying dead on the floor, and the appellant was seized, brought out and secured. He appears to have offered but little, if any, resistance and some of the witnesses said he appeared dazed. Communication was made to P. W. 16, the village patel, who sent his report to the police and the police-officer arrived later.

On 1st December 1939 P. W. 1, the medical officer in charge of the Local Fund Hospital at Mulki, performed the post mortem examination upon the body of the deceased. He found 20 injuries of which 10 were on the head and the others on the various parts of her body. Seventeen of the injuries could have been caused by the plank with which P. Ws 2 and 3 had seen him striking the deceased, two of the head injuries would have occasioned death within five minutes. Learned counsel on behalf of the appellant stated that he was unable to suggest that the evidence of the above witnesses could in any way be attacked or disputed. There is nothing which shows that these witnesses were unreliable or their evidence unacceptable, and that it is beyond doubt that the appellant caused the death of the deceased by striking her with a wooden plank which, in the way he used it, was a dangerous weapon. The defence which was put forward before the learned Sessions Judge and which has been argued before us is that at the time he killed his wife, the appellant was insane. Section 84, Penal Code, provides as follows:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.

The question of the sanity of the appellant was not raised or suggested to be in doubt until the trial in the Sessions Court which commenced in February 1940, about three months after the occurrence. In the statement which he made before the committing Magistrate on 10th January 1940 the appellant said he did not know anything and that the rest, he would tell in the higher Court, he had no witnesses to be examined in that Court, it was not possible for him to give a list of witnesses at that stage, as he would produce them in the Sessions Court. The facts and circumstances which are relied upon to substantiate the plea of the insanity are (1) the matters given in evidence in the Sessions Court by P. Ws. 1 and 14 and D. W. 1; (2) that the deceased and the appellant throughout their married life had lived upon affectionate and friendly terms; (3) that there was no motive to cause the appellant to take the life of the deceased and (4) that when the prosecution witnesses went to the scene of occurrence, the appellant appeared to be dazed and offered no resistance when he was seized and secured. All the witnesses who were acquainted with the deceased and the appellant said they were always upon affectionate terms together.

Prior to the happenings on 28th November 1939, there is no doubt that the appellant was in some financial embarrassment. He was also concerned in regard to some property belonging to his wife or in which she was entitled to a share and which he described as "our" property. The ejaman of the deceased's family is the husband of P. W. 2, a mortgage was subsisting upon this property and the ejaman had not kept up payment of the interest and some amount in respect both of principal and interest was outstanding. Some approaches to, or negotiations with, a bank in Mangalore had taken place to borrow the necessary funds to discharge the mortgage debt, but these had not been successful. On 23rd November 1939 six days before the occurrence, P. W. 15, a Sub-Inspector of Police had questioned the appellant regarding a piece of jewellery which was stolen and examined him as a witness who had some knowledge of the theft. The relevancy of these two matters will appear later.

It is now convenient to refer to the testimony of the three witnesses upon which the defence relies. P. W. 1, the medical officer who performed the post-mortem upon the body of the deceased, was asked about the mental condition of the appellant when he was cross examined before the learned Sessions Judge. He said that from the nature and the number of the injuries which he found the attack was very brutal. There must be some deep seated motive for a man to cause so many injuries and if the deep-seated motive was absent, then the assailant must be an insane man especially when he is the husband of the victim. In reply to further questions by the learned advocate for the appellant, he then gave the following evidence. One or two days before the death of the deceased, he travelled in a bus with the appellant. Both of them alighted at a village called Mulki. A little later, he said, he saw the appellant prostrating himself before a man who had been a passenger

in the bus and talking incoherently to him, that his behaviour was not quite normal and that he was excited. In one part of his evidence he said he could not make out what the appellant was saying. Later he stated he did not pay any attention to what exact words were uttered, but corrected himself and said that he heard now and then some of the words which the appellant spoke to the passenger and which were 'you are my saviour,' 'had it not been for you I would have been ruined," and "a telegram must be sent to Mangalore" and later still the witness said he did not catch the subject-matter of the talk. The appellant bent his head and touched the feet of the passenger several times. He did not say that the passenger resented the attentions of the appellant or that he tried to get rid of or escape from him, and added that whilst this man was a stranger to the witness, he was not sure that he was a stranger to the appellant.

The appellant is a villager and conduct of this kind is not an unique way for such a man expressing his thanks and appreciation for help and services rendered by another who might be in a higher station in life. If, as he said, he did not know what the subject was of the remarks made by the appellant and heard only the words which are set out above, it is difficult to see how he could say the appellant was talking incoherently. Hearing only three short disjointed sentences of a conversation without knowing the remainder or the subject of the remarks should not lead to an inevitable conclusion that the words which were heard must be incoherent, that is to say, inconsistent. The sentences seem to me to be more compatible with consistency than with incoherence. The witness said that it was the words he heard and, being incoherent, made him understand the appellant was not in his senses. As a general proposition, one cannot accept the opinion which this witness expressed that in the absence of what he described as a deep-seated motive, the brutal assault must have been committed by an insane man. P. W. 1 said that later he went to the house of one Raman Shetty where he saw P. W. 14, Jayarama Shetty, and told him of the incident of the appellant behaving "like a mad man." P. W. 14 said he had been so informed.

P. W. 14, Jayarama Shetty, in examination-in-chief said that he knew the appellant, who had stayed in his house at Mulki from 26th to 28th November, and that it was the custom of the appellant to do this whenever he was in that village. During this particular visit, the appellant told him that there was a debt upon "our" property, Rs. 1000 was due which it was necessary to pay and to do this, application had been made to a bank in Mangalore for a loan which at first was promised but subsequently it had not been sanctioned. P. W. 5, the deceased's brother, who lives at the house of P. W. 2, said in cross-examination that there was a mortgage upon their family property the amount of which had been reduced to Rs. 3000, it was decided to raise a loan to discharge this, and the appellant had been to a bank in Mangalore to obtain a loan. He apparently was not asked and did not say whether the bank declined to grant it. There is no suggestion that the evidence of P. W. 5 was incorrect and therefore the statements by the appellant in regard to the mortgage and the attempts to obtain a loan are substantially correct. The appellant also told P. W. 14 that on account of financial difficulties he had not been able to cultivate his land and had let it out on lease, although no evidence was forthcoming about this, as the appellant was in straitened circumstances, it is likely to be correct. In re-examination, P. W. 14 said that when the appellant discussed financial matters, he talked like a sane man. From this part of this evidence, there is nothing from which it can be contended that the appellant was not in possession of his senses. Reliance is placed upon the evidence which this witness gave in his cross-examination. In this part of his testimony, P. W. 14 said that P. W. 1 had told him of a man behaving like a mad man, and that he, P.W. 14, guessed that P.W. 1 was referring to the appellant. On the night of 26th November 1939, the appellant stayed in his house, his behaviour was not quite normal, he was talking much, which talk was incoherent and nonsense. He expressed the fear he was going to die, that "Thamma" (younger brother or cousin) had given him some medicine which had made him ill and that he felt a strange sensation in his head. It was this talk which the witness said caused him to guess that the appellant was the man to whom P. W. 1 had referred as the former told him he had arrived by bus.

On 27th November 1939, P. W. 14 said the appellant was acting or behaving like a mad man on the road, someone informed him that a man who had stayed at his house the previous night was behaving in this way and on going up to a large crowd found the

appellant, he ascertained that some rupees had been scattered on the road which had been picked up by a Konkani, except two, which the witness secured and took the appellant back to his house. He did not see the appellant throwing money on the road. At about 8-30 that evening the appellant suddenly got up and struck him a blow, attempted to run away, and with the help of two other persons who were present he was caught, brought back and made to sit down. He wept like a child and when asked why he struck the witness he said "When I looked at you, you appeared frightful. So I beat you. I am sorry for having beaten you." Later that evening he the appellant ran from an upper storey in the house saying that he would jump into a well. On the morning of 28th November 1939, P. W. 14 said the appellant was all right. He took him to the bus station, obtained a ticket for him to Kimmigowli which he gave to the appellant and asked some man in the bus to arrange for two people to go with him. At the conclusion of his evidence, he, the witness, said that only occasionally the appellant would go off his head and that for most part of the time during his stay, the appellant was all right, by which the witness must mean he was behaving normally. There can be little doubt, indeed, the learned Public Prosecutor said that he would concede, that at times the appellant's conduct and behaviour were peculiar, but the expressions of regret which the appellant made to P. W. 14 after he had struck him indicate that he realized what he had done and that it was wrong. The incoherency and nonsense mentioned by P. W. 14 appear to refer to the appellant saying he feared he might die and blamed "Thamma" for having given him some medicine which made him feel ill and that he felt a strange sensation in his head. The evidence does not establish it was the appellant who threw money on the road; the defence suggests this should be inferred. The incident when he said he would jump into a well, if it occurred, reflects a suicidal and not a homicidal tendency. The effect of his evidence, whilst it shows the appellant's actions and conduct were strange and eccentric does not establish either that he did not know what he was doing or did not realize what he had done was wrong.

P. Ws. 1 and 14 both described the appellant's conduct as not quite normal which is not unsoundness of mind of the degree required by S. 84, Penal Code. Neither P. W. 1 nor P. W. 14 mentioned any of the matters to which I have just referred when they gave evidence before the committing Magistrate and they were disclosed for the first time in the Sessions Court. Whatever might excuse P. W. 14 not referring earlier to the conduct of the appellant, P. W. 1 is a gentleman of education and a doctor, and one would have thought that if he had formed the opinion that the appellant was not responsible for his actions, he might have mentioned it earlier and not wait until he gave evidence in the Sessions Court. Mr. Ethiraj, the learned Public Prosecutor, however, stated that he did not wish that the position of the appellant should be adversely affected by the failure of these two witnesses to disclose the matters to which they spoke, would make no observations regarding the belated nature of their evidence but confine himself to criticising their testimony. He submitted it did not establish that the appellant, at the time he inflicted the injuries upon his wife, did not know what he was doing, or if he did not know that it was wrong or unlawful.

D. W. 1, Sridhara Shetty, did not give evidence until the trial in the Sessions Court. He said that he knew the appellant and saw him at the end of November in Kimmigowli sitting on a bench in a coffee hotel. There were other people present including a man named Degu Bhandari, who gave some rupees to the appellant. The witness said that he told the appellant that P. W. 14 had sent word that he (the appellant) should be sent to his house escorted by two other persons and asked him whether he was going to his wife's house at Kodappa (this is the name of the house where the deceased was living with P. W. 2). The appellant replied that he had been drugged, krutrima has been done to him and went on talking. The witness said he paid no attention to this. Upon being asked again where he intended to go, the appellant informed him that he was going to Kodappa. The witness said that he told two men, Isthu and Babu, who were not called to give evidence, to take the appellant and leave him at Kodappa. Incidentally, P. Ws. 2 and 3 when cross-examined said that the appellant arrived alone. D. W. 1 did not remain long at the hotel or talk to him much. When the appellant said he would go to his relations at Kodappa he spoke rationally, that he was now and then all right and talked properly. The only matter to which this witness deposed showing abnormality was the appellant's refer-

ence to drugs and krutrima and as he remained only a short time his statement that the appellant was all right now and then, suggesting at other times he was not, carries little, if any, weight.

In the Sessions Court, the appellant made a lengthy statement in the course of which he said that prior to the occurrence he was not well and felt that his enemy had administered evil drugs to him. At that time a man named Aga Kala Dasu Chetty had stolen a jewel. He had informed the Sub-Inspector who was responsible for the theft and ten days afterwards his illness grew worse and he had some fear and a sensation in his stomach. On one occasion when in the dark he felt as though he saw an apparition like a big man. In the journey to Mulki in the bus he felt a sort of fear and was unwell. He lost some rupees which he had on arrival and asked P. W. 14 and others where they had gone. The next day he felt better. He referred to his stay with P. W. 14 and the visit to the hotel of Kinmigowli where he had taken food. He said two persons accompanied him to the house where his wife was, one a Christian and the other a dark man. He felt a chill and was shivering as if he had fever. On arrival at the house, his wife and P. W. 2 asked him if he had fever. They applied some medicine to his head and gave him a bath. The next day he said that P. W. 2 and his wife told him that there was some talk that he had stolen the jewel. Later he said his wife alone told him this. At noon his wife roused him from his sleep and asked him to take some food and then inquired about the stolen jewellery and at that time he was not well. The statement then continues that he was unaware after this if he beat his wife or not. There was no disagreement between them ; he did not ask his wife for money ; she had none; and that whenever she needed any he gave it to her. The next day he was told by the police that he had killed his wife and he said that he had no recollection of doing so. P. W. 2 and her son P. W. 3 bore feelings of enmity against him arising out of a mortgage loan to be obtained from a bank, a disagreement over a marriage and a dispute regarding money, and they had given evidence against him on account of this animosity. He added that he first became aware of his surroundings during the night when he was in the yard with his legs and hands tied. The learned Sessions Judge put to the appellant a large number of questions which more resembles cross-examination than an examination under S. 342, Criminal P. C.

P. Ws. 2 and 3 denied the appellant was brought to the house by two men, that he was ill on arrival and had been given treatment and a bath. These two witnesses and P. W. 5 said that he was in his senses and alright. The evidence regarding the occurrence is given by P. Ws. 2 and 3; it was not suggested they were not speaking other than the truth. There is no reason to reject their testimony upon the appellant's state and condition of mind. The case for the appellant is that his conduct and behaviour during the three days prior to and on the day of the occurrence shows that he was of unsound mind to a degree that he was unable to distinguish between right and wrong. According to his own statement, he underwent a 'black out' at the time of the attack upon the deceased and his memory of that event is a complete blank. There was no evidence, indeed there was no suggestion, that previous to the period covered by the occurrence and the three days prior thereto or at any time since, the appellant has shown any signs of mental derangement, his unsoundness of mind being limited to those few days. In his statement, he gives the places to which he went during that time and his arrival at Kodappa house. His statement is at variance with the evidence of P. Ws. 2 and 3 regarding his arrival with two persons and being given treatment and a bath, but a conflicting statement is not necessarily a sign of insanity. He therefore had a recollection of his movements during this period. His reference to the loss of some money at Mulki and his enquiries of P. W. 14 what had become of it doubtless refers to the affair in the road to which this witness spoke and the inference is sought to be drawn that his mind is a blank in respect of that incident. Whilst this incident may have occurred, one is dependent upon the accused's own statement that he has no recollection of it, the suggestion being that this freak of memory is similar to his want of recollection of the occurrence in the room where his wife was killed. If he was suffering from unsoundness of mind, it is unlikely it would have been manifest only during the period of four days and terminated immediately after the attack upon his wife, when, for a short time, the suggestion is that he became a homicidal maniac.

Even accepting the whole of the evidence of P. Ws. 1, 14 and D. W. 1 of whom the first

two witnesses described the conduct of the appellant as not quite normal, it shows he was strange and eccentric, he was under a delusion that a brother or cousin had given him drugs and that krutrima had been done to him, and putting it at the highest, was acting upon some insane impulse when he struck P. W. 14, but nevertheless, his expression of regret shows he must have known he was then doing what was wrong. P. W. 14 said that when he told him of his financial troubles, he talked like a sane man and it would seem with substantial accuracy. D. W. 1 said he spoke rationally when he said he was going to his relations at Kodappa house. His cognitive faculties were therefore not absent. When a man is worried with his affairs or distracted about money matters, as the appellant was, slight annoyance may rouse his anger which at other times would be left unperturbed and may cause him to lose his temper and do an act even of violence. Can it be said that such a person is insane to a degree the section requires? The appellant and the deceased were in the room for two hours prior to the occurrence. Their young children were with them but are too young to give evidence of what transpired. Whilst there is no apparent motive for the appellant's act, it is not without some significance that the door was bolted from inside the room at the time and although there is no evidence who secured the door the attack was made at a time when entry into the room was obstructed and prevented. This factor is relevant also when considering the appellant's knowledge. The absence of motive and the violence used to cause the death of another alone are not sufficient to establish that the assailant was insane at the time : *see* 16 Pat 333[1] and the cases cited in the judgment.

The last two matters requiring consideration are that the appellant appeared dazed and offered no resistance when he was secured after the occurrence. It is likely that he would be dazed when he realized what he had done and as five men broke into the room, in such circumstances a man who is not out of his senses would appreciate the futility of offering resistance. If the appellant had exhibited violence to, and fought with, these men, such conduct might well reflect a disordered mind. If an inference is to be drawn from his behaviour at this time, it is that he appreciated what he had done and knew that resistance was useless.

Upon consideration of all the evidence, facts and circumstances, including the absence of an apparent motive and the appellant's conduct both before and after the occurrence, it is not established that he did not understand the nature and quality of his act. Although his behaviour may have been unusual and strange, he was not suffering from unsoundness of mind so as to be incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law when he put his wife to death. The defence under S. 84, Penal Code, should therefore fail.

The appellant inflicted grievous injuries upon his wife with a wooden plank which was, by the way in which it was used, a dangerous weapon. The persistence of the attack evidenced by the number of injuries and the grievous nature of at least two of them show that when he was beating his wife he intended to kill her. Therefore the offence which he committed is murder. The absence of an apparent motive is material when the question of sentence is considered. The offence which the appellant committed was not premeditated in any way and must have been the result of impulse and temper. In these circumstances, I consider that although the assault was a violent one, the proper sentence is one of transportation for life. I would therefore affirm the conviction but reduce the sentence.

Patanjali Sastri J. — I regret I am unable to agree with my learned brother in the conclusion he has arrived at. I would accept the appellant's plea of insanity and set aside his conviction. The facts of the case have been fully stated in the judgment of my learned brother which I have had the advantage of reading and it is unnecessary to recapitulate them here. I would content myself with briefly indicating the grounds of my decision. The appellant's plea is based upon S. 84, I. P. C., and the onus of establishing it is on the appellant : *see* S. 105, Illustration (a), Evidence Act. The question for determination therefore is whether the appellant has succeeded in proving that when he killed his wife, he was incapable, by reason of unsoundness of mind, of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It may be observed at once that the appellant was not placed under any medical observation soon after the occurrence and we have thus no expert medical evidence

1. ('37) 24 A I R 1937 Pat 368: 170 I C 74: 16 Pat 333 : 18 P L T 294, Emperor v. Gedka Goala.

relating to the cognitive faculties of his mind during the period immediately following the occurrence. There is, however, sufficient evidence, in my opinion, to establish the appellant's plea of insanity.

In the first place, there is such a complete lack of apparent motive and the act of killing was done with such needless fury and violence that it is difficult to regard it as the act of a person in the unimpaired possession of his cognitive faculties, especially as the deceased was the appellant's wife and it is abundantly proved by the prosecution evidence itself that they were living on quite affectionate terms. Some attempt was no doubt made by the prosecution to suggest a motive of a sort, namely that the appellant had previously taken and sold the jewels of the deceased for his own purposes and when he asked her on the morning of the day of occurrence to give him Rs. 25, the latter replied that if he returned what he took from her previously, meaning the jewels, she would pay the sum required. This is said to have so enraged the appellant that he killed her in a fury. P. Ws. 2, 3 and 5 speak to this incident in the morning but the story is very thin and the witnesses themselves admit that even after the appellant took away the jewels of the deceased, they were living on very affectionate terms. P. W. 2 the grandaunt of the deceased said :

> Yes, the accused was showing great affection to her. Kaveri never complained to me or to my husband about the accused. They were loving each other very much. Even about his having taken away her jewels, she never complained to me or to any of us. The accused was also loving his children very much.

P. W. 5, the brother of the deceased, said :

> Kaveri did complain to me about the accused having sold away her jewels and having himself utilized the proceeds. 'Yes, in spite of that both husband and wife were loving each other. Up till that Wednesday I have not known of any instance of the accused having beaten or ill-treated Kaveri on any other occasion.

This evidence clearly shows that there was no ill-feeling or misunderstanding due to the appellant having sold away his wife's jewels and it could not have possibly served as a motive prompting the perpetration of the deed. Then as to the appellant having asked his wife for Rs. 25, on the morning of the day of the occurrence, it is difficult to accept the evidence as it was admitted by P. W. 5 that the deceased had no money at the time and that the appellant also knew that she had no money, and, in any case, it has been elicited from P. W. 2 that the appellant did not show any signs of having got irritated by his wife's alleged answer to his demand for money. The attempt, therefore, on the part of the prosecution to make out that the appellant's act of killing his wife was prompted by a rational motive must be held to have completely failed and indeed, the learned Public Prosecutor made no such attempt before us.

We have thus the spectacle of a loving husband and an affectionate father who had never been known to have beaten or ill-treated his wife on any previous occasion suddenly killing her by battering her head and body with a sitting plank inflicting as many as twenty wounds and bruises. The post mortem certificate (Ex. K) describing the injuries shows that the appellant must have been seized with a frenzy of violence which led him to deal blow after blow indiscriminately all over the body, and the doctor (P. W. 1) who conducted the autopsy gave it as his deliberate opinion that from the nature and number of the injuries which he had examined, there must have been either some deep-seated motive or the man must have been insane. Comment was made that this was a mere matter of opinion. I did not however understand the Public Prosecutor to argue that it is inadmissible in evidence. In (1843) 10 Cl & F 200[2] the learned Judges who were consulted by the House of Lords expressed the view that a medical man who had been present in Court and heard the evidence might be asked as a matter of science, whether the facts, assuming them to be true, showed a state of mind incapable of distinguishing between right and wrong. If so, I do not see why the opinion of P. W. 1, who was a medical man and had himself seen the injuries on the body of the deceased, should be rejected as inadmissible. Even apart from this opinion of P. W. 1, I consider that the nature and circumstances of the appellant's act justify the inference that it must have been committed under an insane impulse when he was incapable of understanding what he was doing. This inference is supported by the evidence in the case relating to the abnormal behaviour of the appellant spoken to by P. Ws. 1 and 14 during the two days immediately preceding the occurrence. P. W. 1 said that one or two days before the death of the deceased, he saw the appellant at Mulki "behaving like a mad man." He deposed :

2. (1843) 10 Cl & F 200 : 59 R R 85, M'Naghten's case.

I saw this accused prostrating before a passenger (in the bus) and talking incoherently to him. His behaviour that day was not quite normal. He was excited. I could not make out what he was saying to the passenger . . . . I told him (P. W. 14) about this incident—the accused behaving like a mad man.

In re-examination he added:

The accused's prostrating to the passenger was on the road. He did not lie flat on the ground. He simply stooped and bent his head and touched the feet of the passenger so many times. He said 'You are my saviour and so on' . . . He would say some words, now and then, touch the feet of the passenger and then keep quiet and then he would say some words. The words that I caught now and then, while he talked, were incoherent and they made me understand that he was not in his senses.

It is true that this witness did not refer to this incident when he was examined before the committing Magistrate. But it must be remembered that he was not cross-examined on behalf of the appellant in that Court and though he might have voluntarily placed the information that he possessed before the Magistrate, no inference against his veracity could, in my opinion, be drawn from his omission to do so. It might well be that he thought that it is none of his business to bring it to the notice of the Court. It might also be that he did not want to run the risk of his statement being discounted or disbelieved as something volunteered on account of his supposed interest in the appellant. The learned Public Prosecutor stated quite fairly before us that he would not question the veracity of this witness on the ground that he failed to refer to this incident when he gave evidence before the committing Magistrate and argued only that taking his evidence to be true, it was not sufficient to support a plea under S. 84, Penal Code. P. W. 14 also gave evidence as to the accused's state of mind during the same period, i. e. the two days prior to the occurrence. He is a resident of Mulki and he said that whenever the appellant came there, he used to take his food in an hotel but stay in the witness's house during the nights. This witness was examined for the prosecution to show the financial condition of the appellant at about the time of the occurrence. In cross-examination, however, certain important incidents throwing light on the appellant's state of mind have been elicited. The witness said that on the night of the 26th, when the appellant came to his house, the appellant was talking incoherently and even talked nonsense. He expressed some fear and was saying that he was going to die. He said that "Thamma" (younger brother or cousin) had given him some medicine and after that he had been keeping ill and was feeling a strange sensation in his head. On 27th November the witness saw the appellant acting and behaving like a mad man on the road in Mulki. Some one told the witness that the man who had slept in his house on the previous night was behaving like a mad man on the road, whereupon the witness went and saw a large crowd round the appellant on the road where he noticed rupees lying scattered. Some of the coins had been picked up by a Konkani and the witness picked up two which had been left on the road and took the appellant to his house. The witness also said that on hearing his voice, the appellant sat down on the road.

After the appellant was taken to the house, at about 8-30 in the night, he suddenly got up and gave the witness a blow when the latter was talking to certain other persons in the room. After the appellant gave the blow, he attempted to run and the witness and another caught hold of him and brought him back to the house. When asked why he beat the witness, the appellant did not talk at all for an hour; then he wept like a child and said that he was sorry, explaining that he beat the witness as the latter "appeared frightful" to look at. Later, in the course of the night, the appellant ran down from the upper storey saying that he would jump into a well. The next morning, however, the appellant was all right and left the house of the witness saying that he would go to his place. The witness accompanied him to the bus station and bought him a ticket to Kinmigowli where the appellant wanted to go. Finding one Deju Shetti also going to Kinmigowli, the witness asked him to take the appellant to one Shridhara Shetti there and to request the latter to arrange for two men to escort the appellant to this place. In view of these statements of the witness the prosecution obtained permission to cross-examine him and all that was elicited in such cross-examination to shake his credit was that he did not refer to these incidents when he was examined before the committing Magistrate. He explained the omission by saying that the prosecuting inspector in that Court did not ask him what all talks passed between him and the appellant but asked him only to say what the appellant told him about his financial difficulties and to answer only questions that were put to him. The witness denied that the appellant was his particular friend.

He added that only occasionally the appellant would go off his head and would think and think and talk incoherently, but most of the time during his stay on that occasion, the appellant was all right. As in the case of P. W. 1, the learned Public Prosecutor said that he was not prepared to impeach the testimony of this witness on the ground of his failure to refer to those incidents before the committing Magistrate but only urged that it did not assist the appellant any more than the evidence of P. W. 1 to bring himself within the exemption under S. 84, Penal Code.

The learned Public Prosecutor contended, placing reliance upon 16 Pat 333,[1] that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption under S. 84 and that neither the apparent lack of motive nor the particulars of the appellant's behaviour as described by P. Ws. 1 and 14 on the two days immediately preceding the occurrence are sufficient to bring the case within that section. It is no doubt well settled that unless the unsoundness of mind pleaded is such as to render the accused incapable of understanding the nature of the act with which he is charged or that what he was doing was wrong or contrary to law, he is not excused from criminal responsibility. It is also true to say that a mere lack of apparent motive for the deed does not necessarily or always lead to an inference of intellectual aberration or insanity, but a total lack of an apparent motive may in some cases taken along with other facts legitimately give rise to an inference that the act was done under an insane impulse: *see* 49 M L J 598.[3] Similarly, it is true to say, as was said by the learned Judges in the case referred to above, that a crime is not excused by its own atrocity. This indeed is a truism. But can it be said that the nature of the act or the mode of perpetrating it can under no circumstances be taken into account in considering a plea of insanity? It may be that as a rule of prudence, Courts will be slow to infer from such material that the person committing the act was not conscious of its criminality. But I can see no warrant for laying down, as a rule of evidence that one must look outside the act itself for the evidence as to how much the accused knew about it. The truth is that in dealing with all such cases no general rule can be applied and the only proper course to adopt is to decide each case on its own peculiar facts bearing in mind, of course, that the point for determination is whether the evidence before the Court is sufficient to establish that the person charged with the offence was not conscious of the nature of the act he was doing or that he was doing what was wrong or contrary to law. It will be seen that in the case referred to above, the evidence showed that at the time he committed the offence, the accused

> knew what killing was and meant to do it, knew what he had done already, knew who was his brother and his sister-in-law and where they lived and the way to that place.

In the present case, not only is there nothing to show that the appellant was aware of what he was doing but the extracts given above from the evidence of P. Ws. 1 and 14 as well as the conduct of the accused immediately after the occurrence would seem, to my mind, to show that the accused was incapable by reason of his mental aberration of knowing the nature of his act. His incoherent talk to a passenger in the bus which led P. W. 1 who was a medical man himself, to think that the appellant "was not in his senses," and his abnormal behaviour to repeatedly stooping and touching the feet of the passenger on a public road "so many times," hailing him as his saviour certainly show that his reason was affected at the time, and his conduct in throwing rupees on the road is a strong indication that he was not conscious of what he was doing. No doubt, P. W. 14 said that he did not see the appellant throwing rupees on the road but his evidence leaves no reasonable doubt that the act of scattering the rupees which had attracted a crowd round the appellant on the road was an act of the appellant. The learned Public Prosecutor urged that the impression formed by P. W. 1 about the mental condition of the appellant cannot be accepted as correct as it is not warranted by what the witness said he observed and heard with reference to the behaviour and utterances of the appellant. It was said that the appellant's conduct towards the passenger is not an uncommon way among villagers of expressing gratitude for help rendered and that the words which the witness said he heard from the appellant did not indicate that the appellant's talk was incoherent or that he was not in his senses. I cannot agree with this criticism. Surely it is a strange way, either for villagers or townsfolk to express gratitude by

3. ('25) 12 A I R 1925 Mad 1288: 91 I C 78: 27 Cr L J. 46: 49 M L J 598, Subbigadu v. Emperor.

stooping and touching the feet of a helper "so many times" on a public road with intervals of silence; and as for incoherent talk the witness does not say that the words he was able to quote from his recollection three months later were all the words he heard the appellant utter on the occasion of such a casual incident. The impression which the witness says definitely he formed from the conduct and utterances of the appellant that the latter was "behaving like a mad man" and "was not in his senses" goes a long way, in my judgment, to support the appellant's plea of insanity.

The learned Public Prosecutor also laid stress on the statement of P. W. 14 that the appellant attempted to run after beating him and later expressed regret, as indicating the appellant's consciousness that what he did was wrong. But it is significant that when the appellant was asked why he beat the witness, he did not give any reply at all for an hour and then wept like a child and expressed regret saying that he struck the witness because he was frightful to look at. The attempt to run away might have been therefore due to the "frightful appearance" of P. W. 14 in the eyes of the appellant, and the expression of regret which followed only after an hour of dazed silence in spite of questioning, is more consistent with the absence of cognitive faculties at the time when he struck the blow than with possession of such faculties.

Turning next to the appellant's conduct on the day of the occurrence, he said in the course of his examination by the learned Sessions Judge that after his wife roused him at about noon when he was sleeping and served him food and questioned him about some stolen jewels, his mind became a perfect blank and when he became aware of his surroundings in the night he found himself placed in the yard, his hands and legs tied, with people crowding round him and talking. The appellant also stated that he did not know if the door of the room in which the deceased was killed was bolted from inside or not, or if the door was forced open or not, and that he was not aware whether Bogga Shetty (P. W. 7) and others caught hold of him, tied his hands and feet and kept him in the yard. This statement of the appellant receives some support from the admission of several prosecution witnesses in cross-examination that when the appellant came out of the room and was tied after the occurrence, he did not offer any resistance. P. W. 6 said :

> When the accused came out after I forced open the door, he did not try to run away. He quietly submitted when we tied him and did not offer resistance. I did not ask the accused why he beat his wife.

P. W. 10 said :

> When we caught and tied the accused after he came out after the door was broken open, he did not offer resistance. He made no attempt to escape from our hold and to run away. We ourselves tied him to avoid his escaping and running away. We tied him up, because we were afraid that he might beat somebody else.

P. W. 7 no doubt spoke to some resistance on the part of the appellant at the time but in the face of the clear admissions of P. W. 6 and P. W. 10 in their cross-examination, it must be taken that the appellant offered no resistance when his hands and feet were tied and he was taken and placed in the yard of the house where he remained until the Sub-Inspector of Police came and arrested him in the afternoon of the next day. It is no doubt true that there were so many persons present when the appellant came out of the room and his attempt to resist would have been ineffectual and though it is possible that the non-resistance might be due to the realization of this fact, I think it is more probable that it was due to a blank mind, for, it would be a natural instinct of a sane person in the situation of the appellant to try to escape without pausing to think whether such an attempt would be effectual or otherwise. And it is somewhat remarkable that if the appellant was quite all right, as the prosecution witnesses would have the Court believe, that none of the persons who came on the scene ever attempted to question him regarding his apparently unaccountable conduct in killing his wife. Even the brother of the deceased (P. W. 5) did not ask him the reason why he beat his wife to death. He said :

> It struck me as strange that the accused should have beaten and killed her, knowing that he and his wife were affectionate before that. Yet, I did not ask the accused. What I am to ask, after he has killed her ?

None of the witnesses said that he asked the appellant why he committed the deed. This somewhat strange conduct lends countenance to the suggestion made for the defence that the prosecution witnesses were aware at that time that the appellant did the act when he was not in his senses and that they tied him hand and foot lest he should inflict injury on others, though they denied this at their examination. The learned Public Prosecutor drew attention to the circumstance that the appellant had bolted the door of the room before committing the

crime and argued that this was an act of preparation showing that the appellant was conscious of the criminality of the act he was about to perpetrate. The argument would have force if there was clear evidence to show that the appellant bolted the door from inside just prior to the act by way of preparation for it. All that the evidence discloses, however, is that the appellant and the deceased had been in the room for about two hours before the occurrence and that the room was found bolted from inside when other persons came to the spot on hearing the cries of the deceased. It may well be that the deceased bolted the door for privacy or that the appellant did so for the same reason before the idea of killing his wife ever occurred to him. This circumstance cannot therefore be relied upon as definitely pointing to the appellant's knowledge of the nature of the act.

Lastly, the Public Prosecutor referred to the evidence of P. W. 15, the Sub-Inspector, who said the appellant appeared quite normal when he was examined as a witness in the course of investigation of a theft case about six days prior to the occurrence, and also from the time when the witness arrived at the scene of occurrence till the time he got the appellant remanded, and argued that the appellant's case of mental aberration only during the three or four days about the time of the occurrence was highly improbable. I am unable to see any force in this contention. Temporary fits of insanity which come all of a sudden and disappear after a short while are by no means uncommon. Indeed, the evidence of P. Ws. 1 and 14 shows that even during this period the appellant had perfectly lucid intervals. The evidence of P. W. 15 and of some of the other prosecution witnesses who say that he appeared all right when they saw him either before or after the occurrence is not therefore necessarily inconsistent with the truth of the appellant's case. On the whole I am of opinion that the appellant must be held to have killed the deceased under an insane impulse without understanding the nature of his act, and must therefore be acquitted.

[On difference of opinion between Gentle and Patanjali Sastri JJ. the case was posted before King J.]

King J. — The accused in this case, one Sankappa Shetty, has been convicted by the learned Sessions Judge of South Kanara for the murder of his wife, Kaveri, on 29th November last and has been sentenced to death. He is about 35, she was about 24 years of age. They had been married for eight years and had four children of which the youngest was about 18 months old. That child had been born in the house of Kaveri's family in Kuthethur and since its birth the husband and wife had not been living together. The evidence however is that this fact was not due to any estrangement, but to financial reasons, and that the accused frequently came and stayed with his wife for some days. It was on such a visit that accused last went to Kuthethur on 28th November. On the early afternoon of the 29th, accused and his wife were alone in a locked room together. Cries were heard coming from the room and when the witnesses broke open the door they found Kaveri still alive, and her body covered with injuries, found at the post mortem to be twenty in number, ten of them being on the head. Accused was seized and kept tied up until in due course report was made to the village Munsif and the police arrived. Kaveri died within a very short time. The accused did not deny at his trial that he was alone with his wife at the time when she was killed but put forward the plea of insanity and stated that he had no recollection whatever of what happened. The learned Sessions Judge has rejected this plea. Whether he was right or wrong in this rejection is the only point at issue before me.

The burden of proving insanity is cast upon the accused by S. 105, Evidence Act, and under S. 84, Penal Code, he must prove that at the time of the killing he was by reason of unsoundness of mind, incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law. His case is sought to be made out in the following way: (i) by a consideration of the circumstances attending upon the actual offence; (ii) by medical evidence; (iii) by the evidence of P. W. 14; (iv) by the evidence of D. W. 1; and I will deal with each of these in turn. In regard to the first point stress is laid upon the lack of motive or of adequate motive, the exceptionally brutal nature of the attack, and upon the fact that upon discovery the accused made no serious attempt to escape. That there was lack of adequate motive is clear, but everyone who has to do with the administration of criminal justice in this country is unfortunately aware that the commission of crimes of violence, including murder, as the result of the most trivial quarrels is all too common. It is also clear that accused might well have achieved his purpose with a lesser degree of violence, but

here again experience amply proves that once an offender has lost control of his temper he gives way unrestrainedly to his passion, without any thought for what may or may not be precisely necessary to carry out his intention. That the accused made no serious attempt to escape on discovery was no doubt due to the fact that five men were there to seize him and the weapon he had used was no knife, but only a wooden footstool. It is further argued for the accused that he appeared to be dazed, but this, I think, is natural enough upon any view of accused's state of mind when he committed the act. No doubt there is nothing positive in the evidence relating to accused's conduct to prove conclusively that he was able to think of his position and make rational decisions —but this evidence standing alone, is equally inconclusive in favour of accused's plea.

The medical evidence was given by P. W. 1, the officer in charge of the Local Fund hospital at Mulki. So far as it deals with insanity as a branch of medical jurisprudence it is of no value whatever. He quotes no text books but gives it as his opinion that a husband who inflicts so many injuries without a deep-seated motive must be insane—and he says this without any reference to the knowledge referred to in S. 84. He however also describes an incident which occurred on 26th November when he saw the accused prostrating himself before a man and talking incoherently to him. I do not think P. W. 1's evidence—which may be accepted as true—is of any assistance to the accused. Whether talk is incoherent or not is a matter of opinion. P. W. 1 heard only snatches of the conversation and the statements which he heard are by no means incoherent. These statements and accused's action are quite consistent with the theory that accused was deeply grateful to another man for help rendered, and was expressing his thanks to him. There is no evidence at all to show that the man was a stranger, or the help rendered a delusion.

P. W. 14 is a landholder of Mulki. His evidence is that accused came to him on the evening of 26th November and stayed until the morning of the 28th. He says that during this time the accused frequently talked incoherently; once accused a relation of having given him medicine which made him ill; once gave him a blow and fell to weeping and did not reply for an hour when asked why he had done so, and said finally it was because the witness looked frightful. He also said he would jump into a well, and once on the 27th took out Rs. 17 and scattered them on the roadside. When he left, the witness bought a bus ticket for him, and gave him in charge to one Deju Shetti with instructions to see that he got safely home. Now this evidence, if believed, certainly reveals some measure of eccentric conduct on the part of the accused but the learned Sessions Judge does not believe it. He points out, that according to the witness himself accused was able to speak quite rationally about his cultivation and his financial difficulties and that the witness took no steps to inform others about or protect himself against possible further violence from the accused. For these and for other reasons which I shall mention later, I agree that the learned Sessions Judge was right in rejecting this evidence however respectable the social position of the witness may be.

D. W. 1 is a cultivator of Mennakettu, and the president of the Panchayat Court in that village. His evidence is that he arranged on what must have been 28th November to send accused to his wife's house. He was told by one Degu Bandari that accused was unwell. He called two men Isthu and Babu, and told them to take accused to his wife's house and to tell its inmates that he was sick. Accused told him that he was the victim of witchcraft, but the witness paid very little attention to his remark, and was unable to say positively whether accused's talk in general was coherent or not. Neither Degu Bandari nor Isthu nor Babu was called as a witness to support him. In these circumstances it is not surprising that the learned Sessions Judge thinks his evidence of no importance.

I may now state that, apart from the lack of corroboration to which reference has already been specifically made I am unable to believe P. W. 14 or D. W. 1 in so far as they seek to establish insanity because if their evidence were true, further corroboration should inevitably have been available. If we take the evidence for the accused at its best, we have in this case proof of delusions, and of some degree of eccentric conduct extending over the extremely short period of three days (26th to 28th November). There is no proof of any form of insanity or eccentricity before 26th November; no proof of any accident or shock or any other event which might have brought on insanity; and no indication whatever of anything abnormal during the police investigation, the period of accused's detention in jail, the preliminary inquiry, or the trial. I

do not wish to be too dogmatic on the very difficult subject of insanity, but I feel convinced that it is impossible for manifestations of an insanity so serious as to result in the killing of a wife, to be confined to these comparatively trivial incidents over a period of only three days—and for the witnesses to such incidents to be confined to comparative strangers. And even on 28th and 29th November themselves it is to be noted, we get no indications at all (apart, of course from the murder) of eccentric conduct on the part of the accused as it appeared to his wife and her relations. The Kuthethur witnesses are unanimous on this point. It is argued that they are so determined to see that accused suffers the penalty for his crime that they are wilfully suppressing evidence which would help him to establish his plea. I am unable to take this view of their evidence and must point out on the contrary that all are anxious to emphasize that accused and his wife were on good terms.

For the reasons which I have given I am thus of opinion that the learned Sessions Judge was justified in not accepting the evidence of P. W. 14 and D. W. 1. Even if it were accepted as true, it would still in my opinion be insufficient to prove accused's plea. Delusions about the witchcraft and poisonous medicine may have been mentioned—there is nothing whatever to connect these with accused's wife. Accused himself does not say who it is who has practised witchcraft upon him. Surely if insanity be the cause of this crime it is explicable only on the hypothesis that accused was actuated by homicidal mania, or killed his wife under the delusion that she was not his wife at all, or that he was bound to kill her for some reason or other. Of homicidal mania there is really no trace in the evidence. The 'blow' to P. W. 14, if given, must have been a trivial one. Of any delusion concerning the identity or actions of accused's wife, there is clearly no trace. I find accordingly that the accused has been rightly convicted for murder. I think however that this is a case which does not call for the extreme penalty of the law. There cannot have been any pre-meditation—and I feel sure that the accused must have received what he felt to be considerable provacation before he attacked his wife in the way he did. I accordingly in confirming the conviction commute the sentence into one of transportation for life.

C.R.K./G.N. *Sentence commuted.*

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PANDRANG ROW J.

In re Balam Pateyya and others — Appellants.

Criminal Appeal No. 265 of 1938, Decided on 20th January 1939, against order of Sessions Court, West Godavari Division, in C. C. No. 6 of 1938.

(a) Criminal trial—Numerous offences—Joint trial is illegal unless offences form part of same transaction — Joint trial, even if legal, in respect of very large number of counts deprecated—There should be separate trial in respect of every separate charge—Even if joint trial permitted by law, Judge can hold separate trials — Trial in respect of very large number of counts—Proper course to be adopted, stated.

Unless a number of offences are parts of the same transaction, there can be no joint trial according to law in respect of all the offences. A joint trial in respect of very large number of counts is very much to be deprecated even though the law may not prohibit it. Such a trial not only prejudices the accused but also works havoc in the minds of the jury and makes it very difficult if not impossible for them to express any rational opinion on the matters remitted to them for judgment. A joint trial even if legal should also be proper in the circumstances. The general rule is that there should be a separate trial in respect of every separate charge. It is the exceptional cases which contemplate joint trials in respect of a number of charges, and there is no rule of law which compels a Judge to hold a joint trial. Even where a joint trial is permitted by law, it is open to him to hold separate trials. The usual course to adopt in a case of very large number of counts is to ask the Public Prosecutor to select what he considers to be the best case from his point of view and to try that case first and leave the other charges to be tried if necessary later on after the result of the first trial is known. [P 341 C 1 ; P 342 C 1]

(b) Criminal P. C. (1898), S. 297 — Riot — Which party started doubtful — Judge must warn jury against acting on uncorroborated testimony of interested prosecution witnesses and to treat such evidence with caution — Failure to do so amounts to misdirection.

Where the parties have been at bitter enmity and so far as the question of motive is concerned, either of the parties might have started the riot, it is obviously incumbent on the Judge to warn the jury not once, but more than once wherever the evidence was very scanty and lacked corroboration or was given by interested witnesses, or where corroboration was available, to treat the uncorroborated evidence offered on behalf of the Crown with caution and to accept it only after a careful examination thereof. Failure to so warn the jury amounts to misdirection. [P 343 C 1, 2]

(c) Criminal P. C. (1898), S. 297 — Jury trial —Vandalism and theft or dacoity are different—Failure to point out difference amounts to misdirection.

Vandalism is one thing and dacoity and theft are quite different. Consequently, in a jury trial the failure of the Judge to point out the difference between vandalism and dacoity or theft to the jury when asking them to give their verdict on counts relating to dacoity and theft amounts to misdirection. [P 343 C 2]

K. S. Jayarama Iyer and G. Gopalaswami — for Appellants.

K. Venkataraghavachariar for Public Prosecutor — for the Crown.

Judgment. — This is an appeal from the judgment of the Sessions Judge of West Godavari dated 7th May 1938 in S. C. No. 6 of 1938 on his file. The case related to certain occurrences which took place in the village of Mukkumala on 15th August 1937. The trial in the Sessions Court began only on 21st March 1938 and went on for nearly a month and a half. There were 24 accused and the number of witnesses examined for the prosecution were 51 and a fairly large number of exhibits were filed on both sides. To add to the complexity and the difficulty which the case must have presented to the jury who in respect of some of the counts acted as assessors and also to the trial Judge, the charges against the accused were on no less than 66 counts and the occurrences related to about fifteen different places, the first occurrence being at the hamlet of the Edigas in the village known as the Edigagudem, the next being the gingelly fields near it, the third occurrence being between the washerman's hut and Edigagudam and the remaining occurrences having taken place in various houses belonging to the Kammas in the village, the houses being twelve in number. The first count was in respect of rioting with deadly weapons against all the twenty-four accused; counts 2 to 7 related to offences of causing grievous hurt with dangerous weapons, i. e., offences under S. 326, Penal Code, some of the counts being against a few of the accused and the others being against the rest constructively by the operation of S. 149, Penal Code; counts 8 to 29 related to hurt with a dangerous weapon, an offence under S. 324, Penal Code, some of the counts being under that section alone against some of the accused and the others being against the remaining accused constructively by the operation of S. 149, Penal Code; counts 30 to 44 were in respect of the offence of mischief punishable under S. 440, Penal Code, against all the accused in the various houses in which mischief is said to have been committed. So far as this offence is concerned, it must be mentioned that there was no charge under S. 149, Penal Code. Counts 45 to 56 were counts relating to the offence of housebreaking punishable under S. 455, Penal Code, against all the accused in the respective houses referred to in the counts; counts 57 to 62 related to the offences of dacoity punishable under S. 398, Penal Code, against all the accused in respect of the various houses referred to in the counts; the remaining four counts 63 to 66 related to the offence of theft in a building against all the accused in the respective houses referred to in the counts. Counts 45 to 66 were tried with the aid of a jury and the jurymen acted as assessors in respect of the other charges which were triable with the aid of assessors.

The entire trial was held jointly and there was no separate trial in respect of any counts. In the result thirteen out of the twenty four accused were convicted on various counts—six Edigas and seven Malas, and these are the appellants in this appeal. Most of the appellants have been convicted under a very large number of counts ranging from 13 to 24. The sentences have however been ordered to run concurrently in all cases and the longest sentence was only three years on the ground as stated in the judgment that though the offences were grave, the rioters had behaved with moderation and they had been on remand for several months and also because most of the offences were practically parts of one transaction. This observation of the learned Judge that most of the offences were practically parts of one transaction shows that the learned Judge himself was not quite sure that all the offences were actually parts of the same transaction. It is obvious that unless all the offences were parts of the same transaction, there could have been no joint trial held according to law in respect of all the offences. This point will have to be considered at greater length later on after giving a brief description of the facts of the case.

It is not disputed that there had been trouble between the Kamma community on the one hand and the Ediga and Mala communities on the other in the village for some time before the occurrence. The trouble was mainly due to a dispute about wages, the Kammas being generally speaking, employers, and the Edigas and the Malas being generally labourers employed by the Kammas. A fairly accurate account of the state of affairs about a week or so before the occurrence is to be found in the special report sent by the Sub-Inspector to the joint Magistrate (EX. B) on 8th August 1937. As observed by him, the fight by the labourers against their employers had already begun and there were complaints made to the authorities by both parties. The Sub-Inspector warned both parties and asked for instructions. The Sub-divisional Magistrate appears to have been of the opinion that

the state of affairs did not warrant any action on his part. To this effect he made an endorsement on the report on 13th August 1937. On the same date the Inspector of Police appears to have sent a report to the joint Magistrate (EX. E-1) praying for action to be taken under S. 107, Criminal P. C., against ten members each of the two parties on the following grounds :

> The strike is formed about one and a half months ago and is getting from bad to worse day by day. The Sub-Inspector, Tanuku, enquired into this and tried his best to arrange a compromise but in vain. The Kammas are rich and obstinate. The Edigas are poor but desperate. Their feelings are highly strained and they are trying to avenge each other. Even in my enquiry both parties abused each other and the situation is serious. Unless both parties are bound over they are determined to commit a breach of the peace.

Unfortunately, for reasons which are not discoverable on the record, the joint Magistrate does not appear to have taken any action in the matter as requested by the Inspector of Police, and two days after the date of the report the trouble came to a head, and there was undoubtedly a serious breach of the peace in the village owing to the clash between the warring communities in the village. There can be no doubt that the beginning of the clash was provoked by the unwarranted action of some of the Kamma community in going to the hamlet of the Edigas and searching the house of one of the Edigas on the pretext that certain hay had been stolen and was secreted in the house. No attempt has been made before me on behalf of the Crown to justify this action on the part of the village Munsif and there is no doubt that it was this raid into the house of one of the Edigas by the village Munsif and some of the Kammas that was the immediate cause of the clash. The clash was thus sudden and was not the result of any previously concerted action on the part of the appellants, and it is impossible to say that the events that took place at Edigagudam and even the events that took place in the gingelly fields immediately afterwards in which two or three people were beaten are parts of the same transaction as the events that followed after a large number of Edigas and Malas had collected subsequent to these events and made a rush to the village in which the Kamma houses were situated.

There was in my opinion no justification for regarding all the events that took place on that day in the village as parts of the same transaction, and it was not right to try the cases in respect of all these occurrences in one trial. The danger of the joint trial in this case is indeed apparent on the most cursory examination of the judgment itself. The large number of the counts on which the trial was held led to a lengthy trial spread over nearly a month and a half and must have necessarily confused the minds of the jury the members of which also acted as assessors in respect of some of the counts. The result of such confusion is apparent, for it is clear from a mere perusal of the verdict of the jury on some counts and the opinions of the jurymen as assessors in respect of the connected counts arising out of the same occurrences, that they are absolutely inconsistent. To put it in other words, even where the occurrence is one and the same in the sense that it took place in the same house and the evidence regarding the occurrence was the same but different offences were committed, for instance, hurt, mischief and housebreaking and dacoity, the members of the jury gave a verdict which is inconsistent with their opinions as assessors in respect of the counts on which the trial was with the aid of assessors. This is absolutely inexplicable except on the supposition that their minds were so confused by reason of the length of the trial, the volume of the evidence and, if one may say so without meaning any disrespect to the learned Sessions Judge, the very lengthy and not very clear charge which he delivered to the jury. The summing up appears to have lasted from 11 in the forenoon till about 7 in the evening, an ordeal which most people would find it difficult to stand without some untoward reaction in their minds.

It is very difficult in a case where the trial has lasted for more than a month and a number of witnesses were examined, for the members of the jury to carry in their minds any clear idea either of the demeanour of the witnesses or of the particular charges to which the evidence of a particular witness relates and this inability to remember is not removed by the long charge, a charge so long that before one got to the end of it, one must necessarily have forgotten something of the beginning or the middle. The difficulty was increased by reason of the fact that the ordinary precaution of stating to the jury the evidence as against each of the accused was not followed in this case. The evidence was undoubtedly marshalled and ably marshalled, by the learned Judge as regards each particular count or connected sets of counts, but

unfortunately no attempt was made either at the beginning or at the end to indicate to the jury what was the evidence against each particular accused and in respect of each particular count. It is not known whether the members of the jury were furnished with a copy of the counts or whether a translation was furnished to them, and one can very well imagine the state in which their minds were at the end of the charge, and the clearest indication of that state is furnished by the inconsistency between the verdict of the jury and the opinions of the same gentlemen as assessors in respect of the same occurrence backed by the same evidence.

A joint trial in respect of very large number of counts is very much to be deprecated even though the law may not prohibit it. It is one thing to say that a joint trial was legal but quite another to say that it was proper in the circumstances. No doubt, joint trials would be legal in certain circumstances, but the general rule is that there should be a separate trial in respect of every separate charge. It is the exceptional cases which contemplate joint trials in respect of a number of charges, and there is no rule of law which compels a Judge to hold a joint trial. Even where a joint trial is permitted by law, it is open to him, and in a case like this it would have been expedient also to have held separate trials. The usual course adopted in such circumstances is for the Public Prosecutor to be asked to select what he considers to be the best case from his point of view and to try that case first and leave the other charges to be tried if necessary later on after the result of the first trial is known. This practice is in accordance with common sense and does justice to the accused and does not result in the confusion that we find in the present case as a result of the joint trial held in respect of so many as 66 counts.

After going through the charge to the jury, I am of opinion that it has not been fair to the accused and that it contains several misdirections. There has also been an improper exclusion of relevant evidence which was attempted to be let in on behalf of the accused. The learned Judge did not lay sufficient stress on the fact that all the witnesses for the prosecution were interested, when he was charging the jury as to the evidence on particular counts. I wish to mention an instance or two as examples, as there are several such instances to be found in the charge. For instance, in dealing with counts 33, 47 and 60 in paras. 65 to 67 of the charge, the learned Judge first of all points out that the witnesses who speak to those counts are P. Ws. 18 and 47. Towards the end of para. 67 he points out that P. W. 47 does not speak with any personal knowledge as to what happened. It was thus clear that there was only the evidence of P. W. 18 in respect of these counts. He has pointed out at the same time that according to the evidence of P. W. 18 the events in the house were witnessed not only by himself but also by his wife, his daughter, his brother's wife and his brother's daughter who were in the house at the time of the occurrence. None of these have been examined. The witness also spoke to the commission of dacoity in his house, the dacoity consisting in the fact that a sum of Rs. 100 is said to have been demanded by the accused under threats and that actually he was beaten thereafter. Fortunately for the accused so far as the count of dacoity was concerned, the learned Public Prosecutor stated that the accused were entitled to the benefit of the doubt; otherwise I should not have been surprised if the jury had returned a verdict of guilty in respect of this count also.

The verdict of the jury was (by a majority of one) a verdict of guilty in respect of count 47 and in respect of count 33 they gave their opinions as assessors, as follows: four of them to the effect that none of the accused was guilty and one to the effect that accused 6 and 13 were guilty. This verdict and these opinions are, in my opinion, directly attributable to the failure on the part of the learned Judge to have warned the jury against acting on the uncorroborated testimony of an interested witness like P. W. 18, whose evidence about a part of the same occurrence namely the dacoity, was such that the Crown itself was prepared to advise that the accused were entitled to the benefit of the doubt. On the same evidence, it is impossible to justify the verdict of guilty by 3 to 2, while in respect of another part of the same occurrence backed by the same evidence the majority was 4 to 1 to the effect that none of the accused was guilty. It is impossible to my mind to account for these extraordinary aberrations, so to speak, of judicial opinion delivered by members of the jury in their dual capacity, except on the ground that they did not know what they were doing because of the length of the trial and the length of the charge and the complexity of the case occa-

sioned by the joint trial on a large number of counts. Such a trial not only prejudices the accused but also works havoc in the minds of the jury and makes it very difficult if not impossible for them to express any rational opinion on the matters remitted to them for judgment. On the other hand, instead of warning the jury in respect of the remaining counts namely 33 and 47—count 60 having been practically abandoned by the Crown—that it was not safe to convict in view of the interestedness of the witness and the absence of corroboration, the learned Judge thought it fit to dismiss the argument to this effect by the accused's counsel in the following words in para. 67 of his judgment :

> One of the arguments of accuseds' counsel was that in every case in which there was no corroboration, it would be safer for you to reject the testimony. Such a condemnation of uncorroborated testimony is not correct. There is no principle which debars you as judges of fact from relying upon such testimony. No particular quantum of proof is required to prove any fact. In order to hold any fact proved you require only such evidence as would satisfy a reasonable man that the fact is true.

While these observations cannot be said to be erroneous in law, they were undoubtedly not calculated to lead to a correct or just decision in a case of this kind. This was not a case in which these observations should have been made to the jury, which appear to have encouraged instead of discouraging them to accept the uncorroborated testimony of an interested person while the prosecution had given no reason for not examining a number of other witnesses who were available at least for the purpose of corroboration though they were equally interested. Similar observations can be made in regard to a number of other counts dealt with in the charge of the learned Judge. It is not as if any particular observation was not in strict accordance with law or with the evidence in the case, but throughout it appears that wrong guidance was given to the jury by the learned Judge ; where caution ought to have been imposed on the jury encouragement was given to them to accept evidence which was obviously to be treated with considerable caution. According to the learned Judge the parties were at bitter enmity and so far as the question of motive was concerned, either of the parties might have started the riot. When such was the position, it was obviously incumbent on the learned Judge to have warned the jury not once, but more than once wherever the evidence was very scanty and lacked corroboration, where corroboration was available, to treat the uncorroborated evidence offered on behalf of the Crown with caution and to accept it only after a careful examination thereof. In several places the learned Judge himself remarks that even as regards the material portions of the prosecution story the truth had not been placed before the Court by the prosecution. For instance, in para. 95 of his judgment, he says that he has no hesitation in discrediting the story related by the prosecution as regards theft of hay. He did not accept the broad case for the prosecution that there was an unlawful assembly of the Malas and Edigas from the very beginning whose common object was not only to beat the members of the Kamma community but also to invade their houses, break the doors and windows, cause hurt to the inmates and to commit theft, dacoity, etc. So far as the first part of the occurrence is concerned, he appears to have come to the conclusion in para. 95 of his judgment that there must have been a free fight between the Malas and Edigas on the one hand and the Kammas on the other in Edigagudam in the course of which both parties sustained injuries, and that it was only thereafter that the Edigas and Malas gathered in large numbers and marched into the village and committed several acts of vandalism. Vandalism is one thing and dacoity and theft are quite different, and the learned Judge failed to point out the difference between vandalism and dacoity or theft to the jury when he asked them to give their verdict on counts relating to dacoity and theft.

In several places in his judgment, it is very clear that a good portion of the prosecution evidence was disbelieved by the learned Judge. He concedes in para. 101 of his judgment that all the material prosecution witnesses are Kammas and that it was possible for the prosecution to obtain the testimony of disinterested witnesses belonging to Brahmin and Vysia communities in the village. He says that while this is a ground for scrutinizing the evidence with care, it is not proper to condemn the evidence as a whole. The charge delivered by the learned Judge does not however show that the jury were asked to scrutinize the evidence with care, and if there was any scrutiny, the result of the scrutiny by the jury and by the Judge shows that the scrutiny must have been exceedingly slipshod. Otherwise there would not have been the

numerous inconsistencies that are to be found between the opinions of the jury as jurymen and as assessors, and also between what the Judge stated in his judgment and the convictions recorded by him. As an instance of the latter, I might mention that while in para. 142 the learned Judge has recorded the opinion that there was no identification of any of the accused as regards count 43, he has actually convicted a number of accused under that count. He has moreover convicted various accused persons under Ss. 440 and 149, Penal Code, while as a matter of fact there was no charge under S. 149 in respect of any of the counts relating to S. 440, Penal Code. It would also appear that the judgment and the finding are inconsistent so far as count 42 is concerned.

I shall go on to indicate briefly the various other defects which are to be found in the charge. The learned Judge omitted to tell the jury that there was no mention of the commission of any house breaking or dacoity in the first report of the occurrence EX. F. He also omitted to mention to the jury that even in the charge sheet only one dacoity was mentioned whereas in the evidence no less than six dacoities were spoken to. The result of this is seen in the fact that in the case of two dacoities (counts 57 and 58) the jury returned a verdict of guilty by a majority. The inconsistencies between the verdict of the jury as a jury and the opinions of the members of the jury as assessors are to be seen in the following instance. On counts 57 and 58 by a majority of 3 to 2 the jury returned a verdict of guilty against accused 1 to 4, 7, 13, 14, 17 and 18. On the connected count 34, that is to say, the count relating to the occurrence in the same place regarding which the evidence is the same, the opinion of the assessors was in the case of two not guilty and in the case of two other assessors, that accused 1 to 3 and 13 were guilty and in the case of the remaining assessor that accused 1 to 3 were guilty. These opinions and the verdict are not reconcilable. In respect of these very counts also, the learned Judge omitted to direct the jury that the accused implicated by the witnesses were only accused 1 to 3, 13, 14 and 17. If this had been pointed out, it is not likely that the jury would have returned a verdict even by a majority against accused 4, 7 and 18 who were not implicated by the witness in the dacoity.

Then again in respect of count 45 which relates to house-breaking, the jury found by a majority of 3 to 2 that all the appellants were guilty, while in respect of the same incident dealt with in count 31 which relates to mischief three out of the five assessors expressed the opinion that none of the accused was guilty, the evidence being the same. In respect of the same count 45 the only eyewitness who speaks to it, namely P. W. 41, mentioned only accused 1, 3, 4, 14 to 16, but this was not specifically mentioned to the jury in the charge. The result was that accused 15 and 16 who were mentioned by the sole witness were acquitted, whereas, several others who were not mentioned, namely 2, 7, 13, 17 and 18, were found guilty by the jury. This again is an inconsistency which deprives, in my judgment, the verdict of the jury of any real value as a judicial verdict. It is impossible really to treat a verdict of this kind with any respect when the same gentlemen in their capacity as assessors on the same evidence have expressed absolutely different and inconsistent opinions. Verdicts of this kind were really not entitled to acceptance, and unless the learned Judge who tried the case was himself in the same boat so to speak, with the jury, it is impossible to account for his acceptance of such verdicts in the face of the opinions of the jurymen as assessors given at the same time. A mere comparison of the opinions with the verdicts would have indicated to him the necessity of expressing his disagreement with the verdict of the jury and making a reference to the High Court. The acceptance of the verdicts in these circumstances shows that there has been a disregard of the duty of the Judge to consider the verdicts carefully before he expresses his agreement with them or decides not to express his disagreement. Instances of this kind may be multiplied, and they are all found in the memorandum of appeal: *vide* particularly paras. 13, 14, 15 and 16 of the grounds of appeal. I may here mention that the learned Public Prosecutor has not attempted any explanation of these inconsistencies when the appeal was argued before me and indeed no explanation seems to be possible. The inconsistencies are so gross and so glaring that the only explanation would be though it would hardly be a satisfactory explanation that all those who were connected with the trial were so confused at the end of it that they did not know what they were doing. Such an explanation would certainly not be very useful from the point of view of the prosecution. I come next to the contention that relevant evidence was excluded

by the learned Judge during the trial. In the case of P. Ws. 23 and 24 there is specific proof that certain evidence was excluded : *see* pp. 96 and 100 of the printed record. P. W. 23 who speaks to the commission of various offences in his house in respect of which convictions have been recorded, was asked in cross examination

when you went and reported to the Sub-Inspector at 1 o'clock you did not mention the names of any of the culprits ?

This obviously relevant and important question was objected to and was actually disallowed by the learned Judge. It must be remembered in this connection that in his evidence in the case P. W. 23 had implicated a number of accused and the case for the defence was that as a matter of fact the witness had not mentioned any of these accused to the police when questioned immediately after the occurrence. It was certainly relevant and important to elicit the fact whether as a matter of fact the witness had mentioned the names of any of the culprits to the Sub-Inspector at 1 o'clock that is to say, almost immediately after the occurrence. There was in my opinion no justification for exclusion of evidence of this kind; the question was overruled and the evidence was excluded by the learned Judge. A somewhat similar question was put to P. W. 24, namely "Did you tell the Sub-Inspector that your brother paid Rs. 50 and your wife paid Rs. 15?" This was in connection with the allegation made in the evidence of the witness that these sums of money had been extorted from these people under threat of instant hurt. It is difficult to understand the reason for the objections to a question like this. Section 162, Criminal P. C., does not certainly stand in the way of such evidence being given. Apparently, by reason of the objection being sustained in reference to this question by the learned Judge, similar questions were not asked of the other witnesses for the prosecution. I may mention, however, in this connection that similar questions appear to have been asked of P. W. 27 and disallowed : *vide* p. 107 of the printed record. It is apparent, therefore, that there has been a serious exclusion of evidence which was perfectly relevant and which might have materially helped the defence in throwing doubt on the veracity of important prosecution witnesses.

I have said enough to show that the convictions of the appellants in this case cannot stand. There has been no proper trial; the trial that was held was not according to law; there was a wrongful exclusion of material evidence by wrongful disallowance of relevant and material questions which must have prejudiced the appellants' defence and there was throughout in the charge a failure to put points which were favourable to the accused before the jury. The judgment itself apart from the record of the case, clearly establishes the fact that in this case there has been no attempt to consider the case as against each of the accused, and the jury must have been considerably confused and misled by the defects in the charge. I am therefore of opinion that the appeal must be allowed. The convictions and the sentences on the appellants are hereby set aside and in view of the fact that the appellants have been in jail pending trial, some for six months or thereabouts and others for as long as ten months or so, it is in my opinion unnecessary to direct a retrial. Even otherwise I am of opinion after considering the evidence for myself that it is hopelessly lacking in quality and it is not likely that there would be a conviction if a retrial is held according to law. I therefore acquit the appellants and direct that the bail bonds executed by them be discharged.

C.R.K./G.N. *Appeal allowed.*

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* A. I. R. 1941 Madras 345

VARADACHARIAR AND ABDUR RAHMAN JJ.

Yellavajjhula Surayya

v.

Tummalapalli Mangayya and others.

Appeal No. 21 of 1935, Decided on 28th November 1938.

(a) Evidence Act (1872), S. 92 — S. 92 applies to parties to transaction and persons claiming under them — Widow obtaining reconveyance of property sold by husband — Question to be decided as to character in which widow acted — Her own assertion and conduct in connexion with transaction being evidence against persons claiming under her is admissible.

Section 92 applies only as between the parties to a transaction and those claiming under them respectively. Where the real question is, in what character the widow acted when she obtained a reconveyance of the properties sold by her husband, her own assertion and conduct in connexion with the transaction is certainly evidence against the persons who claim under her and therefore is admissible. [P 348 C 1]

(b) Hindu law—Widow—Purchase of property by widow with her own savings — Property is prima facie widow's absolute property—Purchase with aid of husband's estate — Property must be taken to form part of husband's estate — Widow blending funds of husband's estate and funds source of which not known and re-acquiring with such funds property which formed part of her husband's estate but was alienated by him —

Acquired property must be taken to form part of husband's estate.

No doubt where a widow purchases property with savings from her own income, such property is prima facie her absolute property. But where the purchase is made with the aid of the husband's estate, whether by sale of a portion thereof or by money raised on the security thereof, the reversioners are entitled to claim that the property thus purchased must be held to form part of the husband's estate. To the extent to which nothing is known as to the source of the purchase money the Court can only act upon inferences suggested by surrounding circumstances. Where the widow blends funds of several kinds, i. e., funds known to have come from the husband's estate and funds whose source is not known, and the blended fund is invested in re-acquiring the property which was undoubtedly part of the husband's estate but had been alienated by him the acquired property must be taken to be part of the husband's estate.

[P 348 C 1]

(c) Hindu law — Reversioner—Widow allowing her father to manage husband's estate cannot give rise to any claim on part of reversioner.

The fact that the widow allowed her father to remain in possession and manage a portion of her husband's estate, certainly cannot give rise to any claim on the part of the reversioner. [P 348 C 2]

(d) Hindu law — Widow — Compromise for settlement of disputes with brother whereby widow recognizing brother as entitled to part of husband's estate—Onus is on brother to prove compromise to be bona fide.

Where as a result of a compromise between the widow and her brother for the settlement of disputes between them the widow recognizes the brother as entitled to a part of her husband's estate the onus lies upon the brother and those claiming under him to support the compromise on the ground of a bona fide settlement of disputes.

[P 348 C 2]

(e) Hindu law — Reversioner—Widow—Alienation in excess of her power is voidable at reversioner's option — Reversioner can affirm it and claim benefit thereof.

A widow's alienation even in excess of her powers is only voidable at the option of the reversioner and the reversioner is entitled to affirm any of her transactions and claim the benefit thereof for the estate, if it should be to his benefit to affirm her transactions: A I R 1922 Mad 357 and A I R 1930 Lah 1010, *not approved.* [P 349 C 2]

(f) Provincial Insolvency Act (1920), S. 28 (4) — On widow's death her husband's estate devolving upon insolvent as reversioner after his adjudication but before discharge—Insolvent after obtaining absolute discharge instituting suit as reversioner against widow's alienees for recovering properties—Suit held maintainable.

The plaintiff was adjudicated insolvent in 1919 and had not obtained his discharge by 1929 when on the widow's death her husband's estate devolved on him as reversioner. Afterwards he was granted an absolute discharge on 15th August 1931. No creditors however came forward to prove their debts or take any steps between 1919 and 1929, nor did the official receiver take any steps either prior to 1929 or between 1929 and 1931. After his absolute discharge in 1931 the plaintiff instituted a suit against the widow's aliences for recovering possession of properties. :

Held that there was nothing in the policy of the Insolvency Law to suggest that it was intended to benefit strangers and that in the circumstances of the case the plaintiff was entitled to maintain the suit : A I R 1924 Mad 223, *Rel. on*; AIR 1927 P C 108, *Disting.*; A I R 1935 All 675 (FB), *Expl.*

[P 350 C 1]

(g) Hindu law—Reversioner—Suit by—Alienee from widow claiming compensation for improvement—Improvement effected at expense of person who was managing widow's estate — Claim for improvement does not fall under S. 51, T. P. Act.

In the suit by the reversioner for recovering possession of properties alienated by the widow the alienee claimed compensation for improvements, in the property in his possession which were effected at the expense of the person who had been managing the widow's estate :

Held that the claim for improvements did not fall within S. 51, T. P. Act. [P 350 C 2]

T. Satyanarayana—for Appellant.

P. Somasundaram and V. Viyanna — for Respondents.

Varadachariar J.—The appellant sued for recovery of possession of certain properties on the footing that as reversionary heir to the estate of one Surayya who died sometime between 1880 and 1883 he had become entitled to possession on the death of Surayya's widow on 20th September 1929. The plaint schedules specified several items of properties. As regards some of them the lower Court has passed a decree in the plaintiff's favour. As regards other items the suit has been dismissed. The present appeal is concerned with items 1 to 6 of the plaint, Sch. A and items 1 and 2 of the plaint, Sch. B. Alternatively, there is a claim for items 22 to 24 of the plaint, Sch. A if the Court should hold that the plaintiff is not entitled to claim possession of items 1 to 6.

The claim to items 1 and 2 of Sch. B may be briefly disposed of. The lower Court found that the plaintiff had not proved that these items belonged to the last male holder. There is only the general assertion of the plaintiff from the witness box that all the plaint properties belonged to the estate of the last male holder; it is perhaps possible to explain the absence of more detailed information as regards items 1 and 2 of the plaint Sch. B on the ground that the defendants interested therein were not contesting the suit. But whatever the reason for such absence may be, we do not find that there is sufficient material on record to justify our dissenting from the conclusion of the lower Court on this point. An attempt was made before us by the learned counsel for the appellant to connect these items with certain items referred to by the widow as her husband's property in Ex. A-9. This attempt merely rested upon a presumed identity of the boundaries in Exs. A-9, X-f and X-g. But even this identity is not clear

in the absence of information as to changes in the names of the owners of the neighbouring properties and as no evidence has been given in the Court below as to these neighbouring owners it does not seem to us right to act upon mere speculation and hold that the attempt at identification has succeeded. The decree of the lower Court must therefore be confirmed so far as items 1 and 2 of Sch. B are concerned.

As regards items 22 to 24 of the plaint Sch. A, the lower Court found that their alienation under Ex. III-b was justified and proper. We shall refer to this matter again when dealing with the title to items 1 to 6; but we may at this stage express our concurrence in the finding of the lower Court as to the validity of Ex. III-b. The claim to these items is however only an alternative claim, as already stated; and as we propose to hold that the plaintiff is entitled to recover possession of items 1 to 6, it is unnecessary to say more about items 22 to 24 except that the appeal as regards these items fails. Items 1 to 6, to which the arguments on both sides were mainly directed, have been held by the lower Court not to have formed part of Surayya's estate at his death. It is somewhat difficult to reconcile this conclusion of the learned subordinate Judge with his observations in other portions of his judgment. We start with the fact that items 1 to 3 were purchased by Surayya under Ex. A-5 on 25th May 1880 from his father-in-law for a stated consideration of Rs. 700. Items 4 to 6 admittedly belonged to Surayya already. These six items were transferred by Surayya to one Sriramulu under Ex. IV and on 27th May 1880 for a sum of Rs. 400. To complete the narrative, we may add that these six items came back to the widow under Ex. IV-b on 23rd January 1884. The widow's father was no doubt also a transferee under Ex. IV-b but the learned subordinate Judge has found, and we agree with him, that even from the terms of Ex. IV-b it is clear that the father's name was introduced only as a matter of convenience at the widow's request and no beneficial interest belonged to the father. Surayya having died between the dates of Exs. IV and IV-b, it becomes important to know the exact legal operation of these two documents before determining whether at the date of Surayya's death these items were in any sense part of his estate and were acquired by the widow as part of his estate or they had ceased to belong to the estate and were independently acquired by the widow.

The learned subordinate Judge himself has given good reasons in support of his conclusion that though in form Ex. IV purports to be a sale, it must, in reality, have been intended to be only a mortgage. Not merely does the disparity between the consideration stated in Ex. A-5 for only three items, namely items 1 to 3 and the consideration stated in Ex. IV for the transfer of the whole property items (1 to 6) lend support to this conclusion but the way in which the property comes back to the widow confirms this view. We are prepared to assume that Sriramulu took possession in pursuance of Ex. IV; but that the widow did continue to assert some kind of claim to the property is shown by the fact that in 1883 he had to sue for registry of title to these properties in his name. The manner in which this suit, O. S. No. 386 of 1883 terminated, is significant. On 23rd January 1884, Sriramulu executed Ex. IV-b in favour of the widow and her father and withdrew the suit on 28th January 1884. The recital in Ex. IV-b as to this suit, O. S. No. 386 of 1883, is not very full, but the suit register extract, Ex. IV-a, shows that the arrangement between the parties was that on payment of Rs. 500 Sriramulu should give up his right in the lands in question. In Exs. III-b and III-d which were executed by the widow in favour of third parties for raising money to pay part of the amount payable to Sriramulu under Ex. IV-b it is distinctly recited that these moneys were required to pay off debts which had been borrowed by Surayya from Sriramulu.

It is thus clear that the widow was claiming and acting on the footing that Ex. IV though in form a sale deed really represented a mortgage transaction. It is also noteworthy that Ex. IV-b contains a provision that one would scarcely expect to find in the ordinary course in a normal sale deed; in respect of disputes relating to title, the vendor exonerates himself from liability and throws it on the transferee to get any such disputes cleared. This is consistent with the hypothesis that though to keep up consistency with the form of Ex. IV the transfer Ex. IV-b was also put in the form of a sale deed, it was really in the nature of a redemption and therefore the apparent vendor was not prepared to give any covenant as to title. If this is the correct view of the effect of Exs. IV and IV-B, the learned subordinate Judge ought to have held that items 1 to 6 continued to be part of the estate of Surayya at his death and all that the widow did was to redeem them. The

learned counsel for the respondent contended that such an interpretation of EXS. IV and IV-b would contravene the provisions of S. 92, Evidence Act. There is no force in this contention. Section 92 applies only as between the parties to a transaction and those claiming under them respectively. The real question here is, in what character the widow acted when she obtained a reconveyance of the properties under EX. IV-b. Her own assertion and conduct in this connexion is certainly evidence against the present defendants who claim under her.

We may deal with the case even in the alternative footing that EX. IV represented a sale and EX. IV-b represented a purchase by the widow. Even in this view, we are of opinion that by reason of the purchase under EX. IV-b items 1 to 6 must be held to have become part of the estate of Surayya. The sum of Rs. 500 paid as consideration for EX. IV-b is stated to have been paid as follows: Rs. 150 in cash and Rs. 350 caused to be paid by one K. Venkatasubba Naidu. This sum of Rs. 350 was raised partly by sale under EX. III-b of certain items admittedly belonging to the husband's estate and partly by the usufructuary mortgage under EX. III-d of another portion of the husband's estate. It is no doubt well established that where a widow purchases property with savings from her own income, such property is prima facie her absolute property. But where the purchase is made with the aid of the husband's estate, whether it be by sale of a portion thereof or it be by money raised on the security thereof, the reversioners are entitled to claim that the property thus purchased must be held to form part of the husband's estate. To the extent to which nothing is known as to the source of the purchase money the Court can only act upon inferences suggested by surrounding circumstances. Where the widow blends funds of several kinds, i. e., funds known to have come from the husband's estate and funds whose source is not known, and the blended fund is invested in re-acquiring what till recently was undoubtedly part of the husband's estate, we think it is a fair inference that the acquired property must be taken to be part of the husband's estate. Mr. Somasundaram relied on the fact that the usufructuary mortgage, EX. III-d was allowed to be worked out by the mortgagee's enjoyment of the usufruct for a period of six years and he contended that in this sense the case is analogous to the investment by a widow of income from her husband's property. We are inclined to think that the proper way of viewing the transaction is that it is money borrowed on the security of the husband's estate; but even if any importance should be attached to the way that this debt has been discharged ultimately, the consideration that we have already adverted to, namely that these varieties of funds were blended together and invested in purchasing what till recently was a portion of the husband's estate justifies the inference that items 1 to 6 were intended to form part of the husband's estate.

If matters had stood on EX. IV-b, there should have been little complication, but shortly afterwards, the widow unfortunately yielded to the temptation to make her interest in her husband's estate absolute by a so-called family arrangement between the widow and the presumptive reversioner. On a frivolous pretext, she entered into an arrangement by way of settlement and a dispute with her brother-in-law on 21st September 1885 (EX. A-9). The pretext for the alleged dispute is that the widow allowed her father to remain in possession and management of a portion of her husband's estate. This certainly would not give rise to any claim on the part of the reversioner and the learned subordinate Judge was perfectly right in holding that this was merely a pretext and a device for bringing about the arrangement EX. A-9, whereby the estate was divided between the widow and the presumptive reversioner. We do not pursue this matter further because no arguments were advanced before us on the strength of EX. A-9. Some time after EX. A-9 an equally frivolous occasion seems to have been found for an alleged settlement evidenced by EX. IV-c between the widow and her brother. We do not have on record the papers relating to the litigation arising out of this dispute, O. S. NO. 412 of 1891. It is said to have been compromised in April 1892 under EX. IV-c. As a result of the compromise the brother was recognized as entitled to a part of items 1 to 3 and the widow retained the rest. The onus lies upon the brother and those claiming under him to support EX. IV-c, on the ground of a bona fide settlement of disputes and no such attempt has been made. We must therefore hold that neither the widow's brother nor the widow derived any kind of title under this arrangement which can prevail as against the claim of the reversioner after the widow's death.

By a series of transactions to which it is now unnecessary to refer items 1 to 3 have passed into the hands of defendant 1, items 4 and 5 into the hands of defendants 2 and 3, and item 6 into the hands of defendants 5 to 8, partly by transfers by the widow and partly by transfers by her brother. In the view already stated, these transfers could not be treated as transfers by a person having an absolute right. Regarded as transfers by a Hindu widow holding a limited interest they have not been shown to be binding upon the reversioner. As regards one set of these transactions, reliance has been placed upon Exs. V, V-a and V-b. Exhibit V-b is a sale in favour of defendant 1. But the validity of the transfer has to be determined with reference to Exs. V and V-a. Exhibit V is a mortgage by the widow dated 14th July 1897 and Ex. V-a is a sale by her to the mortgagee on 25th August 1899 in satisfaction of the debt due under the mortgage deed Ex. V. The consideration for Ex. V is stated to be a sum of Rs. 300 borrowed for repayment of debts due to others and for the purchase of paddy. Beyond these recitals there is no other evidence in the case of necessity or existence of debts. Mr. Somasundaram relied upon the presumptions which a Court will be justified in drawing in respect of ancient transactions; but the way in which the widow has acted in utter disregard of the law and with a view to benefit herself by Ex. A-9 and Ex. IV-c makes it impossible for us to presume that the widow must, in the ordinary course, have acted within the limits of the law in entering into Ex. V. Further, before Ex. A-9 she was in possession of a considerable extent of property and the circumstances so far as we can now judge of them were not such as to suggest a necessity for borrowing for purposes of her maintenance. We are therefore unable to hold that Ex. V was a proper transaction binding on the reversioners merely on the strength of the recitals contained in Ex. V. It follows that the alienations of items 1 to 6 are not binding on the reversioner and that he is entitled to recover possession.

The principal reason assigned by the learned subordinate Judge for dismissing the plaintiff's claim to items 1 to 6 is based upon the decisions in 1921 M W N 434[1] and A I R 1930 Lah 1010.[2] Here again, it is difficult to reconcile this conclusion of the learned Judge with the finding that the sale of items 22 to 24 under Ex. III-b was justified. All that the decisions above referred to lay down is that if a widow improperly alienates certain property of the husband for the purpose of raising money to purchase new properties for her own benefit, the remedy of the reversioners is to sue for recovery of the properties improperly alienated under the earlier sale and not to proceed against the alienees of the newly acquired properties. In the present case, the alienation under Ex. III-b was not an improper alienation even according to the learned Judge. There was accordingly no occasion for the reversioner to proceed against the alienees under Ex. III-b. The very basis of the finding in favour of Ex. III-b is that the money raised under it was required for a legitimate purpose of the estate, namely the acquisition of items 1 to 6 under Ex. IV-b. On this footing, there is no scope for the application of the principle laid down in 1921 M W N 434[1] and A I R 1930 Lah 1010.[2] We do not however wish to be understood as concurring in the view laid down in these cases. For the reasons already stated, it is not necessary to canvass that question, but we are with all respect obliged to say that these decisions do not seem to give due effect to the well-established principle that a widow's alienation even in excess of her powers is only voidable at the option of the reversioner and that the reversioner is entitled to affirm any of her transactions and claim the benefit thereof for the estate, if it should be to his benefit to affirm her transactions.

It only remains to deal with another objection raised by Mr. Somasundaram to the plaintiff's right to maintain this suit. This objection is founded on the terms of S. 28 (4), Provincial Insolvency Act. The plaintiff was adjudicated insolvent in 1919, and had not obtained his discharge by 1929 when Surayya's estate devolved on him on the widow's death. Before instituting the present suit he filed his application for discharge. The Insolvency Court granted him a conditional discharge but on appeal the appellate Court, by order dated 15th August 1931, granted an absolute discharge and this suit was instituted in September 1931. On these facts, it has been contended that as the plaintiff was an undischarged insolvent at the time of the devolution of the estate on him in 1929, the title "forthwith" vested in the official receiver and that the plaintiff was not entitled to maintain the suit. The construction of cl. 4

1. ('22) 9 A I 1922 Mad 357 : 64 I C 481 : 1921 M W N 434, Rammayyar v. Mahalakshmi.
2. ('30) 17 A I R 1930 Lah 1010 : 128 I C 293 : 11 Lah 393: 31 P L R 755, Mahna Singh v. Thaman Singh.

of S. 28 is not free from difficulty. But in view of the circumstances of this case, we see no sufficient reason to dissent from the decision of a Division Bench of this Court in 45 M L J 827.[3] As has been pointed out in the order of discharge and in the finding of the lower Court on issue 2 in this suit, no creditors came forward to prove their debts or take any steps between 1919 and 1929, nor did the official receiver take any steps either prior to 1929 or between 1929 and 1931. It has been suggested that the order of discharge must have been fraudulently obtained by keeping back from the knowledge of the official receiver and of the Court the right of the plaintiff to the suit estate. We have no materials before us either to support or to contradict this hypothesis. Nothing that we say in this judgment will prejudice the right, if any, of the official receiver or of the creditors of the plaintiff to assert such rights and remedies as they may have in law in respect of the suit properties. But, in the circumstances above stated, we see no justification for holding that the plaintiff is not entitled to maintain this suit for recovery of possession of the property from strangers. We see nothing in the policy of the Insolvency Law to suggest that it was intended to benefit strangers. The observations in 54 Cal 595,[4] do not directly bear upon the decision in 45 M L J 827.[3] In 58 ALL 132,[5] the learned Judges no doubt expressed their disapproval of the distinction drawn in the Madras case between property which belonged to the insolvent at the date of adjudication and property which subsequently devolved upon him. But even in that case, the Court did not go the length of suggesting that the insolvent's suit ought to be dismissed. They only regarded the suit by the insolvent as "defective" and suggested that notice might be given to the official receiver to join in conducting the suit if he thought fit. We therefore agree with the finding of the lower Court on issue 2.

An argument was next advanced in support of the claim that defendant 1 had effected some improvements in item 1. All that the evidence shows is that one Venkatasubbiah spent about Rs. 300 in filling up pits formed by the action of water flowing from a neighbouring stream. We have no details or reliable evidence as to the sum spent in this connection. But apart from that circumstance, defendant 1 himself admits that Venkatasubbiah, who is said to have spent that sum, was managing the estate of the widow. We cannot therefore hold it to be proved that the claim is one that will fall under S. 51, T. P. Act.

The decree of the lower Court so far as it dismissed the suit in respect of items 1 and 6 must therefore be set aside and the plaintiff given a decree for possession of these items. Though evidence was recorded on the question of mesne profits, the lower Court has not recorded any finding as regards the mesne profits payable in respect of this item. The case will therefore be sent down to the lower Court to pass a supplemental decree for mesne profits. The finding so far as mesne profits prior to the date of the institution are concerned, will be based on the evidence already on record. As regards mesne profits subsequent to the institution of the suit and prior to delivery of possession, the lower Court will direct the necessary inquiry unless the parties are able to agree upon the amount payable. The appellant will be entitled to recover from defendants 1 to 8 his costs both here and in the Court below proportionate to the value of items 1 to 6 to the subject-matter of the appeal and the suit. The appellant will pay to defendant 13 costs of the appeal proportionate to the value of items 22 to 24 to the subject-matter of the appeal. The appellants will pay to respondent 10, Rs. 50 for his costs in this appeal.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 350

BURN J.

Natesa Ayyar and another—Petitioners

v.

Singaravelu Pillai — Respondent.

Civil Revn. Petn. No. 24 of 1940, Decided on 12th September 1940.

Madras Debt Conciliation Act (11 of 1936), Ss. 9, 7 and 25—Meaning of second part of S. 7 explained—S. 7 refers to rejection for formal defect—Debtor cannot make more than one effective application for settlement of particular debt—Debtor cannot obtain stay under S. 25 in particular suit or proceeding more than once.

The meaning of the provision in the second part of S. 7 is that if an application has to be rejected merely for want of some formality, the debtor should not be precluded from bringing a fresh application. The absence of any provision for a fresh application with regard to the same debt when the application has been dismissed on the merits indicates that in such cases the Legislature

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3. ('24) 11 A I R 1924 Mad 223 : 76 I C 805 : 45 M L J 827, Ramanadha Iyer v. Nagendra Iyer.
4. ('27) 14 A I R 1927 P C 108 : 101 I C 442 : 54 Cal 595 : 54 I A 180 (P C), Kalachand Banerjee v. Jagannath Marwari.
5. ('35) 22 A I R 1935 All 675 : 157 I C 41 : 1935 A L J 709 : 58 All 182 (F B), Abdul Rahman v. Nihal Chand.

did not contemplate a fresh application by the same debtor. The presence of the provision in S. 7 by which an applicant can make a fresh application if his application has been rejected on formal grounds and the absence of any similar provision in S. 9 conclusively indicates that the Legislature did not intend debtors to be allowed to make more than one effective application for the conciliation of a particular debt under the provisions of the Act and inasmuch as the Act does not contemplate successive petitions by the same debtor in respect of the same debt a judgment-debtor is not entitled to obtain a stay under S. 25 in any individual suit or proceeding more than once : A I R 1940 Mad 31, *Approved*; A I R 1939 Mad 215; A I R 1940 Mad 791 and A I R 1940 Mad 917, *Disting*.

[P 351 C 2; P 352 C 1,2]

R. Somasundaram Iyer — for Petitioners.

K. S. Desikan — for Respondent.

Order. — This is an application to revise an order passed by the learned District Munsif of Negapatam on 13th December 1939 in E. A. No. 995 of 1939 in Small Cause Suit No. 267 of 1937. The applicant before the District Munsif was the decree-holder in the small cause suit. The petitioners in this case are the defendants in the small cause suit. The facts which it is necessary to mention are that while execution proceedings were pending, the judgment-debtors filed a petition, O. P. No. 61 of 1939 before the Debt Conciliation Board, Negapatam, and in consequence of that the sale of the judgment-debtors' property which had already been proclaimed was stopped on 1st May 1939 presumably under the provisions of S. 25, Madras Debt Conciliation Act, 1936. The judgment-debtors' petition, O. P. No. 61 of 1939 was dismissed by the Debt Conciliation Board on 28th June 1939. After that dismissal, the decree-holder proceeded with execution and the sale of the properties was fixed to take place on 6th November 1939. The learned District Munsif says that the judgment-debtors' pleader applied for an adjournment of the sale on the ground that he wanted time to raise the decree amount and accordingly the sale was adjourned to 27th November 1939. Instead of paying up the decree amount the judgment-debtors proceeded to file O. P. No. 197 of 1939 before the Debt Conciliation Board for the conciliation of the same debt and the Board intimated to the District Munsif that such a petition had been presented and requested the District Munsif to stay the sale proceedings in execution of the small cause decree. The decree-holder thereupon applied to the District Munsif to direct the sale advertised for 4th December 1939 to go on disregarding the fact that the judgment-debtors had filed an application before the Debt Conciliation Board. The decree-holder contended that the Debt Conciliation Board had no jurisdiction to stay the sale.

The learned District Munsif after considering such authorities as there are, decided to follow a decision of Stodart J. reported in (1939) 2 M L J 727.[1] The learned Judge held in that case that a judgment-debtor is not entitled to obtain a stay under S. 25, Madras Act, 11 of 1936, in any individual suit or proceeding more than once. It was argued before the learned Judge that upon a second application to the Conciliation Board the judgment-debtors were again entitled to stay. The learned Judge thought that to admit such a proposition would lead to absurd results. There was nothing he said in the Act to prevent a debtor filing one application after another, and if under S. 25 of the Act, he could obtain stay of the suit or other proceedings as long as an application was pending before the Board he would be enabled to put his opponent to great trouble and inconvenience suffering little if any expense himself. That in the opinion of the learned Judge was not the intention of the law. This it may be said is the only direct decision upon this point so far pronounced.

In the case reported in (1938) 2 M L J 1032,[2] Stodart J. and myself held that S. 25 of the Act was mandatory and that a sale in execution held in violation of the provisions of S. 25 is void. Learned counsel for the petitioners relies strongly upon this decision which he says has been followed by other learned Judges. It does not however deal with the question with which this petition is concerned, namely whether the Court of the District Munsif of Negapatam can be compelled to stay execution proceedings in respect of the same judgment-debt more than once under the provisions of the Madras Debt Conciliation Act. Learned counsel for the petitioners has referred me to a case decided by Wadsworth J. in 1940 M W N 837,[3] but that case also does not touch the point now in issue. That was a case in which an application under S. 4, Madras Act 11 of 1936 had been rejected under the provisions of S. 7 of the Act. The second part of S. 7 says:

> The rejection of an application under this section shall not preclude the applicant from making a fresh application.

1. ('40) 27 A I R 1940 Mad 31 : (1939) 2 M L J 727, In re Ellappa Chettiar.
2. ('39) 26 A I R 1939 Mad 215 : 180 I C 783 : (1938) 2 M L J 1032, Hirannayya v. Thippeswami.
3. ('40) 27 A I R 1940 Mad 791 : (1940) 2 M L J 283: 1940 M W N 837, Roopchand Merlacha v. Sha Motaji Mokanji.

The learned Judge therefore held that although the statutory bar imposed by S. 25 of the Act would cease to operate immediately upon the dismissal of an application under S. 7, yet upon a re-presentation of the application under the authority given by the second part of that section the bar would again come into operation. That is not the case with which I have to deal. Learned counsel has also referred me to a case decided by Horwill J. and reported in 1940 M W N 860.[4] In that case the learned Judge held that even though an application might be frivolous or vexatious nevertheless under S. 25 of the Act, the Court would be bound to stop all further proceedings in connexion with the debt which was being considered by the Conciliation Board. There is no question there of successive petitions by the same debtor in respect of the same debt.

After considering the matter as well as I am able I find myself practically in agreement with Stodart J. It has been pointed out to me by Mr. Desikan for the respondent that the wording of S. 4, sub-s. (1) is : "a debtor may make an application for the settlement of his debts . . . . ." He has also pointed out that when an application is dismissed under S. 9 of the Act, there is no provision in S. 9 or elsewhere in the Act, similar to the second part of S. 7. Section 7 provides for the rejection of an application if it does not comply with any of the requirements mentioned in Ss. 5 and 6. These requirements are all matters of a formal nature, and the meaning of the provision in the second part of S. 7 appears to be that if an application has to be rejected merely for want of some formality, the debtor should not be precluded from bringing a fresh application. The absence of any provision for a fresh application with regard to the same debt when the application has been dismissed on the merits would seem to indicate that in such cases the Legislature did not contemplate a fresh application by the same debtor. To suppose that a debtor may go on without limit making successive applications for the settlement of his debts under S. 4 and thereby causing an executing Court to stay its hand under S. 25 is equivalent to supposing that the Legislature intended to put it in the power of a debtor to postpone execution of a decree against him to the Greek Kalends. I cannot believe that the Legislature intended debtors to be allowed to make more than one effective application for the conciliation of a particular debt under the provisions of this Act. The presence of the provision in S. 7 by which an applicant can make a fresh application if his application has been rejected on formal grounds and the absence of any similar provision in S. 9 appear to me to be conclusive on this point. For this reason I think the learned District Munsif was right in following the decision of Stodart J., and in holding that stay could not be ordered more than once under S. 25 in respect of the same debt. This petition is accordingly dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

4. ('40) 27 A I R 1940 Mad 917 : (1940) 2 M L J 322 : 1940 M W N 860, Sundaralingam v. Venkataramanayya.

A. I. R. 1941 Madras 352

LAKSHMANA RAO J.

In re Govindarajulu Naidu—Petitioner.

Criminal Misc. Petn. No. 334 of 1940, Decided on 15th August 1940, to quash proceedings on file of Court of Sub-Magistrate, Kodaikanal.

Motor Vehicles Act (4 of 1939), S. 112—Registered owner of motor lorry for private use allowing his driver to carry goods of another for hire—Offence falls under R. 138, Madras Motor Vehicles Rules — Suspension of permit not being penalty for aforesaid offence owner can be prosecuted under Section 112.

Where a registered owner of a motor lorry for private use allows his driver to carry goods of another person for hire, the offence falls under R. 138, Madras Motor Vehicles Rules framed under the Act. The power conferred on the transport authority to suspend the permit in such cases cannot be regarded as a penalty for the offence, and therefore the owner can be prosecuted under S. 112. [P 352 C 2]

K. Jayarama Iyer and C. K. Venkatanarasimham—for Petitioner.

A. S. Sivakaminathan for Public Prosecutor—for the Crown.

Order.—The petitioner is the registered owner of a motor lorry for private use and he is alleged to have suffered his driver to carry goods of another person for hire. This would unquestionably be an offence under R. 138, Motor Vehicles Rules and the offence would be punishable under S. 112, Motor Vehicles Act if no other penalty is provided for it. The power conferred on the transport authority to suspend the permit in such cases cannot be regarded or treated as a penalty for the offence, and the prosecution of the petitioner under S. 112, Motor Vehicles Act, is not illegal. There is therefore no ground for quashing the proceedings and the petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 353

LEACH C. J. AND PATANJALI SASTRI J.

Muthu Goundan — Petitioner

v.

Peria Goundan and another — Respondents.

Civil Misc. Petn. No. 1261 of 1940, Decided on 18th April 1940, to issue a writ of certiorari.

(a) Madras Debt Conciliation Act (11 of 1936), Ss. 18 and 17—Action under S. 18 does not depend on majority of creditors agreeing to settlement—Board eventually dismissing under S. 17 petition for settlement of debts—Board can still grant certificate under S. 18.

Action under S. 18 does not depend on a majority of the creditors agreeing to a settlement of the debts owing to them. The certificate under S. 18 can be granted during the pendency of the proceedings if a fair offer has been made by the debtor and has been refused by the creditor. The fact that the Board may have to dismiss a debtor's petition does not deprive it of the right of exercising its power of certifying that a reasonable offer has been refused. The Board is consequently entitled to give a certificate under S. 18 even when it eventually dismisses under S. 17 a petition for the settlement of the petitioner's debts. [P 354 C 1]

(b) Madras Debt Conciliation Act (11 of 1936), S. 17—Board merely considering provisions of Madras Agriculturists' Relief Act to determine what would be fair offer by debtor—Board cannot be said to have acted without jurisdiction or even contrary to law.

No doubt the Board has no power to scale down the debt in accordance with the provisions of the Madras Agriculturists' Relief Act but where the Board does not purport to scale down the debt under the provisions of that Act but merely takes into consideration its provisions in order to consider what would be a fair offer by the debtor, it cannot be said that it has acted contrary or without jurisdiction or even contrary to law : A I R 1940 Mad 295, *Ref.* [P 354 C 1]

C. S. Krishnamurthi Iyer and C. S. Vidhyasankara Iyer — for Petitioner.

A. Srirangachariar — for Respondents.

Leach C. J. — This matter raises the question whether a Debt Conciliation Board is entitled to give a certificate under S. 18, Madras Debt Conciliation Act, 1936, when it will be bound eventually to dismiss under S. 17 of the Act a petition for the settlement of the petitioner's debts. The respondent applied to the Debt Conciliation Board, Namakkal, for a settlement of his debts under the provisions of section 4 of the Act. His only creditor was the petitioner in these proceedings, who has security. The petitioner appeared before the Board and informed it that he was not prepared to agree to a settlement of his debt. Before there can be a settlement of debts under the Act, creditors representing more than fifty per cent. of the total amount of debts must agree to a settlement. If no amicable settlement is arrived at within 12 months from the date of the application the Board is bound by virtue of the provisions of S. 17 to dismiss the application. In this case the Board did not at once dismiss the petition as the result of the petitioner's objection, but proceeded to consider what would be the amount payable by the respondent to the petitioner if the debt was scaled down in accordance with the provisions of the Madras Agriculturists' Relief Act. The Board had no power to scale down the debt, as was pointed out by this Court in I L R (1940) Mad 188.[1] The Board did not, however, purport to scale down the debt. It merely considered what would be the figure arrived at if the provisions of the Madras Agriculturists' Relief Act were applied. It found that on this basis the debt due to the petitioner would be reduced to Rupees 1954. Thereupon the respondent expressed his willingness to pay this amount with interest at 6¼ per cent. from 1st October 1937 till the date of payment. The Board considered that this was a reasonable offer and granted a certificate under S. 18 (1), Madras Debt Conciliation Act. The petitioner says that the Board had no power to pass this order and therefore it should be quashed.

Sub-section (1) of S. 18 states that where, during the hearing of any application made under S. 4, any creditor refuses to agree to an amicable settlement, the Board shall, if it is of opinion that the debtor has made such creditor a fair offer which the creditor ought reasonably to accept, grant the debtor a certificate, in such form as may be prescribed in respect of the debts owed by him to the creditor. The effect of a certificate is that when a creditor sues in a civil Court for the recovery of his debt the Court cannot allow the plaintiff any costs in the suit, or any interest on the debt after the date of the certificate in excess of simple interest at six per cent. per annum on the principal amount due on the date of the certificate. This provision is contained in sub-s. (2). Rules have been framed under the Act and they contain the form of certificate to be given under S. 18 (1). The form reads as follows :

This is to certify that during proceedings No. of under the Madras Debt Conciliation Act, 1936, between (debtor) on the one hand and (creditor) on the other hand, for the settlement of an alleged debt of Rs. the said creditor has,

1. ('40) 27 A I R 1940 Mad 295: 188 I C 617: ILR (1940) Mad 188: (1939) 2 M L J 789, Ramaswami Chetty v. Ramachandra Rao.

in our opinion, refused a fair offer of settlement made by the said debtor, which the said creditor ought reasonably to have accepted. 2. The following particulars of the debt were furnished by the said creditor under S. 10 (1) of the Act.

Action under S. 18 does not depend on a majority of the creditors agreeing to a settlement of the debts owing to them. The opening words of sub-s. (1) of S. 18, namely "where, during the hearing of any application under S. 4" make it quite clear that the certificate can be granted during the pendency of the proceedings if a fair offer has been made by the debtor and has been refused by the creditor. The form of certificate given in the rules emphasizes this. The fact that the Board may have to dismiss a debtor's petition as the Board will have to do in this case, does not deprive it of the right of exercising its power of certifying that a reasonable offer has been refused. As the Board did not purport to scale down the debt under the provisions of the Madras Agriculturists' Relief Act, but merely took into consideration the provisions of that Act in order to consider what would be a fair offer by the respondent, it cannot be said that it has acted contrary or without jurisdiction or even contrary to law. The petitioner's application for a writ of certiorari must be dismissed with costs.

C.R.K./G.N. *Application dismissed.*

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* A. I. R. 1941 Madras 354

GENTLE J.

Madhava Ramachandra Kamath — Petitioner

v.

Canara Banking Corporation Ltd. — Respondent.

O. P. No. 109 of 1940, Decided on 26th July 1940.

** (a) Companies Act (1913), S. 34— Company's article empowering its director to transfer shares without instrument of transfer is ultra vires of Section 34.*

An article of a company conferring upon its directors power to transfer shares in spite of the absence of an instrument of transfer is ultra vires of S. 34. [P 355 C 2]

** (b) Company — Articles of, are contract between member and company — Company cannot alter articles without knowledge or consent of members.*

The provisions of the articles of a company form part of the contract between a member or a shareholder and the company and one party to a contract cannot add terms to the contract without the knowledge or consent of the other party. Consequently, any alteration in the articles cannot in any way be binding upon the member from whom notice of the meeting at which the alteration was made was withheld. [P 355 C 2]

** (c) Company — Company by resolution expelling member from membership — Articles not empowering company to deprive expelled member of his share —Resolution of expulsion is ineffective.*

Where a company by resolution expels a member from membership and the articles of the company at the date of expulsion do not empower it to deprive the expelled member of his share the resolution of expulsion has no effect inasmuch as while the expelled member remains a shareholder he must also remain a member. [P 355 C 2]

(d) Companies Act (1913), S. 38 (1) (a)—Striking out member's name is omission of his name under S. 38 (1) (a).

The striking out or expunging a member's name from the register is an omission of his name within the meaning of S. 38 (1) (a). [P 356 C 1]

K. Srinivasa Rao — for Petitioner.

K. P. Sarvothama Rao — for Respondent.

Order. — This is a petition by a shareholder of the Canara Banking Corporation Ltd., under S. 38 (1), Companies Act. This section so far as it is material, provides that if the name of any person is without sufficient cause entered in or omitted from the register of members of a company, the person aggrieved may apply to the Court for rectification of the register. The petitioner is the holder of one share only and the company at a general meeting purported to act under Art. 173 of the Articles of Association and expelled him from membership. This article provides to the effect that if any shareholder unjustly or unlawfully has recourse to law in any matter whatever connected with the Corporation, he shall render himself liable to expulsion and on such expulsion he shall never again be admitted into the Corporation.

The petitioner preferred a complaint to the District Magistrate of South Canara seeking sanction under S. 196-A, Criminal P. C., to prosecute some directors and ex-directors of the company for conspiracy in the preparation of a balance sheet or balance sheets of the company. The learned Magistrate refused to grant the process sought and in the course of his order he gave the following reasons for his decision : the respondents (directors) were all highly respectable gentlemen; the balance sheet had been accorded sanction at a general body meeting of the shareholders; petitions to the Registrar of Joint Stock Companies and to Government to initiate an enquiry into the affairs of the company had been rejected, and he had been forced to think that the petitioner was working against the Bank out of sheer malice. He added that from the attitude of the Registrar and the Government it was apparent that there was no reason to think

that the respondents in the proceedings before the Magistrate had any reason whatever to conspire to cheat the shareholders. It is said and not disputed that a copy of the order of the Magistrate was circulated to all the shareholders of the company. A meeting was called on 20th July 1939. The petitioner attended and objected to the meeting continuing; nevertheless, a resolution was passed that, in view of his conduct in filing an application before the District Magistrate of South Canara seeking sanction to prosecute some of the directors and ex-directors, thereby acting contrary to Art. 173 as seen from the order of the District Magistrate, he be expelled from the membership of the Corporation. On the date when this resolution was passed the petitioner was undoubtedly a member of the company. There was no power for the company to deal with the share or shares which were held by a person whom the company at a general meeting purported to expel from membership. The articles provide forfeiture of shares by members in certain contingencies but these contingencies do not include purported expulsion of a member under Art. 173. Ordinarily, a company is unable to sell its own shares but when shares are forfeited it can resell or dispose of them as provided in the articles.

Subsequent to the passing of the resolution of expulsion the company has altered its articles by making an addition to Art. 173. Notice of the meeting at which these articles were changed was not given to the petitioner. Under the additional article, provision is made by which the company can, in effect, force an expelled member to sell his shares to any person at a price which is fixed under the provisions of the article and the company is enabled to authorize a director to sign the necessary transfer instrument on behalf of such transferor if he fails to do so. Section 34 (3) of the Companies Act, provides that it shall not be lawful to register a transfer of shares unless a proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company. There are of course occasions when the transferor does not or cannot sign, such as, when a court sale has been held. In that event, O. 21, R. 80, Civil P. C., provides for the Judge or an officer of Court directed by him signing the transfer instrument. Article 52 (3) of the companies' articles, it would seem, purports to confer upon the directors of the company power to transfer shares in spite of the absence of an instrument of transfer. It says:

> Unless sanctioned by the Board of Directors, it shall not be lawful for the Corporation to register a transfer of shares unless a proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the Corporation.

If this article does purport to confer power on the directors to transfer shares in the absence of an instrument of transfer, it is clearly ultra vires of S. 34, Companies Act. The position at the time when the purported expulsion of the petitioner took place was this. He was a shareholder and learned counsel on behalf of the company has conceded that so long as a person remains a shareholder he must remain a member of the company. The company purported to expel him, according to the terms of the resolution, from the membership of the company. There was no power by which it could obtain, seize, or deprive him, of his share. No doubt he was a holder of one share only, but the same principle would apply with a holder of a large number of shares of considerable value. The articles did not enable the company to forfeit shares or sell them to another person as they are now empowered to do by the alteration. The alteration in the articles effected after the date of the resolution under Art. 173 cannot, in any way, be binding upon the petitioner. Notice was withheld from him of the meeting at which the alteration was made. The provisions of the articles form part of the contract between a member or a shareholder and the company, and one party to a contract cannot add terms to the contract without the knowledge or consent of the other party. It is quite clear that after the position in regard to the company and the petitioner was realized, the company took steps to provide by an addition to the articles, the necessary means to carry out what they wished to effect in regard to an expelled member. As the powers of the company at the date when the petitioner was purported to be expelled did not empower them to deprive him of his share and while he remained a shareholder he must also remain a member, it must follow that the resolution of expulsion has no effect. His purported expulsion by the resolution having no effect, the sale in law could not be carried out. Further, he could not be compelled under any provision of the articles to transfer his share to any other person. He was entitled to keep it; the company could not authorize anyone to sign

an instrument of transfer on his behalf, he never signed any instrument and no valid instrument was sent to the company, as the Companies Act requires. In my view, the petitioner never ceased to remain a member of the company inasmuch as he always remained a shareholder.

Learned counsel on behalf of the company raised an objection that proceedings under S. 38 (1), Companies Act, are not open to the petitioner as this section provides a remedy only when the name of any person is without sufficient cause entered in or omitted from the register of members. The name of the petitioner was included in the register of members and was struck out when his expulsion took place or when the company purported to force him to sell his share to some other person. Some two months after the resolution expelling him, the company wrote to the petitioner, on 23rd October 1939, that his share had that day been transferred to Mr. V. Achutha Srinivasa Kamath, and a cheque for Rs. 70 was sent to him as the price for such share. The petitioner wrote objecting to the action of the company and said that he did not propose to cash the cheque and he has not done so. This action by the company took place after the addition to the articles had been made to which I have referred earlier. The striking out of the name of the petitioner from the register containing the names of the members apparently would have taken place on or about the date when the company wrote to the petitioner that his share had been sold to the transferee. Learned counsel on behalf of the company contended that the word 'omitted' in S. 38 (1) (a) does not include the striking out of the name of a member which had been previously in the register. When the name of a person, who is a member of the company, has been struck out, the effect is the same as if his name had never been entered. The striking out of his name in the register thus causes his name to be omitted from it and I hold that, when a person's name has been struck out or expunged, then it is an omission of his name within the meaning of the section.

A further point was taken on behalf of the company by learned counsel that the present petition is abortive inasmuch as the name of the transferee has not been added as a party. In my view there has been no valid or legal transfer of the share which the petitioner held in the company to any transferee and he is still the holder of the share; therefore his name must be included in the list of members. The petitioner still holds the certificate recording that he is the holder of one share in the company and I direct that there be rectification of the register and the company will add to the names of members that of the petitioner. The relief which I am granting in this petition is to place the petitioner in the position in which he has always been—a shareholder of the company. The petitioner is entitled to his costs against the company. Learned counsel for the petitioner has asked me to fix the amount of costs. He has spent Rs. 40 as out of pocket. I fix the total costs including the out of pocket expenses at Rs. 150.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1941 Madras 356

WADSWORTH AND PATANJALI SASTRI JJ.

S. Ramasubbier and another —

Appellants

v.

P. Rama Iyer and others —

Respondents.

Appeals Nos. 101 and 160 of 1940, Decided on 4th November 1940, against orders of Sub-Judge, Tinnevelly, D/- 31st October 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl. — Member of joint family executing fresh document for liability binding on family but incurred on its behalf by other member — Previous debt can be regarded as renewed or included in fresh document under S. 8, Expl.

Where a member of a joint family executes a fresh document for a pre-existing liability binding on the family but incurred on its behalf by another member, such previous debt can be regarded as renewed or included in a fresh document within the meaning of S. 8, Expl., as the debtor in each case is the same person, namely the joint family: A I R 1941 Mad 59, *Foll.* [P 357 C 1, 2]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl.—Under S. 8, Expl., debt must continue in substance to be same though amount and parties under vouchers given are not identical — Debt divided among creditor's heirs — Debtor executing separate instrument for part of debt in favour of each heir—Pronotes cannot be said to represent renewals of original debt or its inclusion in fresh document within meaning of S. 8, Expl.

Section 8, Expl., requires that the debt must continue in substance to be the same though the amount and the parties under the various documents given as vouchers for it need not be strictly identical. This requirement cannot be regarded as satisfied when the debt is divided among the heirs of the creditor and the debtor executes a separate instrument for a part of the debt in favour of each of such heirs. The promissory notes executed by the debtor separately in favour of the heirs for portions of the original debt allotted to them at the partition cannot be said to represent a renewal of the original debt or its inclusion in fresh documents within the meaning of Explanation to S. 8, although

the sums for which such promissory notes are given equal in the aggregate to the amount of the original debt. [P 357 C 2; P 358 C 1]

T. M. Ramaswamy Iyer — for Appellants.

B. C. Seshachala Iyer — for Respondents.

Patanjali Sastri J.—These are appeals preferred by decree-holders against orders scaling down their decrees under S. 19 of Madras Act 4 of 1938. The debts which had ripened into these decrees had their origin in a promissory note for Rs. 7000, executed by one Pichumani Iyer and two of his sons Rama Iyer and Venkatachalam Iyer on 14th August 1922 in favour of Srinivasa Iyer, the father of these decree-holders. After Srinivasa Iyer died, there was a partition between the two sons on 15th May 1925 at which the debt was divided between them and in pursuance of the division the debtors Rama Iyer and Venkatachalam Iyer executed on 19th August 1925 a promissory note for Rs. 4900, to the appellant in C. M. A. No. 101 and another promissory note for Rs. 2600, to the appellant in C. M. A. No. 160, their father having died in the meantime. On 13th August 1928, Rama Iyer and Venkatachalam Iyer and the other two sons of Pichumani Iyer who did join in the execution of the earlier notes executed two promissory notes for Rs. 5400 and Rs. 2200 respectively in discharge of the prior notes for Rs. 4900 and Rs. 2600 referred to above. In June 1931, Venkatachalam Iyer separated himself from his brothers by executing a release deed and on 5th August 1931 the other three brothers who continued joint executed promissory notes for Rs. 5963 and Rs. 2425 respectively in settlement of the debts due under the notes of 1928. The appellant in C. M. A. No. 101 brought O. S. No. 49 of 1933 for recovery of the amount due under his promissory note and obtained a decree on 16th September 1933 and the appellant in C. M. A. No. 160 sued in O. S. No. 739 of 1932 for the amount due to him and obtained a decree on 6th February 1933. These decrees have been scaled down by the Court below with reference to the principal sum advanced under the original promissory note of 14th August 1922, and the question for consideration in these appeals is whether in the circumstances mentioned above, the debt can be said at each stage to have been renewed or included in a fresh document in favour of the same creditor within the meaning of the Explanation to S. 8 of the Act.

We have already held in (1940) 2 M L J 651[1] that when a member of a joint family executes a fresh document for a pre-existing liability binding on the family but incurred on its behalf by another member, such previous debt can be regarded as renewed or included in a fresh document within the meaning of the explanation, as the debtor in each case is the same person, namely the joint family. It is not disputed in this case that the various promissory notes were executed on behalf of the joint family of Pichumani Iyer and his sons. It follows therefore that so far as the debtors under the various promissory notes are concerned, they are substantially the same. The question next arises whether the creditor or creditors under the successive promissory notes can also be said to be the same. Here again, it will be seen from the facts mentioned above that the creditor in respect of each set of promissory notes executed subsequent to the partition in the creditors' family is the same, namely the appellant in each of these appeals. The debt due under each of these decrees can thus be traced back, through successive "renewals" to the promissory notes executed on 19th August 1925.

Learned counsel for the respondent would also have us go further back to the first promissory note of 14th August 1922 and take the sum of Rs. 7000, advanced thereunder as the principal sum for purposes of scaling down the decrees under section 8. We are however unable to do so. As stated already, the earliest note was executed in favour of Srinivasa Iyer, the father, and at the partition that took place after his death, the debt was split up into two unequal parts and the appellant in each of these appeals got the debtors to execute a separate promissory note for the portion of the debt allotted to him and these notes have been renewed subsequently from time to time. It has been argued that in view of the definition of "creditor" as including "his heirs, legal representatives and assigns," the promissory notes taken by the sons of Srinivasa Iyer though for distinct portions of the debt due under the original note executed in his favour must be regarded as a renewal of that debt or at all events its inclusion in fresh documents. But it seems to us that the Explanation to S. 8 requires that the debt must continue in substance to be the same though the amount and the parties under the various documents given as vouchers for it need not be strictly identical. This requirement cannot be regarded as satisfied when the debt is divided among the heirs of the creditor and the debtor executes a

1. ('41) 28 A I R 1941 Mad 59 : (1940) 2 M L J 651, Doraikannu Odayar v. Veerasami Padayachi.

separate instrument for a part of the debt in favour of each of such heirs. We are therefore of opinion that the promissory notes executed by the debtors separately in favour of the two sons of Srinivasa Iyer for portions of the original debt allotted to them at the partition cannot be said to represent a renewal of the original debt or its inclusion in fresh documents within the meaning of the explanation, although the sums for which such promissory notes were given equal in the aggregate to the amount of the original debt. It follows that the decree in each case must be scaled down with reference to the amount of the promissory note executed in favour of each of the appellants on 19th August 1925. The order of the Court below is set aside and the applications are remitted to the lower Court for disposal in the light of this judgment. As the appeals have not fully succeeded, we direct the parties in each case to bear their own costs.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 358

BURN AND MOCKETT JJ.

Public Prosecutor — Petitioner

v.

S. Venkatasubramanyam — Accused Respondent.

Criminal Revn. Case No. 799 and Petn. No. 753 of 1940, Decided on 18th November 1940, to revise order of Court of Session, Chittoor Division, D/- 17th July 1940.

(a) Madras Children Act (4 of 1920), Ss. 22 and 3—Whether offender is young person or not — Point of time to be considered is time of passing sentence and not time of commission of offence.

The point of time that is material in considering whether an offender is a 'young person' or not is the time of conviction and not the time of commission of the offence. Consequently, an offender who is over 16 years at the time of passing sentence can be sentenced to death or transportation.

[P 358 C 2; P 359 C 1]

(b) Penal Code (1860), S. 302 — Accused conceiving and instigating murder — Fact that he did not commit it is no reason for mitigating punishment.

Where the accused has conceived and instigated the murder the fact that he did not commit it is not of course a reason for mitigating the punishment.

[P 359 C 1]

(c) Madras Children Act (4 of 1920), S. 22— Murder case — Offender above 18 years — Youth alone is no reason for mitigating punishment — But young murderers under 18 are very rarely sentenced to death.

Youth alone is not a reason for mitigating the punishment in murder cases where the offenders are above the age of 18. But it is very rarely that young murderers under 18 are sentenced to death.

[P 359 C 1]

Petitioner in person.

C. K. Venkatanarasimham — for Respondent.

Burn J.—The learned Public Prosecutor has brought up in revision the order passed by the learned Sessions Judge of Chittoor in S. C. No. 14 of 1940. In that case the accused Venkatasubramanyam was charged with abetment of murder (Ss. 302 and 114, Penal Code). The assessors unanimously expressed the opinion that he was guilty and the learned Sessions Judge found him guilty under Ss. 302 and 114 but the learned Judge, instead of passing any sentence upon the accused, has reported the case to Government for orders under S. 27, Madras Children Act (4 of 1920). Pending the orders of the Government, the learned Judge has ordered the accused to be detained in the Senior Certified School at Chingleput.

The order of the learned Sessions Judge is based upon the fact that the accused was under 16 years on 8th February 1940, when this dreadful crime, as the learned Judge properly calls it, was committed. The learned Judge says that the accused was a 'young person' as defined in S. 3, Madras Children Act (4 of 1920), and therefore he cannot be sentenced to death or transportation for life: *vide* S. 22 of the same Act. The learned Judge has however failed to notice that the point of time that is material in considering whether an offender is a 'young person' or not is the time at which the sentence is to be pronounced. Section 22 says:

> Notwithstanding anything to the contrary contained in any law, no child or young person shall be sentenced to death, transportation or imprisonment.

Now, on 17th July 1940, when the learned Sessions Judge had concluded this trial and was in a position to pass sentence, the accused in this case was no longer a 'young person.' The learned Judge's finding is that the accused may be taken to have been born on 10th June 1924. The learned Judge has pointed out that there has been some alteration of the final figure in the Sanskrit College Register, which he treated as evidence for purposes of the case, but even if the figure is properly recorded as 1924, it is clear that the accused was over 16 at the time of the trial of the case. He was not therefore a 'young person' and S. 22 did not impose any bar against sentencing him to death or transportation. This is made clear by a reference to the definition of 'youthful offender' in S. 3 of the Act. It is there stated that a 'youthful offender' means any person who has been convicted of an offence punishable with transportation or imprisonment and who at the time of such conviction was

under the age of 16 years. It is therefore the time of the conviction and not the time of the commission of the offence that is important.

The order of the learned Judge must therefore be set aside. In considering the sentence that ought to be passed in this case, we are obliged to note that the crime was a peculiarly despicable one. The person murdered was a very old and infirm lady and she was murdered for the sake of her valuable gold chain that she was wearing round her neck and a ring that she wore on her hand. She was murdered by strangulation, the actual strangling being done by one Raghavalu at the instigation of the accused, Venkatasubramanyam. Why Raghavalu was tendered a pardon and thereby enabled to get off scot free we do not know. Learned counsel for the respondent in this case has pointed out the great disparity in fortune between Raghavalu and the respondent. Raghavalu who did the actual murder gets off wholly free. The respondent who conceived and instigated the murder but did not commit it is in danger of being hanged. That however by itself is not of course a reason for mitigating the punishment of this respondent. We have frequently stated that youth alone is not a reason for mitigating punishment in murder cases, but those cases have usually been cases of offenders above the age of 18. It is very rarely that young murderers under 18 are sentenced to death. We shall therefore sentence the respondent in this case to transportation for life. It is not a case in which we are able to make any recommendation on his behalf to the Provincial Government.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 359

BURN AND MOCKETT JJ.

Public Prosecutor — Appellant

v.

Munigan — Accused 2 — Respondent.

Criminal Appeals Nos. 574 and 657 of 1940, Decided on 29th October 1940, to set aside order of acquittal by Session's Judge, North Arcot, in S. C. No. 18 of 1940.

(a) Evidence Act (1872), S. 32 — Murder case — Evidence for alleged motive of murder derived from statements made by deceased prior to death — Statements held inadmissible in evidence.

In a murder case it was in evidence as an alleged motive for the murder that the accused had been on intimate terms with certain girl and the deceased was attempting to arrange the marriage of that girl with another person. The evidence for this alleged motive for the murder was derived from the statements said to have been made by the deceased prior to her death :

Held that these statements were inadmissible in evidence: A I R 1939 P C 47, *Rel. on.* [P 360 C 1]

(b) Criminal trial — Evidence — Persistent questioning by police to accused in custody — Statements by accused would be involuntary.

Naturally, persistent questioning by the police to the accused in custody may negative the impression that statements are voluntary. It would be extremely dangerous to attach any importance to statements made in these circumstances: AIR 1940 Mad 136 and AIR 1940 Mad 12, *Rel. on.* [P 361 C 1, 2]

(c) Criminal trial — Murder — Two accused seen in company of deceased at time of murder and one of them subsequently found in possession of jewels taken from body of deceased — Such accused stating that he was in company of deceased as he had been asked by other accused to fetch deceased — Statement is not such as to raise irresistible presumption of guilt.

In a murder case it was in evidence that two accused were in company of the deceased at the time of murder and subsequently one of them was found to be in possession of jewels taken from the body of the deceased. The accused admitted his presence with the deceased but gave an explanation as to why he was in company of the deceased, namely that the other accused had asked him to fetch the deceased. He did not admit his guilt :

Held that such a statement might arouse suspicion against the accused but it was not such a statement as to raise the irresistible presumption of guilt which may arise in other cases on totally different facts. [P 362 C 1]

C. K. Venkatanarasimham — for Accused.

Public Prosecutor — for the Crown.

Mockett J. — In this case the Public Prosecutor on behalf of the Provincial Government has appealed against the acquittal on a charge of murder of one Munigan alias Munisami, who was accused 2 in S. C. No. 18 of 1940 tried by the learned Sessions Judge of North Arcot Division at Vellore. This accused was charged with another, one Chinnasami alias Chenga Reddi, with the murder on 9th February 1940 of a woman, one Thayarammal, near the village of Kainoor. There is no question whatever that Thayarammal was murdered. Her body was found on the morning of 10th February and according to P. W. 1, the doctor, there were three external injuries, wounds on it, and it is obvious that great violence had been used that could have been caused by M. O. 1, a billhook which is so commonly in evidence in these cases. According to the doctor, the death of Thayarammal might have occurred at about 2-30 in the morning on 10th February, which was a Saturday. Before the learned Sessions Judge accused 1 and 2 were acquitted of murder, but accused 2 has been convicted under S. 201, Penal Code, and has been sentenced to rigorous imprisonment for five years.

Thayarammal, the deceased woman, had been kept for some time by accused 1 and the witness Munisami Reddi (P. W. 8). There is said to be a motive at the back of this murder namely that accused 2 had been on intimate terms with Thayarammal's sister Salammal (P. W. 7), and it was suggested in evidence that the deceased was attempting to arrange the marriage of Salammal to the brother of P. W. 14. Indeed the marriage was said to have been fixed for 11th February. This action of the deceased is said to have been displeasing to accused 2, and to have influenced him in taking the life of Thayarammal. It was alleged at the trial too that the motive which was supposed to have influenced accused 1, was that accused 1 was endeavouring to persuade the deceased to discard P. W. 8 in his favour and that the deceased was not willing to do so. It is enough to summarize the alleged motive in that way. It rested largely on the evidence of P. Ws. 4, 5 and 7, and a great deal of it unquestionably was derived from statements said to have been made by the deceased woman. There are a number of statements attributed to the deceased woman which have been admitted in evidence which were wholly inadmissible. We would invite the learned Sessions Judge's attention to a recent decision of the Judicial Committee in (1939) 1 M L J 756.[1] In this case Lord Atkin explained the provisions of S. 32 as applicable to murder cases, and after that authority, there should be little reason for the burdening of the record with statements of persons who subsequently died, which are totally inadmissible, as is unhappily frequently the case.

The evidence against accused 2 is almost entirely derived from the statements made by himself accompanied by the fact, the undoubted fact, that he was on that evening in the company of the deceased woman. It appears that on the night of the 9th, the woman, Thayarammal, who was living in the house of P. W. 4, went to lie down and the next morning she was found to be missing. It was supposed she had gone to the fields to work, but no trace of her could be found and so enquiries were set on foot and, on 10th February P. W. 6 seeing a crowd, went to it and there saw the body of the deceased woman. She still had some of her jewellery upon her, but one article of jewellery, a pair of kammals marked, M. O. 2 in this case, was missing. The course of events afterwards was as follows : P. W. 4 made a report, which is the first information report in this case and which is marked Ex. D, and it is interesting to note in that report that P. W. 4 supposes that the likely criminals were accused 1 and P. W. 8. On 11th February, accused 1 was arrested and on the 12th accused 2 was arrested. Accused 2 was remanded to the sub-jail at Arkonum and remained there until the 17th, on which day the Circle Inspector (P. W. 19), after obtaining permission of the Sub-Magistrate questioned him in jail. It is quite obvious that he made a statement which the Circle Inspector wished to use under the provisions of S. 27, Evidence Act. That is evident because an application was made to the Subdivisional Magistrate at Ranipet to have the accused transferred to police custody. The requisition on which that order was made is Ex. H and the order thereon is Ex. H-1. In it, the Circle Inspector says :

> I interviewed Munigadu alias Muniswami in the Arkonam Sub-Jail and he promises to show the place where he had kept the kammals in question.

But it must be remembered that in his evidence the Inspector tells us that he had been "enquiring him," which presumably means questioning him. The accused was taken in charge by the Inspector and was again questioned in the sub-jail premises, outside his cell, panchayatdars having been introduced into the jail for the purpose of hearing what he was going to say. One of them is Varadarajulu Naidu who gave evidence in this case as P. W. 20. According to the Inspector, accused 2 then stated that the kammals worn by the deceased Thayarammal had been handed over to him by one Valliammal and that he secreted them by the side of his house and would show the place and make recovery of the jewels; and accused 2 also said that the kammals had been removed from the ears of the deceased and handed over to him immediately after Thayarammal was murdered. This statement was given in evidence in that form by the Inspector, but it was actually reduced to writing and signed by the Inspector and mediators and it is Ex. J in this case. In it accused 2 made a long statement of which the learned Sessions Judge has admitted the following. It begins in the middle of a sentence with the words "Cut Thayarammal's neck." Who it was that cut we are not allowed to know.

> He cut with knife. Valliammal removed the kammal and gave it to me. I have kept the said

1. ('39) 26 AIR 1939 P C 47 : 180 I C 1 : 40 Cr L J 864 : I L R (1939) Kar 123 : 66 I A 66 : 18 Pat 284 : (1939) 1 M L J 756 (PC), Pakala Narayanaswami v. Emperor.

kammal by the side of my house. I shall now show that spot. The said spot is in Kainoor. If I am taken, I shall take out and give the said kammal.

The accused did produce the kammal from a cattle shed by the side of his house in Kainoor village. But that was not all. According to Ex. J-3 and the evidence of the Circle Inspector, after the property was taken out, the accused was further questioned about the knife with which Thayarammal was cut and in reply to that the accused said that the knife with which Thayarammal was cut was the knife which his father Thangi Reddi had brought that day from Thangavelu Mudaliar of Kainoor for cutting fibre, that after cutting Thayarammal he kept the said knife in his house and that his younger sister Ayammal took away the said knife and gave it in the house of the said Mudaliar; and he showed the house of the Mudaliar. The procedure adopted by the police in this case is, in our opinion, to be condemned. It appears to be in breach of the Standing Orders of the Madras Police. Order 583 (Madras Police Standing Orders) states quite clearly that, once an accused person has been arrested, the police are strictly forbidden to interrogate him or press him to make a statement. But the Circle Inspector's own admission is that the accused was interrogated more than once; he was apparently interrogated not less than three times—once when he was in the custody of the jail authorities, and twice when he was in the custody of the police. We are furthermore satisfied that he was pressed to give these answers although P. W. 19, the Inspector, says that he made the answer about the billhook immediately on being questioned and without hesitation. P. W. 20, who is of sufficient respectability to be summoned to be present at the questioning of prisoners, stated that accused 2 was hesitating for about ten minutes before he replied to the Circle Inspector about the knife. This aspect of the case appears to have been wholly overlooked in the lower Court.

This Court has on many occasions expressed its view with regard to the questioning of persons in custody. Naturally, persistent questioning may negative the impression that statements are voluntary. There are two decisions of this Court reported in 1939 M W N Cr 174[2] and 1939 M W N 133 Cr,[3] which contain expressions of opinion by two different Benches on this aspect. It would be extremely dangerous to attach any importance to statements made in these circumstances. There is however the fact that accused 2 produced M. O. 2 from the shed of his house and there is the further fact that in consequence of a statement made by him an aruval was produced. There was however no blood upon the aruval detectable. There remains the statement, Ex. S, which the accused made at the Magistrate's Court and his statement at the Sessions Court. In Ex. S the accused said in answer to a long question put to him by the Magistrate which was really a summary of the facts alleged against him:

I did not know that Salammal was going to be married. Accused 1 asked me to bring Thayarammal for the bioscope. I and accused 1 are very friendly. Some enmity there is between P. W. 9 and accused 1. One night accused 1 and P. W. 9 quarrelled. Accused 1 told Thayar, "I told you that you should not talk to P. W. 9. Why do you talk to him ?" and forbade her doing so. On the night of the murder, accused 1 said to me "Bring Thayarammal. We shall go to the bioscope at Arkonam." Myself, accused 1 and Thayar used to come to the bioscope. That day near the field of Adinarayana Reddi, accused 1 asked me to hold Thyarammal's hand or arm. Accused 1 cut Thayar. I then went home. Accused 1 went away to the field to the place where sheaves lay.

After the statement was read out to him, the accused added:

Next day at daybreak on the day on which the police brought accused 1, accused 1 gave M. O. 1 to me asking me to 'keep it'.

It was contended that, on that statement the Court was entitled to draw the inference that this man was responsible for the murder of the deceased and cases were cited to the lower Court to establish the principle on which such an inference could be made. Those cases were of the class where a single man is seen in the company of a person who is at or about that time clearly murdered and who in addition is found soon after in possession of jewels taken from the body of the deceased and who further gives no explanation which is reconcilable with the truth. This is not such a case. It must be remembered that, putting it at its highest, the only evidence against the accused was that of P. Ws. 10 and 11 who said that they saw him in the deceased's company at 9 and 10 P. M. respectively on the night of 9th February. But there is the accused's own statement admitting his presence with the deceased but giving an explanation as to why he was in her company, namely, that he had been asked by accused 1 to fetch her. He furthermore does not admit his

2. ('40) 27 A I R 1940 Mad 136 : 186 I C 484 : (1940) 2 M L J 35 : 1939 M W N Cr 174, Chinna Papiah v. Emperor.
3. ('40) 27 A I R 1940 Mad 12 : 41 Cr L J 242 : 1939 M W N 133 Cr, Emperor v. Poligadu.

guilt. The most he admits is that accused 1 asked him to hold Thayar's hand. He has not said that at that time accused 1 had an aruval in his hand or had said or done anything to indicate that he contemplated violence against Thayarammal. That such a statement may arouse suspicion against accused 2 cannot be doubted; but it is not such a statement as to raise the irresistible presumption of guilt which may arise in other cases on totally different facts. It is possible that there may be some truth underlying the accused's story. It is far from certain that he is guilty of murder. On these facts there is necessarily that element of doubt to which an accused person is always entitled. So far as the appeal against the acquittal is concerned it must, in our view, be dismissed.

But the accused is also an appellant in Criminal Appeal No. 657 of 1940 against his conviction under S. 201, Penal Code. The facts which we have set out are sufficient for the purpose of considering this appeal also. Taking the accused's own statement and putting it as much in his own favour as one can as we have done for the purpose of the appeal of the Crown, after being present at a murder, he took from the man who, according to him committed the murder, a kammal which was unquestionably the property of the deceased and had hid it, and we know that he produced it. It cannot possibly be said that on these facts the Court was not entitled to take the view, that when he hid this article of jewellery, he hid it with the intention of screening the offender, whoever he was, from legal punishment. We think therefore there is no substance in the appeal by accused 2 and that appeal is also dismissed.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1941 Madras 362

WADSWORTH J.

Gorle Satyanarayana — Petitioner.

v.

Gorle Peddi Naidu and another — Respondents.

Civil Revn. Petn. No. 1010 of 1940, Decided on 2nd October 1940, to revise order of Sub-Judge, Vizagapatam, D/- 15th September 1939.

Madras Agriculturists' Relief Act (4 of 1938), S. 19 — Application under S. 19 — O. 7, R. 10, Civil P. C., applies to such application by virtue of S. 141, Civil P. C.

An application under S. 19 is not an application to amend a decree so as to bring it in accordance with the judgment; nor is it an application which can be said to be ancillary to the suit in which the decree was passed. It is in substance an application to enforce a new right created by a statute which came into force after the decree was passed. It is in no way ancillary to the decree but destructive of the decree; and though it may result in the amendment of the decree and the recording of satisfaction it is not an application in the suit in which the decree was passed, but an entirely separate proceeding to enforce a new right quite distinct from the right declared in the original suit. Hence S. 141, Civil P. C., extends to such an application the procedure provided in the Code, including that laid down in O. 7, R. 10 : A I R 1939 Mad 483; *Ref.*; 17 All 106 (PC), *Rel. on.*; A I R 1927 Cal 534; A I R 1926 Mad 325 and A I R 1931 Mad 795, *Considered.* [P 363 C 1, 2]

B. V. Ramanarasu for V. Govindarajachariar — for Petitioner.

Kasturi Seshagiri Rao and Kasturi Sivaprasada Rao — for Respondents.

Order. — This revision petition is filed against an order dismissing an application under S. 19 of Act 4 of 1938, on the ground that it was presented in the wrong Court. The application was in fact presented to the appellate Court, whereas in accordance with the decision in (1939) 1 M L J 329[1] it should have been presented in the Court of first instance. The decision upon which the lower Court proceeded took a view of the law which was by no means universally accepted before that decision appeared and it cannot be said that the applicant in applying to the Court which actually passed the decree which he desired to scale down was going contrary to the obvious meaning of the section under which his application was framed. It was only by reading S. 19 along with S. 20 that this Court arrived at the conclusion that the proper Court to receive an application under S. 19 was the Court of first instance. We must therefore take it that the application to the appellate Court was one which according to the applicant's view of the law was bona fide presented in the proper Court though by reason of the subsequent decision it became apparent that his view of the law was wrong.

That being so, should the lower Court have dismissed his application or should it have returned the application for presentation in the proper Court? The question is whether O. 7, R. 10, Civil P. C., read with S. 141 applies to an application of this nature. There is a good deal of case law on the applicability of S. 141, Civil P. C. The cases mostly depend on the decision of the Privy

1. ('39) 26 AIR 1939 Mad 483 : 183 I C 596 : ILR (1939) Mad 520 : (1939) 1 M L J 329, Gangarazu v. Bulli Ramayya.

Council in 17 ALL 106[2] where their Lordships decided that S. 647 of the old Code (corresponding to S. 141) does not apply to proceedings in execution. The reasoning of that decision is that an elaborate procedure is set forth in the Code itself for proceedings in execution and it would be surprising if the framers of the Code had intended to apply another procedure mostly unsuitable by saying in general terms that the procedure for suits should be followed as far as applicable. Then follows the following sentence :

> Their Lordships think that the proceedings spoken of in S. 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth and do not include executions.

The decision in 54 Cal 405[3] and other decisions of a like nature have added to this obiter dictum of the Privy Council the word "only," and have laid it down that S. 141 extends the procedure of the Code as far as it can be made applicable only to original proceedings in the nature of suits, such as proceedings in probate, guardianship and so forth. This view has not been universally followed, for, this Court has held in 50 M L J 75[4] that O. 9, R. 9, read with S. 141 can be applied to an application for the restoration of a petition dismissed for default which petition itself was preferred under O. 9, R. 9. In A I R 1931 Mad 795,[5] this Court has held that by virtue of S. 141, O. 9, R. 5 can be applied to an application for a personal decree in a mortgage suit. It seems to me, however, that it is unnecessary for me to decide whether or not S. 141 should be restricted to original proceedings more or less in the nature of suits; for, I am of opinion that an application under S. 19 of Act 4 of 1938 can be brought under this category. An application under S. 19 is not an application to amend a decree so as to bring it in accordance with the judgment; nor is it an application which can be said to be ancillary to the suit in which the decree was passed. It is in substance an application to enforce a new right created by a statute which came into force after the decree was passed. It is in no way ancillary to the decree but destructive of the decree ; and though it may result in the amendment of the decree and the recording of satisfaction, it is not, in my opinion, an application in the suit in which the decree was passed, but an entirely separate proceeding to enforce a new right quite distinct from the right declared in the original suit. In this view therefore, even adopting the strict view of S. 141 taken by the Calcutta High Court in 54 Cal 405,[3] I am of opinion that S. 141, Civil P. C., extends to such an application the procedure provided in this Code, including that laid down in O. 7, R. 10. It follows that the Court below wrongfully failed to exercise its jurisdiction to return this application for presentation in the proper Court. The revision petition is therefore allowed with costs and the application will be returned to the applicant by the lower Court for presentation in the Court having jurisdiction.

C.R.K./R.K. *Revision allowed.*

2. ('95) 17 All 106 : 22 I A 44 : 6 Sar 526 (P C), Thakur Prasad v. Fakir-Ullah.
3. ('27) 14 AIR 1927 Cal 534 : 103 I C 69 : 54 Cal 405 : 31 C W N 576, Sarat Chandra Bose v. Bisweswar Mitra.
4. ('26) 18 A I R 1926 Mad 325 : 92 I C 802 : 50 M L J 75, Venkatanarasimha Rao v. Suryanarayana.
5. ('31) 18 A I R 1931 Mad 795 : 135 I C 347, Venkatarama v. Marudachala.

A. I. R. 1941 Madras 363

LAKSHMANA RAO J.

In re Ramanuja Ayyangar — Accused — Petitioner.

Criminal Revn. Case No. 828 and Criminal Revn. Petn. No. 782 of 1940, Decided on 17th October 1940, to revise order of Sub-Divisional Magistrate, Devakottah, D/- 17th September 1940.

Defence of India Act (35 of 1939), S. 2, Rules under, Rr. 38 (1) (a), 34 (6) (e) and (k), and 130 (1) — Charge under R. 38 (1) (a) for prejudicial act within meaning of R. 34 (6) (e) and (k) — Report under R. 130 (1) — Magistrate is competent to take cognizance though prejudicial act amounts to sedition.

Section 3 of the Act read with S. 1 (2), Criminal P. C., makes it clear that the rules under the Act for the arrest and trial of persons contravening any of the rules are not controlled by the provisions of Criminal P. C. Consequently where under the Defence of India Rules framed under the Act a charge is framed under R. 38 (1) (a) for doing a prejudicial act within the meaning of R. 34 (6) (e) and (k) and a report in accordance with R. 130 (1) is made, a Magistrate is competent to take cognizance of the offence and no objection for non-compliance with S.196 Criminal P.C., can be taken on the ground that the prejudicial act amounts to sedition. [P 364 C 1]

V. T. Rangaswami Ayyangar and K. Umamaheswaran — for Petitioner.

V. L. Ethiraj, Public Prosecutor — for the Crown.

Order.—The petitioner has been charged under R. 38 (1) (a), Defence of India Rules, for doing a prejudicial act within the meaning of R. 34 (6) (e) and (k) and a report in writing of the facts has been made by a public servant as required by Rule 130 (1).

Section 3, Defence of India Act, enacts that rules made for the arrest and trial of persons contravening any of the rules shall have effect notwithstanding anything inconsistent therewith contained in any other enactment and Section 1, clause (2), Criminal P. C., provides that nothing therein shall affect any special form of procedure prescribed by any other law for the time being in force. That the prejudicial act might amount to sedition which according to S. 196, Criminal P. C., cannot be taken cognizance of by any Court unless upon the complaint made by order of or under the authority of the Provincial Government has therefore no bearing and the objection to the competency of the Sub-divisional Magistrate to take cognizance of the offence under R. 38 (1) (a), Defence of India Rules, is untenable. The revision petition therefore fails and is dismissed.

C.R.K./G.N. *Petition dismissed.*

A. I. R. 1941 Madras 364

ABDUR RAHMAN J.

Bongi Narayana and another — Petitioners

v.

Bangari Gurramma and others — Respondents.

Civil Revn. Petn. No. 1006 of 1937, Decided on 16th August 1940, to revise decree of Sub-Judge, Vizagapatam, in S. C. S. No. 315 of 1936 and I. A. No. 1055 of 1936.

(a) Civil P. C. (1908), O. 1, R. 10—O. 1, R. 10 should be liberally construed—Pronote in suit itself renewal of earlier pronote based on prior dealings between parties—Pronote in suit inadmissible as insufficiently stamped—Application by one of defendants to be transposed as plaintiff and to continue suit on original cause of action — Court has power to allow aforesaid application.

Order 1, R. 10, which confers wide powers on Courts, must be liberally construed. Where a pronote in suit is found to be inadmissible in evidence as insufficiently stamped and is itself a renewal of an earlier pronote executed on account of prior dealings between the parties, the Court has power under O. 1, R. 10 to grant the relief sought for by one of the defendants in his application to be transposed as plaintiff and to continue the suit on the original cause of action even when such relief is sought after the pronote in suit has been found by the Court to be inadmissible: A I R 1934 Bom 385 and A I R 1939 Mad 467, *Disting.* [P 365 C 1]

(b) Pronote — Pronote in suit, which was renewal of earlier pronote, found inadmissible as insufficiently stamped—Earlier pronote is not wiped off.

Where the promissory note in suit is a renewal of an earlier pronote and is found to be inadmissible in evidence as being insufficiently stamped, the prior promissory note cannot be said to have been merged in or wiped off by the later document. [P 364 C 2]

(c) Practice—Procedure—Court can invent procedure not provided for unless it is expressly or impliedly prohibited from doing so (Obiter).

Where the rules of procedure do not provide a course necessary for the final adjudication of questions involved in a suit and for avoiding multiplicity of proceedings, the Court is justified—perhaps obliged—to invent a procedure as long as it is not prohibited expressly or impliedly from doing so and to grant relief. [P 365 C 1]

Kasturi Seshagiri Rao — for Petitioners.

P. Suryanarayana — for Respondents.

Order. — This is a revision against an order of the subordinate Judge of Vizagapatam dismissing a suit of small cause on the grounds that the promissory note which formed the basis of the suit was not sufficiently stamped and the application made by defendant 4 to be transposed as a plaintiff and seeking permission to continue the suit on the original cause of action was not maintainable. The suit as framed was certainly based on the promissory note; but either as a matter of history as to how the promissory note came into existence or with the object of disclosing as to how the cause of action had accrued, it was stated in paras. 3 and 4 of the plaint that there were prior dealings between the parties and the last promissory note, on which the suit was based, was only executed in renewal of a prior promissory note in 1930.

The only questions that have been debated before me are whether the application made by defendant 4 for transposition should not have been allowed and whether defendant 4 should not have been permitted to continue the suit on the basis of the original cause of action as the promissory note which formed the basis of the present suit was found to be insufficiently stamped. After hearing learned counsel for the parties, I have no hesitation in holding that defendant 4 should have been ordered to be transposed as a plaintiff and having regard to the allegations made in paras. 3 and 4 of the plaint, the suit should have been treated as one on the original cause of action. If the later promissory note of 1930 was found to have been insufficiently stamped, as it was in the present case and hence inadmissible in evidence, the prior promissory note of 1927 cannot be said to have been merged in or wiped off by the later document. It is true that the present suit was brought by the plaintiff on account of the endorsement made on the later promissory note of 1930 and an application was made on behalf of defendant 4 only when it was discovered that the later promissory note was inadmissible in evidence, but the Court could cer-

tainly make an order, after it was moved to do so under the wholesome provisions of O. 1, R. 10, Civil P. C., when it was found to be necessary for the final adjudication of the questions involved in the suit and would have in any case avoided multiplicity of proceedings. Even if the rules of procedure had not permitted such a course, the Court would have been fully justified—nay perhaps obliged—to invent a procedure as long as it was not prohibited either expressly or or impliedly from doing so and to grant relief. But this question does not fortunately arise in this case as the powers conferred on Courts under O. 1, R. 10, Civil P. C., are wide and the section has to be liberally construed.

Learned counsel for the respondent relied on two decisions one of which is reported in 58 Bom 536.[1] This case has no application because the father who made a petition to be impleaded in that suit was not on the record and it was considered that a substitution of the name of the right plaintiff could only be ordered if the suit was not at the date of such substitution barred by limitation. This is not the case here. The second decision which is reported in 49 M L W 387[2] has also no application as the petition for amendment was made in that case for the first time in appeal while here the petition was made in the trial Court before the suit was disposed of. I would in the circumstances accept the revision and order defendant 4 to be transposed as a plaintiff and permit him to amend the plaint so as to base the cause of action on the original promissory note of 1927 with such other facts as may entitle him to bring his suit within time. There is no reason however why defendant 4 should not be put on terms and pay the costs to the other side. The application has been obviously made as the promissory note was found to be insufficiently stamped. Bearing in mind however that the defendants who had executed the promissory note were to blame themselves for this defect I would order defendant 4 to pay a sum of Rs. 25 only as costs to defendants 1 to 3. So far as this revision is concerned, the parties will bear their own costs.

C.R.K./G.N. *Revision accepted.*

1. ('34) 21 A I R 1934 Bom 385: 153 I C 800: 58 Bom 536: 36 Bom L R 814, Krishnaji Shivaji v. Hanmaraddi Mallaraddy.
2. ('39) 26 A I R 1939 Mad 467: 49 M L W 387, Lakshmi Narasimhachariar v. Mangammal.

A. I. R. 1941 Madras 365

BURN J.

Angora Satyanarayanamurthy — Appellant

v.

Angora Venkamma and another — Respondents.

Second Appeal No. 1212 of 1936, Decided on 1st February 1940, against decree of Sub-Judge, Rajahmundry in A. S. No. 18 of 1935.

Madras Hereditary Village Offices Act (3 of 1895), S. 21—Persons' right to share in inam land already established — Suit for partition among them is not barred by S. 21.

A suit for partition of an inam land between persons whose right to the inam in definite shares has already been established is not barred by S. 21. [P 365 C 2]

M. S. Ramachandra Rao — for Appellant.

C. Rama Rao—for Respondents.

Facts. — The suit is by the plaintiff against the appellant, the plaintiff's deceased husband's brother, for a partition by metes and bounds of a certain piece of land in which the plaintiff had been declared to have a right as a cosharer and joint office-holder along with the defendant, the said piece of land being a service inam forming emoluments of a carpenter's service. The suit was contested by the defendant among other grounds on the ground that a suit in respect of an inam land is barred by Ss. 13 and 21, Madras Hereditary Village Offices Act. The contention was negatived by the District Munsif and on appeal again by the Additional Subordinate Judge on the ground that the plaintiff's right to the office having been declared by the Revenue Court already in another proceeding and the present action being one to recover possession of the land based on that title as a result of the declaration such a suit is not taken away from the jurisdiction of the civil Court by S. 21. Against this decision this second appeal is filed.

Judgment.—The appellant's claim that the suit was barred by S. 21 of Madras Act III of 1895 cannot be allowed. This is not a suit for recovery of the emoluments of a village office (S. 13 of the Act) but a suit for partition of the inam land between two persons whose right to the inam in equal shares has already been established. This appeal is dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 366

Full Bench

LEACH C. J., GENTLE AND KRISHNASWAMI AYYANGAR JJ.

Pechiyappa Chettiar — Petitioner

v.

Vazhukka Chetti — Respondent.

Civil Revn. Petn. No. 880 of 1938, Decided on 10th December 1940, to revise decree of Dist. Munsif, Palghat, in S. C. S. No. 902 of 1937.

Madras Agriculturists Relief Act (4 of 1938), S. 15—Tenancy in fasli 1347 is condition precedent to relief under S. 15 : C. R. P. No. 767 of 1939, OVERRULED.

A tenancy in fasli 1347 is a condition precedent to relief under S. 15, and consequently, the section does not apply when a tenancy has ceased to exist before the commencement of fasli 1347 : A. A. O. No. 462 of 1939, *Approved* ; C. R. P. No. 767 of 1939, *OVERRULED.* [P 366 C 2]

C. K. Viswanatha Iyer — for Petitioner.

C. V. Mahadeva Iyer — for Respondent.

Leach C. J.—The question raised in this petition is whether S. 15, Madras Agriculturists' Relief Act, 1938, applies in a case where there was no tenancy in existence in fasli 1347, that is during the year commencing from 1st July 1937 and ending with 30th June 1938. So much of the section as is relevant here reads as follows :

All rent payable by an agriculturist to a landholder or an undertenure-holder under the Madras Estates Land Act, 1908, or to a jenmi or intermediary under the Malabar Tenancy Act, 1929, which has accrued for the fasli year 1345 and prior faslis and which is outstanding on the date of the commencement of this Act shall be deemed to be discharged whether the rent be due as such or whether a decree has been obtained therefor :

Provided that where the person liable to pay rent (hereinafter in this section referred to as "tenant") does not, on or before 30th September 1939, pay up all arrears of rent accrued in respect of any holding for faslis 1346 and 1347, the arrears of rent for fasli 1345 and prior faslis which were outstanding in respect of the same holding on the date of the commencement of this Act shall be deemed to be discharged only in the same proportion as the rent due for faslis 1346 and 1347 which is paid up by the ryot or tenant bears to the rent due for those two faslis :

Provided further that no tenant shall be entitled to the benefit of this section unless he shall have paid in respect of the holding, the rent due for fasli 1347 on or before 30th September 1938.

These provisions have been differently interpreted by two Division Benches of this Court. In A. A. O. No. 462 of 1939,[1] Burn and Lakshmana Rao JJ., held that the section only applied, if a tenancy was subsisting in fasli 1347. In C. R. P. No. 767 of 1939,[2] Wadsworth and Patanjali Sastri JJ., expressed the opinion that the section did not contemplate merely a continuing tenancy and that a person who had ceased to be a tenant for fasli 1347 could obtain the benefit of the Act in respect of rent which had accrued due for fasli 1345 and earlier faslies. In their judgment, Burn and Lakshmana Rao JJ., did not set out their reasons and merely dismissed the appeal which came before them under O. 41, R. 11, Civil P. C., but the position had been clearly stated in the order of the subordinate Judge and in dismissing the appeal under O. 41, R. 11, the learned Judges indicated their unqualified approval of the view of the subordinate Judge. In his order, the subordinate Judge said that the provisos to cl. 1 of S. 15 made it clear that before a tenant can claim the benefit of that clause he must have been a tenant on the date when the Act came into force. Wadsworth and Patanjali Sastri JJ., considered that to disqualify a tenant from getting the relief merely because rent ceased to be due in respect of the holding in the course of fasli 1347 seemed to go beyond the words of the provisos.

In my judgment Burn and Lakshmana Rao JJ., took the correct view of the section. I consider that the first proviso indicates that here the Act is concerned with a continuing tenancy, but it seems to me that the matter is put beyond doubt by the second proviso which states, without the slightest ambiguity, that a tenant shall not be entitled to the benefit of S. 15 unless he shall have paid rent in respect of his holding for fasli 1347. I can only give this proviso the meaning which the words imply and to my mind its effect is that a tenancy in 1347 is a condition precedent to relief under the section. It may possibly have been the intention of the Legislature to give relief to a tenant whose tenancy has ceased before 1st July 1937, but it has not said so ; in fact it has said the direct opposite. If the section as it stands does not express the intention of the legislative authority, the legislative authority can amend the section. The Court cannot amend it ; it can only have regard to the language used. For these reasons I hold that the section does not apply when a tenancy has ceased to exist before the commencement of fasli 1347. In this case the District Munsif of Palghat dismissed the petitioner's suit on the ground that there was no rent owing to the petitioner, after applying the provisions of the Act for scaling down the debt due by the respondent.

1. A. A. O. No. 462 of 1939, Kotithodi Ahmedkutty Haji v. Ramachandra.
2. C. R. P. No. 767 of 1939, Patteri Pakker v. Kunhi Tharuvayi.

In the view I take the case should be sent to the District Munsif to decide it in the light of this judgment. The petitioner is entitled to his costs.

Gentle J. — I agree but desire to add a few words. Apart from the provisions of Act 4 of 1938, the respondent is liable to pay to the petitioner the rent of the holding for fasli 1345, subject to any contention that there has been a previous discharge. Relief from this payment is given by S. 15 (1) of the Act, and in order to obtain the relief the respondent must bring himself within the statutory provisions, fulfilment of which is required before relief can be obtained. The second proviso to S. 15 (1) indicates that no tenant shall be entitled to the benefit of the section unless he shall have paid the rent due for fasli 1347 in respect of the holding. In my view, payment of rent for fasli 1347 is a condition precedent to obtaining relief in respect of fasli 1345 and earlier years. Since the respondent has not fulfilled this condition precedent he cannot bring himself within the provisions of S. 15 and is not entitled to the relief which the section gives by the moneys or rent owing to the petitioner being deemed to have been discharged.

Krishnaswami Ayyangar J.— I defer to the opinion of my Lord which has also been concurred in by Gentle J. I own a certain amount of doubt still lingering in my mind but it is not sufficiently strong to persuade me to take a different view.

C.R.K./G.N. *Petition allowed.*

A. I. R. 1941 Madras 367

Full Bench

LEACH C. J., VENKATARAMANA RAO AND KRISHNASWAMI AYYANGAR JJ.

Chelikani Kondayya Rao and others — Appellants

v.

Uppalapati Naganna and others — Respondents.

Letters Patent Appeal No. 51 of 1939, Decided on 2nd December 1940, against judgment of Wadsworth J., *Reported in A I R 1940 Mad 40.*

(a) Madras Estates Land Act (1 of 1908 as amended in 1936), S. 3 (2)—Lands admitted to be kambattam within mokhasa village—Village must be deemed to be "estate" within meaning of Act even before its amendment.

Where lands are admitted to be kambattam lands within a mokhasa village, it follows that the village was an 'estate' within the meaning of the Act even before the amendment in 1936. [P 368 C 1]

(b) Madras Estates Land Act (1 of 1908 as amended in 1936), Ss. 181, 77 and 3 (10)—Landholder possessing private land within "estate" selling kudivaram right therein but retaining melvaram right — Landlord must be deemed to have converted land into ryoti land — Additional terms do not alter nature of transaction and are void to extent to which they are inconsistent with ryoti tenure — Instrument held converted kambattam land into ryoti land—Additional terms stipulating for payment of fixed rent; interest on arrears of rent, making rent first charge on land and entitling landholder to trees standing on land at date of contract held not inconsistent with ryoti tenure (Per Full Bench, Krishnaswami Ayyangar J., *contra.)*

Where a landholder possesses private lands within an 'estate' and sells the kudivaram right in those lands but retains the melvaram right he must be deemed to have converted the lands into ryoti lands. Additional terms will not alter the nature of transaction and will stand, provided that they are not inconsistent with what the statute states shall apply to ryoti tenure but to the extent that they are inconsistent with ryoti tenure they must be regarded as being void : A I R 1920 Mad 517, *Disapproved.* [P 369 C 2]

The khat executed by the vendee embodying the terms of the contract, after reciting that the landholder had agreed to sell to him the kudivaram right in the kambattam lands and that he had received the purchase consideration, proceeded : 'You have hereby sold to us all the rights possessed by you in the said lands excepting the melavaram rights thereto. Therefore, in the matter of our enjoying the said lands henceforth from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale, etc., you or your heirs shall never raise dispute either with us or with our heirs.' Then followed certain additional terms whereby a stipulation for the payment of a fixed rent and interest at ten annas per cent. per mensem on arrears of rent was made. The cist payable to the landholder was made a first charge on the land, and the landholder was held entitled to the trees standing on the land at the time of the contract, but trees grown after that date were to belong to the vendee :

Held that the document read as a whole operated to convert the kambattam lands into ryoti lands and that the additional terms were not inconsistent with ryoti tenure. [P 369 C 2]

*(c) Deed — Construction — Rule stated (*Per Krishnaswami Ayyangar J.*)*

In the construction of a deed the question is one of intention to be deduced or inferred from a consideration of the entire deed, bringing into action every part of it and rejecting none, unless the expressions are contradictory and incapable of being reconciled, or there is a repugnancy which calls for the rejection of one part in order the more effectually to carry into effect the real intention of the parties gatherable from the part retained. Rejection should be the last resort, after every means to reconcile are exhausted. The Court should rather lean towards a construction which would give a meaning and effect to every one of the clauses in a deed than towards one which would result in a nullification of any one or more of them in the end. [P 371 C 1]

V. Rangachari — for Appellants.

K. Kameswara Rao — for Respondents.

Leach C. J. — The appellants are the mokhasadars of a village falling within the jurisdiction of the subordinate Judge of Masulipatam. On 7th October 1920 they sold to respondent 1 the kudivaram right in their kambattam, or home farm lands, on conditions to which I shall refer in some detail presently. On 31st March 1934 the appellants filed a suit in the Court of the subordinate Judge of Masulipatam for the recovery of the rent due by the sale of the lands. It was contended by the respondents that by the deed of 7th October 1920 the appellants had converted the lands from kambattam into ryoti lands and consequently the revenue Court, not the civil Court, had jurisdiction. Before the subordinate Judge the appellants admitted that the village was an "estate" within the meaning of the Madras Estates Land Act, 1908, as amended in 1936, but they averred that the village was not an estate within the meaning of the Act as it stood at the time of the contract with respondent 1, and an issue was framed on the question. It is however impossible for the appellants to maintain this contention. By admitting that the lands in suit are kambattam lands within a mokhasa village, it follows that the village was an "estate" within the meaning of the Madras Estates Land Act, even before the amendment in 1936, and the appeal must proceed on this basis. The subordinate Judge upheld the respondents' contention that there had been a conversion and dismissed the suit. On appeal to this Court, Wadsworth J., concurred in these decisions and this appeal is from his judgment.

Section 181, Madras Estates Land Act, before the amendment of the Act, stated that nothing in Ss. 6, 8, 10, 11, 12, 19 and 46 should confer a right of occupancy in, or should apply in any way to, a landholder's private land. Then followed a proviso to the effect that nothing contained in the section should prevent a landholder from converting his private land into ryoti land. Until private land was converted into ryoti land the landholder could deal with it as he liked and that is still the position, although the wording of the section has been altered. Section 19 has throughout been to the effect that except as provided in the Act, the relations between a landholder and a tenant of his private land are not regulated by the Act. There was nothing in the Act as it stood before 1936, nor is there anything in it now, which prevents a landholder from leasing his private land on whatever terms he may think fit, but, of course, if he leases it on terms which imply a conversion of the land into ryoti land all the provisions of the Act with regard to ryoti land will apply and will overrule any provisions in the lease which are in conflict with the provisions of the Act. I may here mention that apart from S. 181 the amended Act is on all fours with the measure as it stood before 1936 so far as this case is concerned.

In 39 M L J 565,[1] a Division Bench of this Court had to consider the terms of a conversion of private land into ryoti land and the judgment appears to go to the length of saying that the terms of a conversion can be enforced even if they are inconsistent with ryoti tenure. It was observed that S. 181 contemplated a conversion from home farm land into ryoti land, but that the Legislature had not made any special provision with regard to the terms on which the conversion might be made. It was on this line of reasoning that the Court held that the contract between the parties was enforceable. In my opinion this is going much too far. When there is a conversion of private land into ryoti land the terms of the contract which are not inconsistent with ryoti tenure can be enforced, but once the conversion has taken place the tenant has all the rights given to a ryot by the Act, and if the rent fixed is unfair the remedies contemplated by the Act are open to him. The sole question in this case is whether the instrument of 7th October 1920 operated to convert the appellants' kambattam lands into ryoti lands. The khat executed by the vendee embodying the terms of the contract, after reciting that the appellants had agreed to sell to him the kudivaram right in the lands for Rs. 33,492 and that they had received the purchase consideration, proceeds :

> You have hereby sold to us all the rights possessed by you in the said lands excepting the melwaram rights thereto. Therefore, in the matter of our enjoying the said lands henceforth from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale, etc., you or your heirs shall never raise dispute either with us or with our heirs.

Then follow the other terms relating to the sale and these are set out in clauses numbered 1 to 10. It is only necessary to refer to cls. 1, 2, 3 and 9, as the others have not been referred to in argument and obviously have no bearing on the question under discussion. Clause 1 stipulates for the

1. ('20) 7 A I R 1920 Mad 517 : 60 I C 15 : 39 M L J 565, Devi Garu v, Yellappa Ramu Naidu.

payment of a fixed rent and cl. 2, for the payment of interest at ten annas per. cent per mensem on arrears of rent. Clause 3, provides that the cist payable to the landholder shall be a first charge on the land, and cl. 9 states that the appellants shall be entitled to the trees standing on the land at the time of the contract, but trees grown after that date shall belong to respondent 1. It is suggested that these terms are inconsistent with ryoti tenure and therefore the document cannot be read as converting the land into ryoti land, but only as a special contract relating to private land. The document must be read as a whole in order to guage its effect and when this is done I consider that it must be held that there has been a conversion.

The main characteristic of ryoti tenure is the permanent vesting in the tenant of the kudivaram right and the permanent retention of the melwaram right by the landholder. That is the position here. By virtue of the contract the kudivaram right was transferred absolutely to respondent 1 and he obtained permanent rights of occupancy on the terms set out in the contract. It is conceded by the learned advocate for the appellants that if the document had stopped at the sale of the kudivaram right there would have been a conversion within the meaning of S. 181. I can see nothing in cls. 1, 2, 3 and 9 which alter the position. If the document had stopped merely with the sale of the kudivaram right it would still have been necessary to fix the rent payable to the appellants as the possessors of the melwaram right, and the fact that the rent was fixed in the contract without contemplation of any change in the rate does not alter the position. The landholder and the tenant may agree on a permanent rent, but if they do this it does not take away the right of the tenant to sue or apply for a reduction of the rent if the lands have been converted into ryoti lands. Section 187 (1) (c) says so. Nor is the provision with regard to the payment of interest inconsistent with ryoti tenure. The payment of interest on arrears of rent is expressly provided for in the Act. Under S. 61 an arrear of rent shall bear simple interest at the rate of one half per cent. per mensem from the date on which the arrear fell due until it is liquidated. Therefore cl. 2 of the additional terms is in full accord with the Act, except that the rate is higher. Again this contingency is expressly provided for. Sub-section (2) of S. 187 says that nothing in any contract between a landholder and a ryot made after the passing of the Act shall affect the provisions of S. 61 relating to interest payable on arrears of rent so as to increase the amount payable. The only comment that the learned advocate for the appellants has to make on cl. 3 is that the cist payable to the appellants is made a first charge on the lands only and not on the lands and produce which the Act would allow. The freeing of the charge on the produce is however a concession to the tenant and there is nothing in the Act which prevents a landholder making a concession to his tenant. The appellants receive no help from cl. 9. The trees belonged to the appellants and without this clause would have passed to respondent 1. The Act does not prohibit a tenant conceding to the landholder the right to the trees on the land, and on a conversion of private lands into ryoti lands the parties can contract as they please so far as the trees are concerned.

In my opinion where a landholder possesses private lands within an "estate" and sells the kudivaram right in those lands but retains the melwaram right he must be deemed to have converted the lands into ryoti lands, and additional terms will not alter the nature of the transaction. The additional terms will stand, provided that they are not inconsistent with what the statute states shall apply to ryoti tenure. To the extent that the additional terms are inconsistent with ryoti tenure they must be regarded as being void. The argument which has been advanced that this interferes with the right of the landholder to contract freely with regard to his private lands seems to me to be beside the question. The landholder does not need to enter into a contract which will have the effect of converting his private lands into ryoti lands, but if he does contract and the tenure which he creates amounts to ryoti tenure he must accept all the consequences of his action. The appellants here could have sold the lands in suit to respondent 1 absolutely or they could have leased them at any rent they might have agreed upon without separating the kudivaram right from the melwaram right, but as they chose to separate the kudivaram right from the melwaram right and grant a permanent right of occupancy on the basis of the payment of rent relative to the melwaram right they must, in my judgment, be deemed to have converted the lands in the ryoti lands. For these reasons I would dismiss the appeal with costs.

Venkataramana Rao J.—I agree.

Krishnaswami Ayyangar J. — With much reluctance, I feel myself obliged to differ from the opinion expressed by my learned colleagues. The question with which we are faced in this case relates to the true construction of a khat or counterpart of a lease, embodying the terms of a contract entered into between the appellants and the respondents on 7th October 1920. By that contract, the appellants, who owned a parcel of private land in an estate belonging to them, sold to the respondents, the kudivaram interest alone in it retaining the melwaram interest for themselves. There are in the deed certain other terms and conditions to some of which a reference is necessary for a correct decision, but there can be no doubt that the dominant object in the mind of the parties was to convey to the respondents the kudivaram right in the land. This is not indeed disputed, but what is disputed is, whether there has been a conversion effected by the instrument of what was admittedly the appellant's private land into ryoti land so as to confer on the respondents those rights and privileges which are recognized by the Madras Estates Land Act, 1908, as inhering in a ryot holding ryoti land in an estate.

That the legal incidents which appertain to private land in an estate essentially differ from those annexed to ryoti land is too plain for argument; in fact it is a matter of concession. The differences are fundamental, the Act drawing a sharp distinction between the two classes of land. Private land is to borrow a word from the English law of real property, the freehold of the landholder over which he has absolute unrestricted dominion. He can deal with it in any manner he likes, enter into any kind of contract he chooses and create any form of tenure in it he pleases. Section 19 of the Act preserves to him an unfettered freedom of contract as regards this class of land, a privilege not recognized in respect of any other class of land within the estate. It declares in explicit terms that the relations between a landholder and a tenant—and be it noted, not a ryot—of his private land are not to be regarded as regulated by the provisions of the Act. Language cannot be plainer. Even the name "ryot" is here avoided when referring to the person who cultivates the private land, and the colourless term tenant seems deliberately to be adopted. The only way by which the landholder can make those provisions applicable, is by converting his private land into ryoti land and conferring occupancy right in the land so converted. Such a course was permitted by S. 181 as it stood before the amendment made by Act 8 of 1934. The section ran as follows :

> Nothing in Ss. 6, 8, 10, 11, 12, 19 and 46 shall confer a right of occupancy in or shall apply in any way to a landholder's private land:
>
> Provided that nothing contained in this section shall prevent a landholder from converting his private land into ryoti land.

Of the sections enumerated here all except S. 19 relate to the acquisition or transfer of occupancy rights, or to the limitations subject to which these rights are to be enjoyed in lands other than private lands. Section 19, as already seen, was enacted to preserve the rights of the landholder in the latter category of land. Reading S. 181 together with its proviso the meaning is clear that the landholder could if he chose convert his private land into ryoti land with a view to confer occupancy right in it, and could also confer such a right. It was the same meaning that has been made plainer by the amendment introduced into the section in 1934. The effect of the amendment is not to make a change in the law, but only to make the meaning more explicit than before, and this was not denied at the bar during the arguments. The section as now amended enacts that :

> A landholder shall be at liberty to convert his private land into ryoti land and confer occupancy right in land so converted.

On a literal interpretation, two steps or processes seem to be necessary before the tenant can claim the rights and privileges of a ryot, in land which was originally private land; first a conversion from the one class to the other and second the grant of occupancy right in the land after conversion. The amended section which may well be regarded as merely declaratory of the law as it was before the amendment thus appears to warrant the view that the mere grant of occupancy right in private land does not by itself suffice to alter its character unless it is preceded by an act of conversion. There is no objection, however, to the conversion and the grant being made by one and the same instrument provided the intention is made sufficiently clear. The real question then is not whether permanent rights of occupancy have been granted by the khat which of course it does, but whether the landholder had also fulfilled what appears to me to be a necessary condition precedent, namely the conversion of his private land

into ryoty land. It is necessary in my view to keep the two things separate in order to avoid falling into a possible error. On a question of this kind, there is no presumption one way or the other and it therefore lies on the party who sets up a case of conversion to make it out. If he wholly fails or only succeeds to the extent of creating a doubt, he derives no benefit out of it, and must fail. The question is obviously one of intention to be deduced or inferred from a consideration of the entire deed, bringing into action every part of it and rejecting none, unless the expressions are contradictory and incapable of being reconciled, or there is a repugnancy which calls for the rejection of one part in order the more effectually to carry into effect the real intention of the parties gatherable from the part retained. The rule is thus stated by Kelly C. B. in (1868) 3 Ex 209[2] at page 215 :

> The result of all the authorities is that when a Court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used and by rejecting as superfluous whatever is repugnant to the intention, so discerned.

Rejection should be the last resort, after every means to reconcile are exhausted. There is ample authority also for the proposition that the Court should rather lean towards a construction which would give a meaning and effect to every one of the clauses in a deed than towards one which would result in a nullification of anyone or more of them in the end. These are some of the principles of general application which I should bear in mind in approaching the construction of a written instrument. It is to be observed at the outset that in the deed in question there are no doubtful words or ambiguous expressions, no terms of technical import and no repugnant clauses. The language is plain, and the meaning is clear; and the intention behind each one of the clauses whether taken separately or in combination is easily gathered and creates no difficulty. Nor have I any doubt that the parties intended to make all of them equally operative, and binding so that their future relations may wholly be governed by them. We should hesitate to accept a construction which will result in that intention being abrogated in whole or in part. I readily grant that a necessity for such a course may arise in the class of cases envisaged by Kay J. in (1881) 18 Ch D 698[3] at p. 705 where he observed :

> The truth is that there are certain legal relations which are entered into by agreeing to certain conditions, and when those conditions are agreed to, it is quite idle for people to superadd, or to attempt to superadd, a stipulation that the necessary legal consequences of those conditions shall not follow from the arrangement.

Such a stipulation may have to be ignored but not before fully satisfying ourselves that the necessary conditions are made out for the excision. An illustration of this principle is to be found in the case where the relationship of partners must be held established by law between persons who have agreed to share the profits of a business carried on by all or any of them acting for all in spite of the superimposition of a contrary term in the articles. The proposition however can have no application except in a case where all and not some only of the conditions requisite for constituting the relationship are present. If the conditions fall short or are of a character, which indicates a different relationship, the proposition cannot apply. I am quite unable to agree that the governing consideration lies in the fact that the landholder has in the case on hand parted with the kudivaram right in the land retaining with himself the melwaram interest only. Had the expression "kudivaram" been declared by statute to connote ryoti tenure or if I could persuade myself that it is a technical word, a term of art, having the same legal import, I should readily assent to the proposition. That however is not the case. It is quite clear that the word has been used in the Act (e. g. S. 3 (2) (d)), in a non-technical sense to denote the kind of tenure held by a tenant who has a permanent right of occupancy. In its literal sense the word kudivaram only means the cultivator's share of the produce, the word melvaram meaning the landholder's share : 41 Mad 1012;[4] 43 Mad 166[5] at page 171. It is customary however to speak of the ownership of land in this province as being composed of the kudivaram and the melwaram interests, or as the ownership of both warams. By a process akin to a metonymic user, the expression kudivaram interest is frequently employed to denote the species of interest which a tenant has in the land

2. (1868) 3 Ex 209 : 37 L J Ex 122 : 18 L T 688: 16 W R 1209, Gyoo Gwyn v. Neath Canal Navigation Co.

3. (1881) 18 Ch D 698 : 50 L J Ch 683 : 30 W R 469, Pawsey v. Armstrong.

4. ('18) 5 AIR 1918 P C 169 : 48 I C 689 : 41 Mad 1012:45 IA 209 (PC), Suryanarayana v. Patanna.

5. ('19) 6 AIR 1919 P C 111 : 51 I C 304 : 43 Mad 166 : 46 I A 123 (P C), Venkata Sastrulu v. Devi Seetharamudu.

in his permanent occupancy, whether that land lies in an estate or outside it. This being the ordinary, popular sense, it must be taken that the word was used in this sense in the document. What is important to remember in this connexion is that kudivaram interest and ryoti tenure are not convertible terms having the same legal significance.

When we speak of ryoti land or ryoti tenure, the picture that is called up to our mind is the picture of that peculiar species of cultivable land in an estate, defined in the Act, to which, and to the holding of which, an entire body of mostly new and special rules have been annexed by force of the estate. Among the incidents which since the Act, attach to this species of land, the most important no doubt is the permanency of the tenure and the fixity of the rent, guaranteed to the tenant under stringent safeguards, subject however to certain conditions to which it is unnecessary to refer for the present purpose. But the other incidents, whatever their relative importance, do exist, and should not be ignored when seeking to obtain a knowledge of the true measure and the real nature of that right. To put it in a simple form, kudivaram is only a part though a major part of the whole. But 15 annas do not make a rupee, nor 19 shillings a pound. To say so is not arithmetic. Neither is it in my opinion law and yet this is in substance the argument of the respondents. With all respect therefore, I am unable to assent to the proposition that the conveyance of that species of right known as the kudivaram interest amounts to the creation of a ryoti tenure in the land conveyed. To examine the matter still further, it is to be observed that this document came into existence more than twelve years after the passing of the Madras Estates Land Act. The expressions, ryot and ryoti land which were newly coined by the Act, to replace the words "tenant" and his "interest" in the holding, in order probably to emphasize the permanent character of that interest, had by the time of the deed become quite familiar to all, and yet it is somewhat strange, that these words have been studiously, as I think, avoided in the conveyance. It was in fact suggested that the deed was drawn up with a knowledge of the decision reported in 39 M L J 565.[1] If in these circumstances the parties had really bargained for a conversion of the private land into ryoti land, it is not a little remarkable that language well known to denote that meaning should not have been employed instead of another, and at all events, a less decisive expression. There is, it may be observed, no suggestion of any overreaching by the one party over the other in this case.

Apart from any such narrow consideration, when one comes to look at the entire document, it becomes in my opinion very difficult to resist the conclusion that the landholder was not here seeking to convert his private land into ryoti land. I have earlier in this judgment endeavoured to recapitulate the rules which have to be brought to bear on this question. One of those rules is that the intention of the parties is to be collected from the whole of the document, not ignoring any part. If, on this principle, the conditions of the contract, contained in "the particulars of the remaining terms relating to the sale" as described in the instrument are considered, there are at least two which definitely militate against the theory of a conversion. Clauses 1 and 4 of these particulars taken together have the effect of fixing a permanent immutable rent payable year after year by the lessees, irrespective of the failure of, or a diminution in the yield, from whatever causes due. Clause 2 again provides that arrears of rent should carry interest at the rate of ten annas per cent. instead of at the rate of eight annas fixed by S. 61. These two terms which were specifically agreed to and undoubtedly intended to be operative, annex to the tenure created by the deed incidents which are not only foreign to a ryoti tenure under the Act, but materially opposed to it. Remembering that it is open to the landholder to create any kind of derivative tenure not opposed to the general principles of law, I find it difficult, nay, impossible to attribute to him an intention to bring into being one tenure, when the very terms of the contract clearly point to the parties having had in mind a different one, with different incidents. It is not for the Court to evaluate the terms for the purpose of accepting some and rejecting others. On the contrary, every rule of law and every rule of equity would seem to prohibit its so doing.

That there is a fundamental divergence between the terms of the contract in question here and the incidents annexed to a ryoti tenure under the Act, will appear plainly from a perusal of S. 187. A ryot's right to sue or apply for a reduction of the rent on the grounds stated in cls. (a) and (b) of sub-s. (1) of S. 38 or sub-s. (3) of S. 32, or on the ground mentioned in cl. (c) of sub-s. (1) of S. 38 is by S. 187 (1) preserved as an in-

violable privilege not to be destroyed or overridden by any contract to the contrary whether made before or after the Act. Similar in effect is S. 187 (2) in so far as the rate of interest fixed by S. 61 is sought to be enhanced. With these inconsistent provisions contained in the deed before us, I consider that it is not open to the Court to infer that it was the appellant's intention to convert his private land into ryoti land. The other clauses in the deed are indecisive and I agree that they do not materially affect the construction. What presses on my mind is that it is not correct for a Court to infer a tenure by taking into account some only of the terms of the contract ignoring others, when it is possible, and I think it permissible to give effect to all the terms by treating it as a special contract and one not entered into for the purpose of impressing a ryoti tenure on the land comprised in the khat.

I may add a word about the decision reported in 39 M L J 565.[1] That was a case where a ryoti tenure had been either expressly created by contract, or admitted to have been so created on the pleadings, and the question arose whether terms and conditions repugnant to such a tenure should be recognized. The Court held that the conditions were valid and enforceable. The ground of the decision is to be found in the concluding sentences in the judgment where the learned Judges say that the Legislature has not made any special provision as regards the terms on which a conversion may be made, and that in the absence of such a provision, the contract of the parties on the basis of which the conversion was made, should prevail. If the learned Judges here meant to lay it down, that there is no objection in law to the superimposition by contract of terms alien to a ryoti tenure, after once creating such a tenure, I must with great respect, dissent from that view, which I think is a view which runs counter to the rule stated by Kay J. The position here is however different. The question is not as to the validity of terms added which detract from the quality of a tenure created and intended to be created but whether there has been an effectual creation of the tenure itself. For the reasons explained, I regret, I am unable to share the opinion of my learned colleagues. I consider that the appeal should be allowed with costs throughout.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 373

WADSWORTH AND PATANJALI SASTRI JJ.

Ramaswami Udaiyar and another — Appellants

v.

Sevu Ramu Aru Ramanathan Chettiar and another — Respondents.

Appeals Nos. 643 and 644 of 1938 and Civil Misc. Petns. Nos. 704 and 705 of 1940, Decided on 19th September 1940, against order of District Court, Salem, D/- 26th September 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 19 — Appeal by decree-holder against decree — Pending it applications by judgment-debtor under Ss. 19 and 23 against decree — Applications dismissed — Judgment-debtor allowing appeal by decree-holder to proceed ex parte—Decree modified in appeal — Appeal by judgment-debtor against dismissal of applications under Ss. 19 and 23 held became infructuous.

A decree-holder filed an appeal against decree. Pending that appeal the judgment-debtor made applications under Ss. 19 and 23. These applications were dismissed. The judgment-debtor allowed the main appeal by the decree-holder against the original decree to proceed ex parte and did not club his own appeal against the dismissal of his applications under Ss. 19 and 23, along with decree-holder's appeal. In decree-holder's appeal the original decree was modified :

Held that the appeal by the judgment-debtor against dismissal of his applications under Ss. 19 and 23 had become infructuous by reason of the substitution of the appellate decree for the original decree. [P 374 C 1, 2]

G. N. Chary — for Appellants.

K. S. Ramabhadra Iyer and P. Sridhara Rao — for Respondents.

Wadsworth J. — These civil miscellaneous appeals are preferred against the order of the District Judge rejecting applications filed in one case under Ss. 8 and 19 and in the other case under Ss. 20 and 23 of Act 4 of 1938. The civil miscellaneous petitions have been preferred owing to the doubt whether a civil miscellaneous appeal would lie praying that these appeals may, if necessary, be converted into civil revision petitions. We have heard these matters on a preliminary objection without deciding the question whether the proper form should be an appeal or a revision petition. The decree out of which these applications arose was passed on 23rd October 1935. In February 1936, the decree-holder preferred an appeal to the High Court the main objection taken in appeal relating to the rate of interest. There was no stay of the lower Court's decree and the decree-holder proceeded with its execution while the appeal was pending and in November 1937 brought to sale the petitioners' property. In March

1938 the executing Court recorded an agreement whereby the sale should be set aside on certain terms, which were in fact not fulfilled. In June 1938 the petitioners preferred these applications, one being for stay and the other, though it is styled an application under Ss. 8 and 23, is in substance one under Ss. 19 and 23 of the Act. On 26th September 1938, the lower Court dismissed these applications holding that Act 4 of 1938, so far as it affected the provisions of the Negotiable Instruments Act was ultra vires of the Provincial Legislature. In these applications a counter affidavit was filed in which attention was drawn to the fact that there was an appeal pending in the High Court against the trial Court's decree. The petitioners filed the present appeals against the dismissal of their applications. Instead of getting these appeals clubbed along with the appeal against the original decree, they allowed the main appeal to proceed ex parte and did not advance therein any claim that they might have to scale down the debt under Act 4 of 1938. On 6th April 1939 the main appeal was disposed of, the lower Court's decree being slightly modified, but substantially the appeal failed.

Now the preliminary objection taken to the maintainability of these civil miscellaneous appeals, assuming that an appeal lies (a matter on which we express no opinion) is that the appeals have become infructuous by reason of the substitution of the appellate decree for the original decree which the applicants sought to scale down. It seems to us that this objection must succeed. We have held that S. 19, Madras Act 4 of 1938, has no application to decrees passed after the Act came into force, one reason being that any person who has a contention to urge which will affect such a decree must urge it in the pending proceedings and if he does not urge it he must be taken to have waived it. We see no reason to apply a different principle to proceedings in appeal of which the affected party has had notice. It may be that in some cases it will be necessary for a person who has applied under S. 19 to scale down the lower Court's decree to put in a separate application to the appellate Court to the same effect and that there will be some duplication of proceedings. But in the present case not even that was necessary, for the desired result could have been achieved by the simple process of asking that these civil miscellaneous appeals and the connected petitions should be clubbed along with the main appeal.

It is difficult to see how when the appellate decree has taken the place of the lower Court's decree as the sole decree which can be executed, any practical result would be achieved by going on with the application to scale down the lower Court's decree. It is suggested that because there was an executable decree at the time when these applications were rejected this Court should decide whether or not the applications were rightly rejected and remand the proceedings if wrongly decided for fresh disposal by the trial Court, in order that the applicants might take such action as might be available to them to get the appellate Court's decree modified to give effect to the scaling down process. It seems to us that when once it is conceded that the decree which the applicants sought to amend is no longer an executable decree and that the decree which has been substituted for it in appeal cannot be scaled down under S. 19, the present proceedings attacking the lower Court's order have become infructuous. In this view therefore we dismiss the appeals and the connected petitions, with costs in the appeal only (one set in each appeal). The memorandum of objections in C. M. A. No. 643 of 1938 is dismissed but there will be no order as to costs.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1941 Madras 374

LAKSHMANA RAO J.

Thoonga Vedan and others—Petitioners

v.

Perumal Goundan and others — Respondents.

Criminal Revn. Case No. 257 and Petn. No. 246 of 1940, Decided on 29th October 1940, to revise order of Sub-Divisional Magistrate, Namakkal, D/- 20-3-1940.

Criminal P. C. (1898), S. 147 — Costs — Subsequent order as to.

If there was no order as to costs in the decision under S. 147, the award of costs by a subsequent order cannot be supported. [P 374 C 2]

V. T. Rangaswami Iyengar and T. R. Ramachandran — for Petitioners.

K. S. Jayarama Iyer and S. Arunachalam — for Respondents.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

Order. — There was no order as to costs in the decision under S. 147, Criminal P. C., and the award of costs by a subsequent order cannot be supported. The revision petition is therefore allowed and the order as to costs is set aside.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1941 Madras 375

PANDRANG ROW AND ABDUR RAHMAN JJ.

Karnam Ramamma and another — Appellants

v.

Peddineni Venkatalakshmamma and others — Respondents.

Appeal No. 340 of 1937, Decided on 29th April 1940, against decree of (Addl.) Sub-Judge, Nellore, in O. S. No. 22 of 1935.

(a) Hindu law — Adoption—Custom — Illatom adoption—Illatom adoption cannot be regarded as complete unless marriage has actually taken place.

It is true that illatom adoption is of secular nature and has no religious significance but it is brought about with the object of securing the adoptee's assistance in the management of the property, usually agricultural, belonging to the father whose daughter he (the adoptee) either marries or intends so to do and cannot be considered to be complete unless the marriage has actually taken place. The fact that a boy is called an illatom son-in-law before his marriage is not of any importance. He is really an illatom son-in-law designate before the marriage and if he is called as such before he is married to the girl with whom his marriage is intended to be performed, this is a courtsey title alone and is given in anticipation of the marriage, which is more or less regarded to be a certainty. [P 376 C 2; P 377 C 1]

(b) Will—Construction — Testator keeping certain boy in his house as illatom son-in-law with view that marriage may be celebrated between him and testator's daughter and providing that his illatom son-in-law and daughter shall be entitled to certain shares in his property after his lifetime —Marriage between illatom son-in-law and testator's daughter held condition precedent to bequest taking effect.

In construing bequest made by a testator Court has to ascertain his intention. If the testator is intended to have conveyed a benefit on a particular individual as a persona designata, the bequest would take effect although the description of the person may be, or may turn out to be, wrong. If, on the other hand, the testator's intention is found to be that the bequest is conditional on an adoption or on some other relationship on account of which he is making the gift, the gift as such must fail if the adoption or relationship is not found to exist or does not come into existence. [P 379 C 1]

A testator in his will provided as follows : "As I have no male issue and as I have a female issue by name *R* I have brought to my house *S*, son of my own uterine sister and I have been keeping him in my house and giving him education with a view that a marriage may be celebrated by giving my daughter to him and that these two might become entitled to and enjoy the moveable and immovable properties specified therein. I have kept him as the huqdar for the office of the Village Munsif in Vasili held by me and kept him as illatom ..... Out of the remaining moveable and immovable properties owned by me, my daughter *R* and my illatom son-in-law *S* shall after my lifetime enjoy with absolute right two shares out of the four shares :"

Held that the illatom son-in-law was not a mere description of *S* but the property was meant to be given to the prospective son-in-law in his capacity as a son-in-law and not to *S* in his individual capacity. *S*'s marriage with *R* was a condition precedent without which the bequest was not to take effect. [P 376 C 2; P 379 C 1]

V. V. Srinivasa Iyengar, V. V. Ramadurai, P. Chandra Reddi and R. Ramalinga Reddi— for Appellants.

R. Sethurama Sastri — for Respondents.

Abdur Rahman J.—The main question to decide in this appeal is one of construction of a will executed by one Veerappa Naidu, a kamma of Nellore. What we have to ascertain is whether the testator's intention was to bequeath a share of his property to a designated person, (persona designata) Sankariah, who happened to be his sister Venkatalakshmamma's son or whether Sankariah's marriage with the testator's daughter Ramamma, defendant 2, was a condition precedent without which the bequest was not to take effect? The will was executed on 27th April 1923 and the testator died two days later. Sankariah died before his marriage on 22nd June 1925 leaving his mother as his heir. He was about 13 years old then. Ramamma was subsequently married to Gopal Naidu, defendant 3, in the suit. Venkatalakshmamma brought the suit out of which this appeal arises for recovery of the share bequeathed by her brother Veerappa Naidu to her son Sankariah under the will EX. A. The relevant portions of the will are as hereunder :

I am now ill in body and apprehend that I may not live. As I have no male issue and as I have a female issue by name Ramamma, I have brought to my house five years ago Pedineni Sankariah, son of my own uterine sister Venkatalakshmamma, and I have been keeping him in my house and giving him education with a view that a marriage may be celebrated by giving my daughter to him and that these two might become entitled to and enjoy the moveable and immovable properties specified therein. I have kept him as the huqdar for the office of the Village Munsif in Vasili held by me and kept him as illatom. . . . Out of the remaining moveable and immovable properties owned by me, my daughter Ramamma and my illatom son-in-law, Sankariah, shall, after my lifetime, enjoy with absolute right two shares out of the four shares. I have arranged the said Sankariah shall have a right to the post of Village Munsif of Vasili village which belongs to me. My wife, my own mother and father shall retain in their possession the other two shares, bring and keep in our house my wife's brother Gola Narasiah, give my uterine younger sister Venkamma (another sister) in marriage to him and the said Gola Narasiah shall, after the lifetime of my father and mother, have a right to one share. The other one share shall, after the lifetime of my wife Lakshmamma, pass to my daughter and son-in-law. She shall be in enjoyment of them till then.

The question to decide is, as we have stated in the beginning, whether Veerappa intended to bequeath two shares mentioned

in the portion marked A-1 to his daughter Ramamma or to his sister's son Sankariah irrespective of the fact whether they were married to each other or not. In the portion of the will marked A-2, another share was bequeathed by Veerappa to his daughter and to his son-in-law on the happening of a contingency, that is, of his wife's death. It would be noticed that in the latter portion of the will (A-2) Sankariah has not been mentioned by name while his name was specifically mentioned in the portion marked A-1. There is no doubt however that the reference in both places in the will is to the same person. No exception can also be taken to the argument that if the property devolved on Sankariah at the time of the testator's death, Sankariah and Ramamma would not take the two shares as joint tenants, there being no right of survivorship as between them, but merely as tenants-in-common and that their shares would be in the absence of any direction to the contrary equal. The answer to the questions whether the bequest to Sankariah was to take effect on his marriage with Ramamma or whether it was contingent on his marrying Veerappa's daughter would depend on the fact whether Sankariah was described as an illatom son-in-law for purposes of identification merely or whether the existence of relationship of an illatom son-in-law was regarded by Veerappa to be a condition precedent without which the bequest could not be held to be operative. If the testator's intention is found to be that Sankariah should take the bequest only in his character as an illatom son-in-law, the bequest must be held to fail as the presumed condition on which Veerappa wanted Sankariah to take the bequest will not be found to exist. To ascertain that intention we must now examine the relevant portions of the will which we have already quoted in extenso.

The first portion of the will is, in our opinion, extremely significant and leaves no doubt that the "two" (Sankariah and Ramamma) were intended by the testator to be "entitled to and enjoy the moveable and immovable properties specified herein" after his daughter's marriage was "celebrated" with Sankariah. This would clearly show that the testator was only trying to provide for this couple in the event of their being married to each other and if by any chance the marriage was not celebrated or became impossible of performance, the legacy was not intended to take effect. Our reading of the will leads us to the conclusion that the testator did not visualize the possibility of these two not being married and did not provide for the contingency that arose on account of Sankariah's death before his marriage. If the actual words of bequest in the will, which have been marked by us as A-1, are read with what was stated in the beginning of the will, it would appear that Veerappa was making a bequest not to his sister's son Sankariah as such, but to his "illatom son-in-law Sankariah" along with his daughter. That is why he referred to the enjoyment of two shares by both of them with absolute rights after his lifetime. In other words, the will was providing for the person who was to marry his daughter and not for Sankariah in any other capacity. The bequest was not made to Sankariah who might become his illatom son-in-law later but to his illatom son-in-law that Sankariah was expected to be. This means that the illatom son-in-law was not a mere description of Sankariah but that the property was meant to be given to the prospective son-in-law in his capacity as a son-in-law and not to Sankariah in his individual capacity.

It is true that Sankariah was mentioned at one place in the will as an illatom son-in-law; but he would have been so if he would have married Ramamma and not before. The object of putting it in that manner was another way of describing the certainty which the testator felt about the marriage as if it had already taken place and Sankariah had already become his son-in-law. The contention raised before us by learned counsel for the respondent that Sankariah was an illatom son-in-law even before his marriage with Ramamma has no force. It is true that illatom adoption is of secular nature and has no religious significance but it must not be overlooked that it is brought about with the object of securing the adoptee's assistance in the management of the property, usually agricultural, belonging to the father whose daughter he (the adoptee) either marries or intends so to do and cannot be considered to be complete unless the marriage has actually taken place. The time that the would-be son-in-law spends in his future father-in-law's house may be regarded as a period of probation, and it is only when nothing untoward happens in the meantime or nothing is discovered which may lead him (i. e., the prospective father-in-law) to consider the boy as an unsuitable husband, that the marriage takes place. Before marriage, he can be asked to go away

and there is no obligation so far as we know, customary or moral, on the adoptive father to do anything for the boy whom he intended to adopt in that form. What would happen if either the boy or the girl happens to die and the marriage becomes impossible? It cannot be reasonably suggested that the status of the son who was intended to be adopted in that form could be in the event of the girl's death regarded to have undergone any change before the marriage.

A great deal of stress was laid by learned counsel for the respondent on the fact that according to custom the boy could be married even subsequent to his adoptive father's death and that he would be called even before marriage, in common parlance, an illatom son-in-law. But we cannot see how these assertions, even if correct, could really help his case. If a boy brought by the father to his house during his lifetime and kept therein with the object of marrying his daughter did not happen to marry her during her father's lifetime, but married her after his death, he would still be a son-in-law of the deceased since the deceased had brought and kept him in his house with the object of giving his daughter in marriage. If the boy continued to live in that house after marriage and carried on the management of his father-in-law's property which was the real object of the adoption, the boy must be taken to have done all that he was expected to do and there could be no difference in his status on account of the fact that the marriage was not performed before his wife's father's death. Nor is the fact that a boy is called an illatom son-in-law before his marriage of any importance. He is really an illatom son-in-law designate before the marriage and if he is called as such before he is married to the girl with whom his marriage is intended to be performed, we take it that this is a courtesy title alone and is given in anticipation of the marriage, which is more or less regarded to be a certainty.

We have tried to show that in this particular case on a proper construction of the will the bequest to Sankariah and to Ramamma must be held to have been made on the condition that they were married. They could not have enjoyed the property jointly before their marriage and it was this joint enjoyment which was, as we read the will, intended to be expressed by the testator in more than one place. If the marriage could not be performed for any reason whatsoever the provisions of the will could not be held to apply and there would be an intestacy so far as the shares that were intended to be given to these two were concerned. If Ramamma gets any share or property of her father subsequently, she would not do so under the will but on account of the provisions of Hindu law. Learned counsel for the respondent placed reliance on certain English and Indian decisions but they are not, in our opinion, applicable to this case. The first case on which reliance was placed was a decision of their Lordships of the Privy Council in 22 Mad 383,[1] commonly called the first Pithapore case. The bequest in that case was made to a person whom the testator was alleged to have falsely described as his aurasa or natural born son. This description was not considered by their Lordships to involve any condition that the legatee should be the testator's natural son in fact and the bequest having been found to be in favour of a designated person was not regarded to be invalid even when the legatee was assumed not to be the testator's son. After considering the various clauses in the will their Lordships arrived at the following conclusion :

> Their Lordships are of opinion that there is a gift by the will to respondent 2 and that the false description which must at present be assumed does not vitiate it.

The next decision which was cited on behalf of the respondent was that in 24 Mad 214.[2] In the will which came up for construction before their Lordships of the Privy Council in this case it was admitted by the testator in the beginning of the will that he had been keeping a minor as an adopted son and protecting him for the last three years. Later on in the will the boy was referred to as an adopted son; but the bequest was not, as would be seen from the words in the will, conditional on his adoption. The relevant passage in the will reads as follows :

> Whereas I, having no issue, have been keeping Venkataramanayyar, a minor aged about ten, son of Venkatadasappayya . . . . who is my brother-in-law, as adopted son and protecting him for the last three years, whereas I am now seriously ill, whereas my mother Venkalakshmi Ammal is in her dotage, and whereas my adopted son, the said Venkataramanayyar, is a minor and consequently incapable of managing the said properties and of protecting us, my wife Subbammal shall, until the said minor becomes a major, administer the said properties as guardian of the said minor . . . . . Afterwards the said minor on his attaining majo-

1. ('99) 22 Mad 383 : 26 I A 83 : 7 Sar 481 : 9 M L J Sup 1 (P C), Venkata Surya Mahipathi Ramakrishna Rao Bahadur v. Court of Wards.
2. ('01) 24 Mad 214 : 27 I A 162 : 7 Sar 782 (P C), Subbarayar v. Subbammal.

rity shall take charge of the said properties . . . . and after the said Subbammal's lifetime he shall perform her funerals and possess and enjoy with all rights the said properties from generation to generation so long as the son and moon last . . . .

In view of the words in the will it was assumed by their Lordships in coming to a decision that the boy was not adopted. But construing the will, their Lordships expressed their opinion in the following words :

It appears to their Lordships that the gift to the minor is not conditional on adoption. The testator no doubt refers to the minor as his adopted son, but he explains what is meant by that expression by stating that he had been keeping the minor "as adopted son" that is with a view to his adoption.

This case renders no assistance to the respondent. It was relied upon because in that case the minor, although not an adopted son, was described in one place as such. But that was explained by their Lordships from what was contained in the will itself. It would be noticed that the bequest was in favour of the minor and not in favour of the adopted son. Moreover, there was nothing in the will from which it could be inferred that the bequest was contingent on the adoption. The next case brought to our notice was that in 28 M L W 869,[3] where, in construing a will which was to the following effect

that to the said properties and to my assets, liabilities, my daughter Subbamma and my sister's son shall be the "karthas" (heirs entitled) and they shall be discharging the debts from out of the income of the lands and be supporting my mother and wife,

a Division Bench of this Court consisting of Sir Murray, Coutts-Trotter C. J., and Ramesam J. held that the gift to Subbiah was not conditional upon his marrying the girl Subbamma. We must remember that in coming to this decision the testator's words that the gift was being made to his sister's son Subbayya could not have been possibly ignored. There was no suggestion in the clause actually containing the bequest that Subbayya would marry his daughter Subbamma. There was apparently nothing in that will similar to what we find in this will as to the reason why the bequest was being made by the testator to his daughter and to his son-in-law. Our attention was however invited to certain observations by Ramesam J. in that judgment, where the learned Judge came to the decision that the word "illatom son-in-law" in that will was meant to convey "intended son-in-law." We do not understand Ramesam J. to have said that in every case an illatom son-in-law should be taken to cover an intended son-in-law. We can only take it to mean that in construing that will this was his opinion. There was a direction in that will that the testator's sister's son Subbayya should be kept as illatom son-in-law and that his daughter Subbamma should be given in marriage to him. In referring to those words the learned Judge observed :

By saying that he should be kept as illatom son-in-law what he apparently meant was that he should be kept in the house with a view to marrying his daughter when the proper time arrived.

Then follows the sentence : "Illatom son-in-law means intended son-in-law." It follows that the learned Judges in that case were of opinion that the bequest was not being made to Subbayya on the condition of his marrying the testator's daughter Subbamma but irrespective of that consideration. If that be so, the decision can be well understood but has no relation to the facts of the present case. Learned counsel for respondent placed his reliance on (1826-49) 58 E R 495[4] as well. This was done as a bequest of £3000 was made to Adelaide Schloss who was described as the testator's wife in one part of the will while in the beginning of the will the testator had referred to her as "Miss Adelaide Schloss, my niece which I may marry in a few days." It was held in that case that the legacy was not given to Miss Adelaide Schloss, on the condition of the testator marrying her although the will was made under the impression that the intended marriage would take effect and the testator had described the plaintiff with reference to his intention of marrying her. This case is distinguishable from the present one as we have found on the construction of the will that Sankariah's marriage with Ramamma was regarded by the testator to be a condition precedent before the bequest could take effect. In view of this construction of the will, it is unnecessary to refer to the cases that were cited by the learned counsel for the respondent in any detail, 11 Cal 463,[5] 20 Bom 718[6] and on appeal to the Privy Council in 23 Bom 271[7] and 28 ALL 488.[8]

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3. ('28) 15 A I R 1928 Mad 926 : 112 I C 255 : 28 M L W 869, Venkatakrishnayya v. V. Madamma.

4. (1826-49) 58 E R 495, Schloss v. Stielbel.

5. ('85) 11 Cal 463 : 12 I A 72 : 4 Sar 610 (P C), Fanindra Deb Raikat v. Rajeswar Das.

6. ('96) 20 Bom 718, Karamsi Madhowji v. Karsandas Natha.

7. ('99) 23 Bom 271 (P C), Karamsi Madhowji v. Karsandas Natha.

8. ('06) 28 All 488 : 33 I A 97 : 3 A L J 415 (P C), Lali v. Murlidhar.

A consideration of all these cases leads us to the conclusion that in construing a bequest made by a testator, we have to ascertain his intention. If the testator is intended to have conveyed a benefit on a particular individual as a persona designata, the bequest would take effect although the description of the person may be, or may turn out to be wrong. If, on the other hand, the testator's intention is found to be that the bequest is conditional on an adoption or on some other relationship on account of which he is making the gift, the gift as such must fail, if the adoption or relationship is not found to exist or does not come into existence. Having regard to this test, and bearing the words of Veerappa's will in mind, we have no hesitation in holding that he did not intend to confer any benefit on Sankariah, if Sankariah did not marry his daughter. In fact, our own conclusion is, as we have stated elsewhere in this judgment, that Veerappa did not anticipate that contingency at all at the time when he was writing his will. On this point, therefore, we must disagree with the decision of the lower Court. Some attempt was made in the beginning of his arguments by learned counsel for the appellant to show that Veerappa had left no will and that in any case the copy of the will produced in the lower Court was not a true copy of that will and was not admissible in evidence without the proof of the loss of the original. But after hearing him we were of opinion that there was no force in this contention. Since, however, he is succeeding in regard to the construction of the will, it is unnecessary for us to give our reasons for that finding in any detail. Suffice it to say that, in our opinion, those contentions had no force. The result of our finding is that this appeal must be accepted and the plaintiff's suit dismissed. But since, it was attempted to be defended both in the lower Court and in this Court on incorrect grounds, we would leave the parties to bear their own costs throughout.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 379

PANDRANG ROW J.

Velayudha Maistry and another — Appellants

v.

Mari Ammal — Respondent.

Second Appeal No. 514 of 1939, Decided on 23rd September 1940.

(a) Second appeal — Findings of facts cannot be questioned.

So far as the facts are concerned, the finding of the lower appellate Court cannot be questioned in second appeal. [P 379 C 2]

(b) Trees — Trees planted on another's land under implied license from latter —Person planting trees can be allowed to remove them and restore land in condition existing before planting.

Where a person has planted trees on another's land under an implied license from the other, the trees do not go with the land and the person who planted the trees can be allowed to remove them and restore the land in the condition in which it was before the trees were planted. [P 380 C 2]

K.S. Desikan and P.C. Parthasarathy Iyengar — for Appellants.

V. Ramaswami Iyer — for Respondent.

Judgment. — This is an appeal from the decree of the District Judge of East Tanjore dated 11th July 1939 modifying in appeal the decree of the District Munsif of Negapatam dated 12th November 1937 in O. S. No. 39 of 1936. The suit was one instituted for a declaration of the plaintiff's title to a narrow strip of land in the Negapatam Municipality abutting on a tank belonging to the community of the defendants, i. e., the washermen of the locality. The land in question is a narrow strip of about 15 ft. abutting on the plaintiff's garden which she purchased in December 1935. This strip was claimed by the plaintiff as part of her garden and included in S. No. 1499. The defendants on the other hand alleged that the strip of land constituted the bund of the tank and belonged to them along with the tank and was included in S. No. 1500. The plaintiff's claim to this strip was negatived by the first Court and also by the lower appellate Court but in the appeal which was preferred by the plaintiff the lower appellate Court, while dismissing the suit for a declaration of the plaintiff's title to the strip in question granted as an equitable remedy permission to the plaintiff to cut and remove the trees in the strip of land before a certain date. The defendants appeal so far as the equitable remedy granted by the lower appellate Court is concerned.

So far as the facts are concerned, there can be no doubt that the finding of the lower appellate Court cannot be questioned in second appeal and as a matter of fact though an attempt was made to question the propriety of the findings of fact by the lower appellate Court in the course of the hearing of this appeal on the ground that there was no evidence to support them, no such attack appears to have been made or intended in the grounds of second appeal. It is in my opinion not open to the appellants to ques-

tion the finding of the lower appellate Court to the effect that the trees in the strip were planted by the plaintiff's predecessors-in-title and not by the present appellants, i. e. the defendants and further, that the planting was under an implied license from the washermen. The first Court also observes that according to the commissioner there is no fence separating the strip in dispute from the adjoining garden which belongs to the plaintiff and that the trees in the strip are more or less of the same age and description as the trees in the plaintiff's garden. The first Court was also of opinion that these circumstances would have afforded some corroborative evidence of the plaintiff's title and possession of the disputed site. In these circumstances, it is impossible to contend that the finding of the lower appellate Court in favour of the plaintiff so far as the planting of the trees is concerned is not supported by any evidence in the case. On the finding of fact that the trees were planted by the plaintiff's predecessors in title and under an implied license it seems to me that no real objection can be made to the modification made by the lower Court in favour of the plaintiff allowing her to cut and remove the trees before a certain date.

Several decisions have been brought to my notice by the advocate for the respondents which show that the rule of English law that whatever is built upon land or grown upon land grows with the land does not apply strictly to India. It is enough in this connexion to refer to the older decisions reported in Beng L R Sup Vol 595[1] and in 6 Bom H C R A C 80.[2] In the latter case Couch C. J., observed that the doctrine of the English law as to buildings, namely that they should belong to the owner of the land, cannot be applied to cases arising in India and that the only doctrine that could be applied is the doctrine established in India that the party so building on another's land, should be allowed to remove the materials. In the former case, Sir Barnes Peacock C. J., after referring to the Hindu law and the Mahomedan law relating to the topic, observed as follows:

> We think it clear that, according to the usages and customs of the country, buildings and other improvements made on land do not by the mere accident of their attachment to the soil become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.

It was argued that the position would be different in the case of trees because trees exhaust the soil and benefit is derived from the soil by the person planting the trees for which no return is made to the owner of the land. This contention appears however to have been negatived in 24 Mad 47.[3] The Full Bench observed in that case as follows:

> We do not think that any valid distinction in principle can be drawn between buildings erected by a tenant and trees planted by him, and it will be observed that the Transfer of Property Act places both in the same category as regards the tenant's right to removal. It is suggested that trees exhaust the ground, but we are not aware that there is any proof of this. Many soils would probably benefit by being opened up and aerated by the planting of trees. There might be more difficulty in restoring ground planted with trees to its original state than in restoring ground covered with buildings, but that is a matter for the tenant to deal with when he removes the trees. If he does not, as the law requires him to do, the landlord will not be injured, and it is difficult to see on what principle the tenant's right to remove the trees could be forbidden.

In this particular case the plaintiff has indeed an indisputable right to the removal of the trees because of the findings that the planting must have been done by her predecessors-in-title under an implied license from the defendant's community. It would be certainly inequitable to hold in such circumstances that the trees planted under a license nevertheless go with the land and the person who planted the trees is not to be allowed to remove them and restore the land in the condition in which it was before the trees were planted. The decree of the lower appellate Court will be modified so as to make it clear that the plaintiff after he removes the trees should restore the land to the condition in which it was before the trees were planted. With this modification the second appeal is dismissed with costs. Leave to appeal is refused. As the cutting of the trees was prohibited by an order made during the pendency of this second appeal the time for the removal is extended to three months from this date.

C.R.K./D.S. *Decree modified.*

1. ('66) Beng L R Sup Vol 595 : 6 W R 228, In the matter of the Petition of Thakoor Chunder Paramnaick.
2. ('69) 6 Bom H C R A C 80, Narayan v. Bholagir Garu Mangir.
3. ('01) 24 Mad 47 : 10 M L J 321 (F B), Vasudevan Nambudripad v. Valia Chathu Achan.

A. I. R. 1941 Madras 381

Special Bench

LEACH C. J., KING AND KRISHNASWAMI AYYANGAR JJ.

Commissioner of Income-tax, Madras—Petitioner

v.

K. M. Ct. Murugappa Chettiar, Kanadukathan—Respondent.

O. P. No. 275 of 1938, Decided on 1st February 1940, reference by Commissioner of Income-tax, Madras.

Income-tax Act (1922), S. 4 (2)—Out of profits of Malacca branch of assessee's business Rs. 10,000 remitted direct to S in Pudukottah by hundi in his favour on Pudukottah bank — S having previous deposit with assessee's other business branch in Burma—Burma part of British India in year of assessment—Aforesaid amount sought to be assessed on ground that it reduced assessee's liabilities to S in British India and therefore must be taken to have come to British India — Amount not transferred by S to assessee in British India — Amount held not assessable as it never came within British India.

From out of the profits of the Malacca branch of the assessee's joint family business a sum of Rs. 10,000 (in two remittances of $5000 and $1290) was remitted to *S* in Pudukottah by a hundi drawn in his favour on a bank in Pudukottah. This amount was sought to be assessed on the contention that *S* had deposited monies with another branch of the assessee's business in Burma which was part of British India in the year of assessment and that the remittances to *S* had reduced the assessee's liabilities to *S* in British India and therefore the amounts must be taken to have come into British India. It was not suggested that the monies were transferred by *S* to the assessee in British India:

Held that unless profits made abroad were received in British India there could be no question of taxation in India and that the amount was not assessable since it never came within British India as *S* was paid by a hundi which was delivered to her outside British India and cashed by her outside British India : A I R 1931 Cal 727 (S B), *Rel. on;* A I R 1936 Mad 282 (S B), *Disting.* [P 382 C 1]

K. V. Sesha Iyengar and V. C. Veeraraghavan—for Petitioner.

P. R. Srinivasan—for Respondent.

Leach C. J. — The assessee in this case is the manager of a Hindu undivided family residing at Kanadukathan in the Ramnad District. The family derives income from property and business in money lending at Kanadukathan and also at Okkan in Burma and Klang and Malacca in the Federated Malay States. For the year of assessment 1936-37, the petitioner returned a loss of Rs. 13,828. The Income-tax Officer having examined the accounts and considered the evidence produced in support of the return, assessed the family on an income of Rs. 14,651, which was subsequently reduced by the Assistant Commissioner to Rs. 10,833. The assessee was dissatisfied with the assessment and asked the Commissioner to refer certain question of law to this Court for decision under S. 66 (2), Income-tax Act (11 of 1922). In accordance with his request, the Commissioner of Income-tax has referred to this Court the following questions :

(1) Was there any material before the Assistant Commissioner to justify his conclusion that the headquarter profits could not properly be deduced from the headquarter accounts and that an estimate was therefore necessary. (2) Whether on a proper construction of S. 4 (2) the following sums were rightly included in the petitioner's total income, namely, (a) $5165 being the amount credited to the folio of K. S. PL. ST., (b) $6290 being the amount debited to the M. V. K. account, (c) Rs. 1000 being the amount utilized for the purchase of shares in the Udumalpet Sri Venkatesa Mills Ltd.

The assessee is now content to have the first question answered in the affirmative. He has also given up his contentions with regard to the sum of $5165, referred to in cl. (a) and the sum of Rs. 1000 referred in cl. (c) of the second question. He has confined his case entirely to the question whether the $6290 referred to in cl. (b) of the second question should have been included in the total income of the family. The aduthal at the Malacca branch of the assessee's family business is one M. V. K. Palaniappa, whose mother, M. V. K. Sigappi Achi, resides in a village in the state of Pudukotta, which is outside British India. In order to defray his marriage expenses, he borrowed Rs. 10,000 from the Malacca branch and remitted the amount to his mother in Pudukotta. The Income-tax Officer refused to accept the statement of the assessee that this remittance represented a loan to the aduthal, but the statement was accepted by the Assistant Commissioner on appeal. On 9th February 1936, the sum of $5000 was remitted from Malacca to Sigappi Achi. This remittance was made by a hundi drawn by the M. C. T. M. Banking Corporation, Ltd., of Kaulalampur on its branch at Pudukottah. On 23rd March 1936 a further sum of $1290 was remitted to Sigappi Achi in the same way. These two sums of $5000 and $1290 make up the $6290 now in dispute. The income-tax authorities have held that these moneys represent remittances from the Malacca branch out of the profits made there during the account year 1935-36 and they maintain that the $6290 must be taxed on that footing. Their contention is based on the fact that Sigappi Achi had deposited with the assessee a sum of Rs. 19,692 which was utilized by the Okkan branch of the business and was credited to her in the

books of that branch. In the year of account Burma was part of British India. It is said that inasmuch as the liability of the assessee to Sigappi Achi has been reduced by $6290, it must be taken that this money has come into British India.

This contention cannot be accepted. It is true that these remittances were paid for from out of the profits which had accrued to the Malacca branch; but the moneys were never received in British India. They were paid direct to Sigappi Achi in Pudukottah and it is not suggested that Sigappi Achi transferred the money to the assessee in British India. Unless profits made abroad are received in British India there can be no question of taxation here. It seems to me that the decision in 5 I T C 154=58 Cal 999[1] is directly in point. Mr. K. V. Sesha Iyengar, on behalf of the Commissioner of Income-tax, has suggested that the case is governed by the decision of this Court in 9 I T C 47,[2] but the facts in that case were entirely different from the facts of the present case. There the creditor and the debtor both resided in British India and the creditor was paid by a hundi delivered to him in British India. Sigappi Achi was paid by a hundi delivered to her outside British India and cashed by her outside British India and the money never came to British India. For these reasons, I consider that the $6290 was wrongly included in the assessee's total income and I would answer the reference in that sense. As this opinion is shared by my learned brothers there will be an order for costs in favour of the assessee for Rs. 250. There will also be a refund of the deposit.

King J. — I agree.

Krishnaswami Ayyangar J. — I agree.

C.R.K./G.N. *Answer accordingly.*

1. ('31) 18 A I R 1931 Cal 727 : 134 I C 937 : 58 Cal 999: 5 I T C 154 (S B), Multanchand Johurmull v. Commr. of Income-tax, Bengal.
2. ('36) 23 A I R 1936 Mad 282 : 159 I C 787 : 59 Mad 171: 69 M L J 844: 9 I T C 47 (S B), Subramanian v. Commissioner of Income-tax, Madras.

A. I. R. 1941 Madras 382

WADSWORTH AND PATANJALI SASTRI JJ.

Chelikani Lakshmi Venkayamma — Petitioner

v.

Mandapati Venkatapathiraju and others — Respondents.

Civil Revn. Petn. No. 486 of 1939, Decided on 4th October 1940, to revise decree of Sub-Judge, Coconada, in S. C. S. No. 180 of 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 9 — Payments made towards interest being in excess of amount of interest as scaled down — Excess will not be adjusted in reduction of principal.

If the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of principal: AIR 1940 Mad 807, *Rel. on.* [P 382 C 2;P 383 C 1]

D. Narasaraju — for Petitioner.

C. Rama Rao — for Respondents.

Wadsworth J.—This civil revision petition raises a question of the interpretation of S. 9 of Madras Act, 4 of 1938. The petitioner here was the plaintiff in the Court below. She sued on a promissory note for Rs. 600, dated 20th March 1935 which carried interest at 15 per cent. per annum. The plaint alleged a series of payments totalling Rs. 165, towards interest and thereafter a payment of Rs. 212, towards interest and principal on 15th March 1938. The lower Court assumed the truth of the assertion in the plaint that the payments were towards interest without recording any finding on the subject and concluded that the balance left over after crediting these payments towards the interest as scaled down under S. 9 (1) of the Act would be available in reduction of the principal amount. It is contended that this interpretation of the section is wrong. Section 9 (1) stipulates that interest shall be calculated upto the commencement of the Act at the contract rate or at 5 per cent. whichever is less, that credit shall be given for all sums paid towards interest and that only such amount as is found outstanding, if any, for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due. It is contended for the plaintiff who is the petitioner that the whole of the process laid down in this portion of S. 9 is a process in reduction of the debt for interest and that it does not contemplate any reduction of the amount due for principal. The process is firstly to calculate the interest which would have been due at the rate of 5 per cent., then give credit for any payments actually made towards interest, then give a decree for interest on the basis of this calculation together with the amount due for principal.

It is contended that if the scaling down process results in a smaller amount of interest than what has actually been paid as interest, there is no provision in S. 9 for carrying over this excess interest in reduction of principal. On the other hand, it is contended for the respondent that the words "credit shall be given for all sums paid to-

wards interest" must be read as if they were "credit shall be given in reduction of the debt for all sums paid towards interest" and that the final words "or such portion of it as is due" contemplate the reduction of principal by the process of carrying over the excess amount paid towards interest. It seems to us that the interpretation of the respondent involves not only the addition to the section of words which are not in it, but also entails the solution of an ambiguity by giving the benefit of the doubt to the ex proprietor, which, as we have frequently held is not permissible in interpreting an Act of this nature. The view for which the petitioner contends is in accordance with the plain language of the section. It is also the view adopted by Horwill J. in 52 M L W 245[1] and we are of opinion that it is the correct view. It results in the conclusion that if the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of principal; but there is nothing contrary to general principles in allowing a creditor to retain that which has been willingly paid to him. It follows that a finding is necessary on the correctness of the averments of fact in the plaint regarding the nature of these payments totalling Rs. 165, alleged to have been made towards interest. It is pointed for the respondent that the result of the finding of fact regarding the nature of these payments may be to enable him to put forward a plea of limitation based on the decision of the Privy Council in (1940) 1 M L J 895.[2] That is a matter which the lower Court will have to take into consideration. In the result therefore the petition is allowed and the suit is remanded to the trial Court for fresh disposal in the light of this judgment. Parties will be permitted to adduce fresh evidence. Costs will abide by the result.

C.R.K./D.S. *Petition allowed.*

1. ('40) 27 A I R 1940 Mad 807 : (1940) 2 M L J 185 : 52 M L W 245, Mohammad Sahib v. Kunthanmal Sowcar.
2. ('40) 27 A I R 1940 P C 63 : 187 I C 233 : ILR (1940) Kar P C 134 : 67 I A 160 : ILR (1940) Lah 470 : (1940) 1 M L J 895 (P C), Rama Shah v. Lal Chand.

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* A. I. R. 1941 Madras 383

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Gourochandro Dyano Sumanto — Appellant

v.

Krushnacharana Padhi — Respondent.

Letters Patent Appeal No. 64 of 1939, Decided on 11th November 1940, against judgment of Abdur Rahman J., *Reported in A I R 1940 Mad 62.*

* *Negotiable Instruments Act (1881), S. 87 — Material alteration in promissory note by stranger —Right of holder of promissory note to sue is not affected.*

The right of the holder of a promissory note to sue is not affected by a material alteration in the instrument when the alteration has been made by a stranger without the consent of the holder and there has been no fraud or laches on the part of the holder : A I R 1928 P C 116, *Ref.* [P 385 C 1]

B. Jagannadha Das — for Appellant.

B. V. Ramanarasu — for Respondent.

Leach C. J.—The question raised in this appeal is whether the holder of a promissory note is affected by a material alteration in the instrument when the alteration has been made by a stranger and there has been no fraud or laches on the part of the holder. On 15th October 1928, the appellant executed a promissory note in favour of the adoptive father of the respondent who is a minor. The father died in 1929, being survived by his wife in addition to the respondent, who continued to live with his adoptive mother who is his legal guardian. On 12th October 1931 the appellant paid Rs. 10 on account of the debt due on the instrument and the fact of payment was endorsed on the instrument. On 22nd October 1934 the respondent, through his mother, filed a suit to enforce payment of the amount then due. It was pleaded by the appellant that there were two material alterations in the note and it is now accepted by the respondent that the plea was justified. The alterations consisted in the changing of the date of the promissory note from 15th October 1928 to 25th October 1928 and the date of the endorsement from 12th October 1931 to 22nd October 1931. The appellant's case was that these alterations were made by the natural father of the respondent. The District Munsif of Aska, who tried the suit, found that the note had been materially altered, but in his opinion the evidence did not disclose who was responsible for the alterations, although it appeared to him likely that they had been made by the respondent's natural father. As it had not been shown that the natural father was

responsible the District Munsif decreed the suit with costs.

The respondent appealed to the District Court of Ganjam. The District Judge found as a fact that the natural father had made the alterations and held that as the result the respondent was not entitled to sue upon it. Accordingly he allowed the appeal and dismissed the suit. The respondent then appealed to this Court, and his appeal was heard by Abdur Rahman J. who restored the decree of the District Munsif. The learned Judge considered that there was no evidence on the record on which it could be held that the natural father had made the alterations. In his opinion the District Judge had merely surmised this and the evidence did not warrant the surmise. The learned Judge considered that, as the respondent was in no way responsible for the alterations, he was not prejudiced by them and therefore was entitled to maintain the suit. The learned Judge gave, however, a certificate under Cl. 15 of the Letters Patent, which has permitted of this further appeal.

It has not been suggested at any stage of the proceedings that the respondent or his guardian was responsible for the alterations in the promissory note nor has it been suggested that there has been negligence. Therefore it must be assumed that the promissory note was taken out of the custody of the guardian without her consent and without any failure of duty on her part. Whether the alterations were in fact made by the natural father of the respondent matters not. Even if the alterations had been made by him in the mistaken belief that he was helping his natural son, that would not in the circumstances of this case deprive the respondent of his right to sue. Section 87, Negotiable Instruments Act, provides that any material alteration of a negotiable instrument renders it void as against anyone who is a party to the instrument at the time of the making of the alteration and does not consent to it, unless the alteration was made in order to carry out the common intention of the original parties. It cannot be said that the appellant, the maker of the promissory note, consented to these alterations, but the section must be read in the light of authority and there is authority which says that in circumstances such as we have here an innocent holder of the instrument is not damnified by a material alteration. At common law a person who has custody of a negotiable instrument is bound to take care to preserve it from alteration. If it is altered by a stranger as the result of the holder's negligence in allowing it to leave his custody, he must bear the consequences. In (1844) 13 M & W 343 : 153 E R 142,[1] Lord Denman said :

> The strictness of the rule on this subject, as laid down in Pigot's case, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part.

In that case, the Court did not, however, consider what would be the effect of a material alteration in an instrument made as the result of some accident or as the result of the malicious action of a stranger who happened to gain possession of it in spite of the exercise of all reasonable care on the part of the holder. The question of the effect of a material alteration as the result of accident was considered by the Privy Council in (1928) A C 181,[2] which was an appeal from the Supreme Court of Hong Kong. The Bills of Exchange Ordinance, 1883, of Hong Kong followed the terms of the Bills of Exchange Act 1882, to which S. 87, Negotiable Instruments Act, corresponds. The wording of the Indian Act does not follow exactly the wording of the English Act, but so far as this case is concerned the difference in the language has no bearing. In the Hong Kong case the respondent received from her husband two bank notes for 500 dollars each, issued by the Hong Kong and Shanghai Banking Corporation. She placed them in the pocket of a garment and having forgotten where she had placed them she washed, dried, starched and ironed the garment. The result was that one of the bank notes was so defaced that the number could not be read and the bank refused to pay it. The question was whether the bank was right in its refusal. It was held by the Supreme Court that the Bank was bound to pay the note in the circumstances and this decision was upheld by the Judicial Committee. After reciting the terms of S. 64 of the Bills of Exchange Ordinance of Hong Kong, Lord Buckmaster, who delivered the judgment of the Board, observed :

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1. (1844) 13 M & W 343 : 13 L J Ex 276 : 153 E R 142 : 1 D & L 377, Davidson v. Cooper.
2. ('28) 15 A I R 1928 P C 116 : 110 I C 127 : 1928 A C 181 : 97 L J P C 35 : 138 L T 529 : 72 S J 68 : 44 T L R 233 (P C), Hong Kong & Shanghai Banking Corporation v. Lo Lee Shi.

Both the history of the law which this section enunciates and the terms of the section itself show that it relates only to alterations effected by the will of the person by whom or under whose directions they are made, and that it does not apply to a change due to pure accident. The alteration contemplated is one to which all parties might assent. It is not reasonable to assume parties assenting to a part of the document being effaced by the operations of a mouse, by the hot end of a cigarette, or by any of the other means by which accidental disfigurement can be effected. Again, the provision which excepts from the category of persons against whom the bill is avoided, a party who has 'himself made, authorized, or assented', to the alteration cannot reasonably apply to the ravages of a rat, a white ant, or any other animal pest. The fact that the change is accidental in itself negatives the possibility of the assent.

If a material alteration which is the result of an accident does not bring the instrument within the mischief of the section, surely the same must apply where a material alteration has been made by a meddlesome or maliciously minded stranger without the consent of the holder of the instrument and without any fraud or negligence on his part. To hold otherwise would mean the doing of grave injustice to an innocent party and this could never have been the intention of the Legislature in inserting S. 87 in the Negotiable Instruments Act. For these reasons we dismiss the appeal with costs.

C.R.K./D.S. *Appeal dismissed.*

A. I. R. 1941 Madras 385

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Civil Misc. Petn. No. 4631 of 1940, Decided on 13th November 1940, to issue a writ of certiorari.

P. V. Ramalingam Chettiar — *Petitioner*

v.

Debt Conciliation Board, Dharmapuri, and another — *Respondents.*

(a) Madras Debt Conciliation Act (11 of 1936), S. 10 (1) and (2) and S. 11 (1) and (3)—Creditor filing written statement under S. 10 (1) but failing to comply with S. 11 (1)—Board cannot act under S. 10 (2)—Only penalty is under S. 11 (3).

Where the creditor files the statement required by S. 10 (1) signed and verified in the required manner but fails to comply with S. 11 (1) the Board cannot act under S. 10 (2) and declare the debt discharged. The only penalty which the Board can inflict is that provided under S. 11 (3). [P 386 C 1]

(b) Madras Debt Conciliation Act (11 of 1936), Ss. 23, 11 (1) and 10 (2) — Board abusing its powers — Person aggrieved should not be compelled to proceed under S. 23 — Remedy under S. 23 not being suitable, High Court can issue writ of certiorari — Creditor failing to comply with S. 11 (1) — Board illegally passing order under S. 10 (2)—Application for review by creditor under S. 23 dismissed for his default in appearance on adjourned date—Creditor's fault held not sufficient to deprive him of all remedy — Board's order under S. 10 (2) and S. 23 quashed.

While the Court will not issue a writ of certiorari when another remedy remains open to the petitioner, it must be a suitable remedy. Where a Debt Conciliation Board has acted in abuse of its powers the aggrieved person should not be compelled to apply for review under S. 23. The remedy provided by S. 23 not being a suitable one for an unlawful order of the Board the Court can issue a writ of certiorari : A I R 1919 P C 31, *Rel. on.* [P 387 C 1]

On the creditor's failure to comply with S. 11 (1) the Board passed an illegal order by proceeding under S. 10 (2). The creditor's application for review under S. 23 was also dismissed for his default in appearance on the adjourned date :

Held that the creditor's fault was not sufficient to justify his being deprived of all his remedy and therefore the orders passed by the Board under S. 10 (2) and S. 23 must be quashed. [P 387 C 1, 2]

D. Ramaswami Ayyangar — for Petitioner.

T. G. Raghavachari and P. Srinivasa Iyengar — for Respondents.

Leach C. J. — This is an application for the quashing of an order passed by the Debt Conciliation Board of Dharmapuri on 4th February 1940. It is abundantly clear that the order of the Board was one which was passed without jurisdiction, but the main question is whether the petitioner has by his conduct forfeited his claim to have the rule nisi which has been issued made absolute. On 19th July 1939 respondent 2 applied to the Board for the settlement of his debts under the provisions of S. 4, Madras Debt Conciliation Act, 1936. His application shows that the petitioner was his only creditor and according to respondent 2 he owed him two sums of Rs. 200 each under bonds which he had executed. Notice was issued to the petitioner under S. 10 (1) and 4th October 1939 was fixed by the Board for the furnishing of the statement required from him by S. 10 (1). On that date the petitioner appeared before the Board and filed the necessary statement. In addition, he produced the two bonds executed by respondent 2 in his favour and a copy of each of the bonds. In the statement which the petitioner filed it was mentioned that respondent 2 was also indebted to him in the sum of Rs. 120 for rent. The Chairman of the Board initialled the original bonds and returned them to the petitioner, after which the Board adjourned the case to 27th October 1939 for the production by the petitioner of his accounts. On that date the petitioner reported to the Board that his accounts had been filed in the District Court and in consequence the Board adjourned the case to 11th December

1939 to enable the petitioner to obtain them from the Court. The petitioner was, however, informed that if he did not produce the accounts on that date an order would be passed discharging his debt. The petitioner did not attend on 11th December and the Board adjourned the case to 4th February 1940. He had not filed the accounts by 4th February 1940, and when the case was called on that date he was absent. Therefore the Board passed an order declaring that the debt was deemed to be discharged under S. 10 (2) of the Act.

As I have indicated, this order was one which the board had no authority to pass. Section 10 (1) requires a creditor to file a statement of the debts owed to him by the debtor. This statement must be in writing, signed and verified in the manner prescribed by the Code of Civil Procedure for the signing and verifying of claims. If such a statement is not filed, the board has power under sub-s. (2) to order that the debt shall be deemed for all purposes and all occasions to have been duly discharged, but sub-s. (3) gives a creditor the right of applying for an order reviving the debt, and he is entitled to an order if he proves to the satisfaction of the board that the notice was not served upon him or that he had no knowledge of the publication or that there was a sufficient reason for his failure to file the statement. The petitioner in this case did file the statement required by sub-s. (1) and it was signed and verified in the required manner. Therefore the board could not act under S. 10 (2) which it purported to do. Section 11 (1) requires a creditor to furnish with the statement mentioned in S. 10 (1) full particulars of all debts owed to him by the applicant and to produce all documents, including entries in books of account on which the creditor relies to support his claim, together with a true copy of every such document. If a creditor does not produce the documents required to be produced by him under sub-s. (1), the documents cannot by virtue of sub-s. (3) be produced in evidence against the debtor in any suit brought by the creditor or by any person claiming under him for the recovery of the debt. The board is given power to excuse for valid reasons any default or delay in producing documents and to grant reasonable time for their production, but failure to comply with S. 11 (1) does not empower the board to declare the debt discharged. The only penalty is that stated in sub s. (3). If a creditor fails to prove the debt claimed to be owing to him the board may decide the matter under S. 12. In the present case there is no question of the petitioner having failed to prove the debts owing to him, at any rate, so far as the debts due on the two bonds are concerned, because respondent 2 admitted in his petition that they were due and owing to the petitioner. The board's order of 4th February being an unlawful order, we should not have hesitated to grant the present application if the matter rested there; but it does not rest there and it is necessary to examine in detail the subsequent events.

On 17th February 1940, the petitioner applied to the board to review its order of the 4th of that month. This application must be deemed to have been made under the provisions of S. 23 of the Act and not under S. 10 (3) because the latter section obviously does not apply. Section 23 says that a board may on application from any interested person or on its own motion review an order passed by it and pass such order in reference to the application as it thinks fit, but no order is to be varied or reversed unless notice has first been given to all interested persons to appear and be heard in support of the order sought to be reviewed. On receipt of this petition the board fixed 26th March 1940 for its hearing. Notice of the petition was sent to respondent 2 by registered post, but the postal authorities were unable to find that respondent. On the date fixed for hearing the petitioner appeared, but as respondent 2 had not been served, the board ordered that fresh notice should be issued to him. The petitioner was required to provide the requisite stamp for service of notice by registered post. The hearing was then adjourned to 23rd April 1940. The petitioner paid the postage and the notice was apparently sent by registered post, because on 23rd April 1940 the Chairman of the board made a note in the record which indicates that the debtor was served, but that the postal acknowledgment had not then been received. In these circumstances he granted another adjournment; on this occasion to 5th May 1940. On that date the Chairman of the board recorded the following order :

> Both parties absent. Creditor has not produced postal cover to send notice to the debtor. This petition for revival of the debt is therefore dismissed.

It would appear that the word "cover" is a mistake for "acknowledgment." The petitioner was in fault when he failed to attend on the date when the last-mentioned order was passed because to his knowledge

the proceedings had been adjourned to that date. The question then is whether the Board should have refused the relief asked for because of the petitioner's failure to prosecute his application for review with due diligence. The explanation, for the petitioner's absence on 5th May 1940, is that the postal acknowledgment had not been received on that date. Be that as it may, the fact remains that the petitioner should have appeared, and his failure to do so has certainly prejudiced his position. But after careful consideration we have come to the conclusion that his fault here is not sufficient to deprive him of all remedy for the injustice done to him by the Board in declaring his debts discharged under S. 10 (2) of the Act.

While the Court will not issue a writ of certiorari when another remedy remains open to the petitioner, it must be a suitable remedy. As was pointed out by the Privy Council in 43 Mad 146[1] certiorari according to the English rule is only to be granted where no other suitable remedy exists. Now, can it be said that by giving a person aggrieved by an order of the Debt Conciliation Board the right to apply for a review under S. 23, there is a suitable remedy for an unlawful order? We have no hesitation in holding that S. 23 does not provide a suitable remedy. It merely gives the right of applying to the tribunal which has passed a wrong order to change its mind. If S. 23 were regarded as providing a suitable remedy, it would mean that the Court could not issue a writ until the aggrieved person had filed a formal application for review. We consider that where a Debt Conciliation Board has acted in abuse of its powers the aggrieved person should not be compelled to apply for review. Moreover, there is the further factor that it is not obligatory on the person to apply for review if he is aggrieved. The petitioner here did apply for review, but did not do what the Board required him to do in connexion with his application, namely to appear on 5th May 1940. As we have already indicated that is not sufficient in our opinion to deprive him of all remedy. If the Court does not interfere here, it means that the petitioner loses money which respondent 2 admittedly owes him and he loses it because he failed to appear on one occasion in proceedings which were not really necessary. If the Court deprives him of all remedy in these circumstances, we think it would be doing the petitioner grave injustice. For these reasons we quash the orders of 4th February and 5th May 1940 and direct the Board to restore the petition and proceed with the case according to law. As this application has been strenuously opposed by respondent 2, the petitioner is entitled to his costs.

C.R.K./G.N. *Order accordingly.*

1. ('19) 6 A I R 1919 P C 31 : 52 I C 209 : 43 Mad 146 : 46 I A 176 : 20 Cr L J 593 (P C), Annie Besant v. Advocate-General of Madras.

A. I. R. 1941 Madras 387

KING J.

Appeal No. 82 of 1939, Decided on 8th October 1940, against appellate order of Sub-Judge, Ramnad at Madura, D/- 12th December 1938.

T. Sundaram Pillai — Appellant

v.

Kandaswami Pillai — Respondent.

(a) Civil P. C. (1908), S. 13 — Filing written statement and attacking jurisdiction of Court amounts to submission to jurisdiction.

The action of a defendant in filing a written statement in Court and attacking the jurisdiction of the Court amounts to submission to that jurisdiction as he is asking the Court to decide a point in controversy between him and the plaintiff : (1915) 2 K B 580, *Rel. on.* [P 388 C 2]

(b) Civil P. C. (1908), S. 13—Defendant filing written statement but subsequently withdrawing from further opposition — Decree passed in favour of plaintiff after his examination in witness box—Decision is on merits.

In a suit the defendant filed a written statement in which he raised various issues but subsequently withdrew from further opposition and a decree was passed in favour of the plaintiff after he had been actually examined in the witness box though his examination was formal and brief and was not subjected to cross-examination :

Held that the decision must be regarded as given on the merits of the case : A I R 1920 Mad 587, *Foll.* [P 389 C 1]

(c) Civil P. C. (1908), S. 13 (e) — Mere fact that decree is obtained on evidence which is belived by Court but which in fact is not true does not mean that is obtained by fraud.

It cannot be argued that merely because a plaintiff obtains a decree upon evidence which is believed by the Court but which in fact is not true, he has obtained that decree by fraud. There must be fraud connected with the procedure in the suit itself to bring the matter within cl (e). [P 389 C 1]

(d) Contract Act (1872), S. 68 — Marriage of young man, whether 'necessary' *(Quære)*.

Whether the marriage of a young man should be considered 'necessary' within the meaning of Section 68: A I R 1917 Pat 332, *Ref.* [P 389 C 2]

(e) Civil P. C. (1908), S. 13 (f) —Claim founded partly on breach of Contract Act but also partly upon claim under Contract Act not involving its breach—Decree sustaining claim not wholly founded upon breach of Contract Act—Decree-holder can execute decree in British India.

Where claim is founded partly upon a breach of the Contract Act, but also partly upon a claim

under the Contract Act which in no way involves its breach and the decree sustains a claim which was not wholly founded upon a breach of the Contract Act, the decree-holder cannot be prevented by cl. (f) of S. 13 from executing his decree in British India. [P 389 C 2]

T. R. Srinivasa Iyengar and E. A. Viswanathan — for Appellant.

P. V. Rajamannar and K. Subba Rao — for Respondent.

Judgment.—The appellant in this case is the holder of a decree obtained in the Court of the District Munsif of Trivandrum against two defendants. Defendant 1 was married to the appellant's daughter and the appellant in filing his suit in Trivandrum alleged that he had furnished the money to pay for the expenses of this marriage. He alleged further that both defendant 1 and his elder brother, defendant 2, had promised to repay that money to him. Defendant 1 did not contest his plaint in Trivandrum. Defendant 2 after being first set ex parte had the ex parte order set aside and then filed a written statement in which he attacked the plaintiff's claim in a number of ways one of which was by questioning the jurisdiction of the Trivandrum Court. After filing the written statement however he withdrew from further opposition and the result was that a decree was passed in favour of the present appellant against both the defendants. In 1937 the appellant applied in the Court of the District Munsif of Sattur, Ramnad District, to execute the decree which he had thus obtained in Trivandrum against a joint family property in the hands of defendant 2 who is the respondent in this appeal. The respondent resisted this application on the ground that under S. 13, Civil P. C., the judgment of the Trivandrum Court could not be executed in British India. The learned District Munsif overruled this objection and ordered execution to proceed, but the learned subordinate Judge of Ramnad upon appeal set aside the District Munsif's order and dismissed the appellant's application. This is an appeal against the order of the subordinate Judge.

This question has to be decided entirely with reference to the clauses to be found in S. 13, Civil P. C. No less than four of these clauses are relied upon by the learned advocate for the respondent in this appeal. It is stated for him that the decree of the District Munsif of Trivandrum was based upon a judgment pronounced by a Court which had not jurisdiction to deal with the suit, that it was not given on the merits of the case, that it had been obtained by fraud and that it sustained a claim founded upon a breach of the law in force in British India. These four clauses will have to be considered one by one. The first objection raised is that the Trivandrum Court had no jurisdiction to try the suit as between the appellant and the respondent because they were residents in British India and the cause of action arose in British India. It is unnecessary however to decide whether the Court was in fact competent to deal with the suit if it is shown that the respondent had submitted to the Court's jurisdiction. It has already been stated that the respondent applied to the Court to set aside the ex parte order and then filed a written statement in which the claim of the plaintiff was attacked on various grounds including that of the jurisdiction of the Court. It has been held in (1915) 2 K B 580,[1] that the action of a defendant in filing a written statement in Court and attacking the jurisdiction of the Court amounts to submission to that jurisdiction as he is asking the Court to decide a point in controversy between him and the plaintiff. Even therefore without any contest on the other issues in the suit a mere submission of the issue of jurisdiction to the decision of the Court amounts to the acceptance of that Court's jurisdiction within the meaning of (1915) 2 K B 580.[1] There are no rulings to the contrary in this country. It seems to me therefore that the District Munsif was right in holding that cl. (1) in S. 13 does not apply to the present case.

The second question is whether this decision has been given on the merits of the case. It is argued for the respondent that the decision is an ex parte decision and therefore is not one on the merits of the case. Here again the facts must be remembered that not only did the defendant file a written statement in which he raised various issues but that a decree was not given until the plaintiff had actually been examined in the witness-box. No doubt his examination was formal and brief and was not subjected to cross-examination but it cannot I think be successfully argued that the decree was based upon the fact of the failure of the defendant to appear, and must be deemed to have been based upon the evidence given by the plaintiff. There is a clear authority which governs the facts of this case in 1920 M W N 412,[2] and no authority to the contrary.

1. (1915) 2 K B 580 : 84 L J K B 1839 : 113 L T 221, Harris v. Taylor.
2. ('20) 7 A I R 1920 Mad 587 : 57 I C 742 : 1920 M W N 412, Venkatachalam Chetti v. Pichai Ammal.

That ruling is binding upon me and I find that here also the learned District Munsif was right in holding that the decision of the District Munsif of Trivandrum was one on the merits of the case. Clause (e) in S. 13 says that the judgment of a foreign Court cannot be executed in British India where it has been obtained by fraud. This is a point which was not apparently made before the learned District Munsif but in appeal before me the learned advocate for the respondent relies upon it also. All that can be said on this point is that the case brought by the plaintiff was a false case and that defendant 1 assisted him in obtaining a decree by withdrawing from any resistance. It does not seem to me that the words "by fraud" can possibly be applied to circumstances such as these. It cannot be argued that merely because a plaintiff obtains a decree upon evidence which is believed by the Court but which in fact is not true, he has obtainted that decree by fraud. There must be fraud connected with the procedure in the suit itself to bring the matter within this clause. This clause also therefore does not apply to the present case.

Finally cl. (f) in S. 13 says that the judgment of a foreign Court cannot be executed in British India where it sustains a claim founded on a breach of any law in force in British India. It has already been stated that the appellant asserted in his plaint in Trivandrum that both the defendants had promised to repay him the amount which he spent on defendant 1's marriage. Now both the defendants at that time were minors according to the law in force in British India. For although they were above the age of 18 they had guardians appointed for them under the Guardians and Wards Act and therefore did not attain majority until the age of 21. It is argued therefore that the plaintiff-appellant brought his case upon a contract which according to the Contract Act in force in British India he was not competent to make with the defendants and that this is a breach of the law as it is observed in this country. The learned District Munsif however points out that an examination of the plaint will show that it was not on this ground alone that the plaintiff brought his claim. No doubt he asserted that there was this agreement to repay him the money which he had spent, but he claimed repayment of that money independently of the agreement as money which was due from the joint family consisting of the two defendants to reimburse him for what he had spent upon a marriage which was a duty devolving upon that family. The learned District Munsif held accordingly that the appellant would have been able to sustain a good case for a decree under the provisions of S. 68, Contract Act. Section 68, Contract Act, deals with necessaries and it is perhaps a little difficult at first sight to see why the marriage of a young man should be considered a 'necessary' within the meaning of that section. But I have been shown an authority of a Bench of the Patna High Court in 42 I C 963,[3] which has applied S. 68 to very similar circumstances.

In any case, whether that be the correct view to take of S. 68 or not is, I think, of no importance in the decision of this appeal. Clause (f) says "where it sustains a claim founded on a breach of any law in force in British India." This claim is founded partly perhaps upon a breach of the Contract Act, but also partly upon a claim under the Contract Act which in no way involves its breach. Whether that claim is a good or a bad one it is not for me now to decide. The District Munsif of Trivandrum has given a decree to the appellant and that decree sustains a claim which was not wholly founded upon a breach of the Contract Act. It seems to me therefore that the appellant cannot be prevented by clause (f) of S. 13 from executing his decree in British India. The result is that S. 13 provides no bar for the present execution application and this appeal must succeed and the order of the District Munsif be restored and execution be ordered to proceed. The respondent will pay all appellant's costs hitherto incurred. Leave to appeal is refused.

C.R.K./D.S. *Appeal allowed.*

3. ('17) 4 A I R 1917 Pat 332 : 42 I C 963 : 2 Pat L J 627, Pathak Kali Charan Ram v. Ram Deni Ram.

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* A. I. R. 1941 Madras 389

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Letters Patent Appeal No. 44 of 1939, Decided on 24th October 1940, against order of Wadsworth J., in Appeal No. 314 of 1938, D/- 26th July 1939.

M. T. Rajamanickam Chetty and another — Defendants — Appellants

v.

T. R. Abdul Halim Sahib—Respondent.

* Transfer of Property Act (1882), S. 6 (e) — Suit for recovery of damages—Right to conduct suit cannot be assigned — Benefit obtainable under decree in such suit may however be assigned.

There cannot be an assignment of a suit which has been filed for the purpose of recovering damages, either in contract or in tort. It is lawful, however, for a plaintiff in a pending suit to assign the benefit which he may obtain under the decree to be passed in the suit; but this does not give the assignee of the fruits of the action the right to interfere in proceedings in the action : (1912) 3 K B 474 and A I R 1924 P C 162, *Rel. on.* [P 390 C 2]

N. Srinivasa Ayyangar — for Appellants.

C. Padmanabha Aiyangar — for Respondent.

Leach C. J. — The question involved in this appeal is whether the right to continue a suit filed in the Court of the subordinate Judge of Chingleput has devolved upon the respondent. The suit was instituted by one T. S. Abdul Kuddus Sahib on 9th March 1934. The plaintiff asked for a decree for Rs. 15,000 as damages flowing from the wrongful termination of a lease in his favour and the entry upon the leased premises of the defendants, who are the appellants. The lease was dated 9th September 1930 and was for a term of three years which commenced on the 15th of that month. The premises leased consisted of a building which was being used as a cinema theatre. The agreement between the parties was that the lessors and the lessee should share equally in the rents of certain shops which were on the premises and the moneys derived from the letting of the theatre for entertainments. The plaintiff averred that the lessors resented the fact that he was entitled to half the rents of the property and as the result of this they entered upon the premises wrongfully and ousted him therefrom. He also averred that valuable articles left by him upon the premises had been removed and that other articles had been damaged. The sum of rupees 15,000 was made up of profits which he claimed he had been deprived of as the result of the wrongful action of the appellants and the loss he had suffered as the result of the removal from the premises of article belonging to him. The plaintiff's claim was based entirely on the alleged wrongful action of the appellants as the two concluding paragraphs of the plaint Nos. 18 and 19, emphasize. They read as follows :

18. The plaintiff claims an aggregate sum of Rs. 15,000 by way of damages against the defendants and pay a court-fee of the value of Rs. 937-7-0.

19. The cause of action for this suit arose at Conjeeveram within the jurisdiction of this Hon'ble Court on 9th March 1931 the date when the defendants wrongfully dispossessed the plaintiff and subsequently de die in diem till 9th September 1931 during which period the defendants wrongfully dispossessed the plaintiff in breach of the terms of the agreement.

On 17th May 1937, the plaintiff sold the whole of his assets to the respondent under a registered deed of sale. The sale deed has not been printed in full and it is said that the portion which has been printed has not been correctly translated. It is however common ground that the respondent bought "the profit and loss" of this suit and that the deed purported to confer upon him the right to conduct it. The plaintiff died five days later after its execution. The plaintiff's sister, his brother and the respondent each applied to the Court of the subordinate Judge to be allowed to continue the suit. The sister and the brother each claimed the right as the legal representative of the deceased. The respondent claimed under the deed of sale of 17th May 1937. The subordinate Judge dismissed the application of the sister and the brother, but granted that of the respondent. The defendant lessors then appealed to this Court. Their appeal was heard by Wadsworth J., who concurred in the decision of the subordinate Judge so far as it concerned the respondent. The sister and the brother did not contest the subordinate Judge's finding that they were not entitled to be brought on record. This appeal is from the judgment of Wadsworth J.

Section 6 (e), T. P. Act, says that a mere right to sue cannot be transferred; and it is accepted by the learned counsel that as the result of this provision there cannot be an assignment of a suit which has been filed for the purpose of recovering damages, either in contract or in tort. It is lawful however for a plaintiff in a pending suit to assign the benefit which he may obtain under the decree to be passed in the suit; but this does not give the assignee of the fruits of the action the right to interfere in proceedings in the action : *vide* (1912) 3 K B 474[1] which was accepted by the Privy Council as correctly stating the law in 48 Mad 230.[2] Therefore the right which the plaintiff purported to confer upon the respondent of conducting this suit was ineffective. All that the deed could confer upon him was the right to the fruits of the litigation. The Court has merely to consider the nature of the suit and as the plaint can only be read as embodying a claim for damages resulting from the alleged wrongful entry of the appellants upon the demised premises, the suit cannot be continued by the respondent. For these reasons

1. (1912) 3 K B 474 : 81 L J K B 1081 : 106 L T 825, Glegg v. Bromley.
2. ('24) 11 AIR 1924 P C 162 : 80 I C 807 : 48 Mad 230 : 52 I A 1 (PC), Subbhadrayamma v. Venkatapati.

we allow the appeal with costs here and below.

C.R.K./D.S. *Appeal allowed.*

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* A. I. R. 1941 Madras 391

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

City Civil Court Appeal No. 36 of 1939, Decided on 17th October 1940, against the decree of City Civil Court, Madras, D/- 21st March 1939.

Gaffar Khan — *Appellant*

v.

Syed Noor — *Respondent.*

* Limitation Act (1908), Arts. 62 and 120 — Money lost by theft—Suit by victim for recovery lies on basis that money has been received for victim's use — Suit falls under Art. 62 and not Article 120.

A person who has suffered from the tortious act of another can always waive the tort and if money has been stolen from him he can sue for the recovery of the money on the basis that the money has been received for his use and consequently the suit must be framed as one for money had and received, in which case it is governed by Art. 62 and not by Art. 120. Of course, if he likes he may sue for the recovery of damages by way of compensation, but here again the period of limitation will be three years : (1851) 6 Ex 349, *Rel. on*; A I R 1926 Mad 615 (F B), *Disting.* [P 392 C 1]

E. Duraiswami Iyer and E. D. Jayeram — for Appellant.

Rafiuddin Ahmed — for Respondent.

Leach C. J. — This appeal raises an interesting question of law relating to limitation. The appellant posed as a Doctor, but he had no qualifications. On 25th February 1934, the respondent had the misfortune to consult him and underwent an examination at the appellant's consulting room in Yunus Ali Street in Triplicane. He had with him at the time a wallet, containing Rs. 1500 in currency notes. The wallet was in one of the pockets of the respondent's coat. For the purpose of the examination he had to take off the coat and he hung it up on a nail in the wall. The appellant took the opportunity to steal the wallet and the respondent did not discover the loss until the next day. When he did so he laid a complaint against the appellant. This led to the latter's arrest and conviction. The appellant was found guilty of the theft on 24th July 1934 and sentenced to a period of six months' imprisonment. On 6th August 1937, more than three years after the conviction the respondent instituted in the City Civil Court the suit out of which this appeal arises for the purpose of recovering from the appellant the Rs. 1500 stolen from him and damages for being deprived of the use of the money. The appellant pleaded the Limitation Act, but his plea was rejected by the principal Judge on the ground that the suit was one for the recovery of a debt and that the case came within the Full Bench decision of this Court in 49 Mad 468.[1]

In the first place, the appellant says that in view of the wording of the plaint the suit must be treated as one for the recovery of compensation for a wrong done to the plaintiff. In the second place, he says that even if the plaint can be treated as embodying a claim for the recovery of a debt the case does not fall within the Full Bench decision in 49 Mad 468[1] and that the appropriate article would be Art. 62, which would also mean that the suit was time-barred. As so often happens, the plaint is very loosely drawn, but the Court is prepared to assume that the claim set forth in the plaint is a claim on the debt and not a claim for the recovery of compensation, apart from a plea that the appellant should pay interest by way of damages on the money for the period during which the respondent was deprived of its use. The principal Judge has rejected the respondent's claim for interest on the debt and has granted him a decree for merely Rs. 1500 with costs. The respondent has not objected to the decision with regard to interest and therefore so far as this Court is concerned, the suit is merely a suit for the recovery of Rs. 1500. If the suit were to be regarded as a suit for damages, it is common ground that it would be time-barred.

In 49 Mad 468[1] a shareholder sued a company for the recovery of a dividend which had not been paid to him. The Court had to consider which of four articles of the Limitation Act applied, namely, Arts. 62, 115, 116 or Art. 120. The Court held that the Limitation Act does not contain an article applicable to a debt simpliciter and therefore the residuary Art. 120 was the only one applicable. Article 62 prescribes a period of three years for a suit to recover money payable by the defendant to the plaintiff as money had and received by the defendant for the plaintiff's use; but the Court did not consider that this article applied to a suit by a shareholder to recover a dividend payable to him by the company. If Art. 62 does not apply in the present case, it is clear that Art. 120 must apply on the same parity of

1. ('26) 13 A I R 1926 Mad 615 : 94 I C 515 : 50 M L J 520 : 49 Mad 468 (F B), Venkata Gurunadha Rama Seshayya v. Tripurasundari Cotton Press, Bezwada.

reasoning as is set forth in the judgment in 49 Mad 468.[1]

In the present case, the trial Judge considered that it would not be possible where a person has stolen another person's money to regard the money as being money had and received for the benefit of the victim, but the learned Judge did not consider the matter in the light of authority. A person who has suffered from the tortious act of another can always waive the tort, and if money has been stolen from him he can sue for the recovery of the money on the basis that the money has been received to his use. This is a legal fiction, but it is a fiction which has found recognition for a great length of time. In (1851) 6 Ex 349 = 20 L J Ex 250[2] it was expressly held that it was open for a plaintiff to waive a tort and sue for money had and received. When the tort amounts to felony, the English law, however, requires the felon to be brought to justice before a civil suit is instituted, on the theory that the primary consideration is the vindication of the law: *see* (1862) 31 L J Ch 757[3] and (1914) 3 K B 98.[4] It is unnecessary for the Court to consider whether this rule should be applied in India, but it may be pointed out that there is nothing in the Limitation Act which suggests the application, that in this country there is no distinction between a misdemeanour and a felony, and that in England the rule does not apply when the tort is a mere misdemeanour. But we will assume for the purpose of this case that it does apply, because the appellant has been convicted and was convicted more than three years before suit.

It is beyond reasonable argument that where a person has lost money by theft he can sue the thief for the recovery of the money, quite apart from the crime, but if he does, the suit must be framed as one for money had and received, in which case it is governed by Art. 62, as this article expressly relates to suits for money had and received. Of course, if he likes he may sue for the recovery of damages by way of compensation, but here again the period of limitation will be three years, as both sides admit. As the respondent sued on the debt and as in the peculiar circumstances the suit must be regarded as a suit for money had and received it does not fall within 49 Mad 468,[1] but within Art. 62, and therefore is clearly time-barred. The appeal will be allowed with costs in the trial Court; but in this Court each party will bear his own costs, the appellant having succeeded on the law point, but having failed on the contention that there was no theft.

C.R.K./G.N. *Appeal allowed.*

2. (1851) 6 Ex 349 : 20 L J Ex 250 : 17 L T (O S) 80 : 86 R R 328, Neate v. Harding.
3. (1862) 31 Beav 351 : 31 L J Ch 757 : 8 Jur (N S) 1028 : 6 L T (N S) 789 : 11 W R 5 : 135 R R 465, Chowne v. Baylis.
4. (1914) 3 K B 98 : 83 L J K B 1339 : 111 L T 195, Smith v. Selwyn.

A. I. R. 1941 Madras 392

LAKSHMANA RAO J.

Criminal Appeal No. 716 of 1940, Decided on 3rd December 1940, against acquittal by Assist. Session Judge, Ottappalam, South Malabar Division, in S. C. No. 44 of 1940.

Public Prosecutor — Appellant

v.

Kanholi Kunhiraman Nayar — Respondent.

Post Office Act (1898), Ss. 52 and 53—Offence under S. 52 can be taken cognizance of without complaint—Offence under S. 52 also constituting minor offence under S. 53 — Offence under S. 52 can be tried without complaint.

An offence under S. 52 can be taken cognizance of without any complaint. The fact that the offence under S. 52 also constitutes the minor offence under S. 53 is no bar to the trial of the offence under S. 52 without the complaint required for taking cognizance of an offence under S. 53.

[P 392 C 2 ; P 393 C 1]

N. Somasundaram — for Appellant.
K. S. Sundaram — for Respondent.

Judgment.—The respondent, a postman was charged by the police with an offence under S. 52, Post Office Act, for secreting two postal articles in course of transmission by post and he was committed for trial by the Court of Session of that offence. There was no complaint by order of or authority from the Director General or Post Master General, and a preliminary objection was taken to the trial on the ground that the acts also constitute the minor offence under S. 53, Post Office Act, of detaining the postal articles, which according to S. 72, Post Office Act, cannot be taken cognizance of unless upon complaint made by order of or authority from the Director General or Post Master General. The objection was upheld and the respondent was acquitted.

Hence this appeal by the Provincial Government and the order of acquittal cannot be supported. The offence under S. 52, Post Office Act, can be taken cognizance of without any complaint, and the commitment was legal. That the acts also constitute the minor offence under S. 53, Post Office Act, is no bar to the trial of the offence under S. 52, Post Office Act, and the respondent ought

to have been tried for that offence. The order of acquittal is therefore set aside and the respondent will be tried in accordance with law.

C.R.K./G.N. *Appeal allowed.*

A. I. R. 1941 Madras 393

PANDRANG ROW J.

Second Appeal No. 1010 of 1937, Decided on 24th September 1940, against decree of Sub-Judge, Chicacole, in A. S. No. 233 of 1936.

Ganthakoru Mangamma and others
— *Appellants*

v.

Dulla Paidayya and others
— *Respondents.*

(a) Practice—Judgment—Appellate judgment not coming to close quarters with judgment of trial Court and not alluding to reasoning of trial Judge — Judgment is vitiated by error in procedure.

Where the judgment in appeal does not come to close quarters with the judgment which it reviews and never discusses or alludes to the reasoning of the trial Judge, such judgment seriously invalidates its authority, and does not satisfy the requirements of the law and must therefore be deemed to be a judgment vitiated by an error in procedure : 16 M L J 272 (P C), *Rel. on.* [P 393 C 2]

(b) Evidence—Appreciation—Appellate Judge should not, without good reasons, interfere with trial Court's conclusion on credibility of oral evidence.

Unless good reasons are given, any interference with the conclusion of the trial Judge on the credibility of oral evidence must be deemed erroneous in law. [P 393 C 2]

Kasturi Seshagiri Rao — for Appellants.

Y. Suryanarayana — for Respondents.

Judgment. — This is an appeal from the decree of the subordinate Judge of Chicacole dated 19th November 1936 reversing on appeal the decree of the District Munsif of Vizagapatam dated 10th November 1932 in O. S. No. 175 of 1932. The reversal was based on a single ground namely, that the plaintiff had failed to show that she or her vendors had possession of the suit property at any time within twelve years prior to the suit and that therefore the suit was barred by limitation. The other points which arose in the case and which had been decided in favour of the plaintiff were not considered by the lower appellate Court and indeed the main complaint by the appellant has been that the judgment of tho lower appellate Court does not satisfy the legal requirements of a judgment. This is a case in which by a curious irony, the subordinate Judge who decided the case was an officer junior in rank to the District Munsif who decided the case as the trial Judge. This is accounted for by the fact that nearly four years elapsed between the decision by the trial Judge and the decision in appeal.

The question of possession was dealt with by the trial Court in a careful judgment covering a lot of ground and no attempt was made by the lower appellate Court to come to close quarters with the evidence in the case or to meet the reasoning of the trial Court in support of its conclusion. In other words, this is a case to which the observations of their Lordships of the Judicial Committee in 16 M L J 272[1] at p. 274 would apply, namely that the judgment in appeal does not come to close quarters with the judgment which it reviews and indeed never discusses or alludes to the reasoning of the trial Judge. In such a case their Lordships observed that this characteristic of the appellate Court's judgment "seriously invalidates its authority." The entire evidence is dealt with very unsatisfactorily by the lower appellate Court in a few sentences and no reference is made to the documentary evidence on the side of the plaintiff and no reason is given for rejecting the conclusion of the trial Judge as regards the credibility of the witnesses examined on the side of the plaintiff. On the other hand, the documentary evidence on the side of the defendants was accepted without question by the lower appellate Court in spite of the several reasons given by the trial Judge for rejecting the documentary evidence. On the whole, I have no doubt that this is a case in which the judgment of the lower appellate Court does not satisfy the requirements of the law and must therefore be deemed to be a judgment vitiated by an error in procedure.

Even otherwise there has been a failure to give sufficiently good reasons for upsetting the findings of the trial Judge as regards the credibility of the oral evidence in the case. As a matter of law, the lower appellate Court was bound not to go against the opinion of the trial Judge who had an opportunity of having the witnesses before him in deciding upon the credibility of the oral evidence in the case. Unless good reasons are given, any interference with the conclusion of the trial Judge on matters of this kind must be deemed erroneous in law. These considerations are sufficient to meet the contention on the side of the respondents

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1. (1906) 16 M L J 272 ; 10 C W N 630 : 3 A L J 363 : 8 Bom L R 400 : 1 M L T 135 (P C), Rani Hemantha Kumari Debi v. Jagindra Nath Roy Bahadur.

that the second appeal is not competent as it does not fall within any of the grounds mentioned in S. 100, Civil P. C. This is a case in which the second appeal does not come within one of the grounds mentioned in that section and the objection as to the competence of the appeal is not well founded. In these circumstances, the only course to be adopted is to reverse the finding on the question of possession and the decree of the lower appellate Court and to remand the appeal for fresh disposal according to law after considering all the evidence in the case. The costs of this second appeal will abide and follow the result and should be provided for in the revised decree of the lower Court. The court-fee paid on the memorandum of appeal will be refunded to the appellants. Leave to appeal is asked for but I see no sufficient reason to grant leave.

C.R.K./D.S. *Appeal remanded.*

A. I. R. 1941 Madras 394

VENKATARAMANA RAO J.

Second Appeal No. 526 of 1937, Decided on 25th October 1940, against decree of Sub-Judge, South Malabar at Palghat, in A. S. No. 13 of 1936.

P. N. Krishna Pattar — Appellant

v.

Kannambra Nayar Veettil Vilia Amma Kutti Neithiar's son Kunhunni Elaya Nayar and others — Respondents.

Contract Act (1872), Ss. 172 and 178 — Word "goods" in Ss. 172 and 178 connotes property capable of physical possession and transferable by manual delivery—Pledge explained — Pledge passes only "special" property in goods—Share certificates are not "goods" within meaning of Ss. 172 and 178 — Essentials of valid pledge stated — Mere deposit of share certificates does not creat valid pledge.

Sections 172 and 178 together indicate that the term "goods" connotes property which is capable of physical possession and transferable by manual delivery. This view derives support from the nature of a pledge. A pledge in law is neither a mortgage nor a lien and does not pass property in the goods but only passes what is described as "special" property, that is, no title to the goods passes but the pledgee is allowed to retain the thing pledged till payment of the debt and in default of payment, to sell the thing pledged so as to pass the property to the vendee. There can be a pledge of goods either by pledging the goods eo nomine or by pledging the relative documents. [P 395 C 1, 2]

Shares in an incorporated company are what in England would be called choses in action. Strictly speaking therefore share certificates are not "goods" within the meaning of Ss. 172 and 178. To constitute a valid pledge there must be such delivery of possession of property intended to be pledged to the pledgee by virtue of which he can exercise the right of sale for realizing the debt, a legal incident which attaches to every transaction of pledge. Therefore a deposit of a share certificate would not confer any interest or property in the shares pledged because if default in payment is committed and the pledgee chooses to enforce the right of sale, he would not be in a position to transfer the title in them to the vendee. In order to constitute a valid delivery the pledgee must be put in control of the thing pledged so that he may effectively exercise the power of sale. Consequently, a mere deposit of share certificate is not enough to create a valid pledge : A I R 1917 Cal 399 and A I R 1918 Cal 947, *Rel. on* ; 12 Bom L R 870 and A I R 1925 Bom 314, *Not followed* ; A I R 1934 P C 246; A I R 1916 P C 7; (1901) 2 Ch 314 ; (1910) 1 Ch 632 and (1886) 11 A C 426, *Ref.* [P 395 C 2; P 396 C 1; P397 C 1, 2]

C. S. Swaminathan — for Appellant.

K. Kuttikrishna Menon — for Respondents.

Judgment.—This second appeal raises a question of some difficulty and importance. The question is whether there can be a valid pledge of the shares of a company registered under the Companies Act, by the mere deposit of shares as a security for a debt. The question has arisen in this case thus. One Subramania Pattar was indebted to Ramakrishna Pattar on a promissory note dated 22nd March 1931. This note was subsequently endorsed to the plaintiff. The case of the plaintiff is that when he demanded the amount due under the note, Subramania Pattar deposited the shares which he held in Parli Tile Works Ltd., as and by way of pledge. He therefore filed this suit for recovery of the debt by sale of the said shares. The main contesting defendant in the case is defendant 4 who purchased the shares in court auction in execution of a decree in S. C. No. 13 of 1934 on the file of the Palghat Sub-Court obtained by defendant 3 against the said Subramania Pattar. He denies the validity of the pledge. The District Munsif was of opinion that the pledge was not valid because there was no transfer of shares in favour of the plaintiff. He therefore declined to give the plaintiff any relief on the footing of the pledge. The learned subordinate Judge held that there was a valid pledge. The question now is whether this view is sound. Section 172, Contract Act, defines a pledge as the bailment of goods as security for the payment of a debt or performance of an obligation. "Bailment" is defined by S. 148 of the Act thus :

> A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

Thus a valid pledge connotes two essential elements : (i) delivery of goods and (ii)

security for a debt or performance of an obligation. There is no definition of "goods" in the chapter relating to bailment nor in the Contract Act as amended. Before the amendment of the Act S. 76 of the Act defined "goods" thus: "In this chapter 'goods' means and includes every kind of moveable property." But the definition was only for the purpose of the chapter relating to sale of goods. Section 76 has been repealed and is replaced by S. 2 (7) of the Act which runs thus: "'Goods' means every kind of moveable property other than actionable claims and money; and includes stock and shares ..." Neither the definition of "goods" in S. 76, Contract Act, nor the definition in the Sale of Goods Act can be availed of for interpreting "goods" in S. 172, Contract Act. There is a difference of opinion as to whether stocks and shares would be "goods" within the meaning of the said section. In 24 C L J 335,[1] Sanderson C. J., and Mukherjee J., took the view that share certificates are not "goods" within the meaning of S. 178, Contract Act. The Bombay High Court has taken the view that they are: *vide* 12 Bom L R 870[2] and 27 Bom L R 514.[3]

Taking the language of Ss. 172 and 178, Contract Act, together, it would seem that the term "goods" was intended to connote property which is capable of physical possession and transferable by manual delivery. This view derives support from the nature of a pledge. A pledge in law is neither a mortgage nor a lien and does not pass property in the goods but only passes what is described as "special" property for want of a better term: *vide* criticism of the use of the term by Rash Behari Ghose in his book on Mortgages, Vol. I, Edn. 5, page 112. What is meant by the expression is that no title to the goods passes but the pledgee is allowed to retain the thing pledged till payment of the debt and in default of payment, to sell the thing pledged so as to pass the property to the vendee. This is ordinarily possible in the case of property which is capable of physical possession, but the statute in certain cases treated documents of title as equivalent to "goods." Lord Wright points out in 58 Mad 181[4] that under the common law a pledge of a document is not a pledge of goods but that under the Factors Acts in England and India a pledge of certain mercantile documents was deemed to be a pledge of goods and the Contract Act amended and consolidated the previously existing law and it shows that there can be a pledge of goods either by pledging the goods eo nomine or by pledging the relative documents. But what these documents are, are specified in S. 178 and why the statute treats a pledge of documents as a pledge of goods was explained by their Lordships of the Privy Council in 40 Bom 630[5] at p. 634 thus:

> In their Lordships' opinion the only possible conclusion is that when any doubt arises as to whether a particular document is a 'document showing title' or 'a document of title' to goods for the purposes of the Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possession of the document to transfer or receive the goods thereby represented.

It seems to me therefore that the view taken by the Calcutta High Court is sound. Shares in an incorporated company are what in England would be called choses in action, a known legal expression to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession. They would be actionable claims within the meaning of S. 3, T. P. Act, but by virtue of S. 137 of that Act are excluded from the purview of the chapter relating to actionable claims. They are moveable property under S. 28, Companies Act, for the purposes of transfer under that Act. Strictly speaking therefore share certificates would not be "goods" within the meaning of Ss. 172 and 178, Contract Act, but the Contract Act is not exhaustive. Under the common law stocks and shares can be the subject-matter of a pledge. Story in his book on the Law of Bailments says as follows:

> And first, as to the things, which may be the subject of it. These are ordinarily goods and chattels; but money, debts, negotiable instruments choses in action (coupon bonds payable to bearer, shares in the stock of an incorporated company) and indeed any other valuable things of a personal nature, such as patent rights and manuscripts may by the common law be delivered in pledge.

But whether the Bombay view is to be taken or whether the common law is to be followed, to constitute a valid pledge there must be such delivery of possession of property intended to be pledged to the pledgee

1. ('17) 4 A I R 1917 Cal 399 : 37 I C 707 : 24 C L J 335, Lalit Mohan Nandy v. Haridas Mukherjee.
2. ('10) 12 Bom L R 870 : 8 I C 183, R. D. Sethna v. National Bank of India.
3. ('25) 12 A I R 1925 Bom 314 : 92 I C 9 : 27 Bom L R 514, Jamshedji v. Maganlal.
4. ('34) 21 A I R 1934 P C 246 : 152 I C 730 : 58 Mad 181 : 61 I A 416 (P C), Official Assignee of Madras v. Mercantile Bank of India.
5. ('16) 3 A I R 1916 P C 7 : 35 I C 954 : 40 Bom 630 : 43 I A 164 (P C), Ramadas Vithaldas v. Amerchand and Co.

by virtue of which he can exercise the right of sale for realizing the debt, a legal incident which attaches to every transaction of pledge. Dealing with the subject of delivery Story says thus:

> What will amount to a delivery of the thing is, in many cases, matter of law. There need not be an actual manual delivery of the thing. It is sufficient if there are any of those acts or circumstances which, in construction of law, are deemed sufficient to pass the possession of the property. Thus, goods at sea may be passed in pledge by a transfer of the muniments of title; as by a transfer of the bill of lading or by a written assignment thereof. So goods in a warehouse may be transferred by a symbolical delivery of the key thereof; (and a pledge of stock in an incorporated company may be created by a written transfer, by which the legal title passes to the creditor.

Therefore a deposit of a share certificate would not confer any interest or property in the shares pledged because if default in payment is committed and the pledgee chooses to enforce the right of sale, he would not be in a position to transfer the title in them to the vendee. In order to constitute a valid delivery, the pledgee must be put in control of the thing pledged so that he may effectively exercise the power of sale. In this connexion, I should like to refer to the decision in 22 C W N 297[6] where it was held that a mere deposit of Government securities cannot constitute a valid pledge. During the course of the judgment the learned Judges observed as follows:

> It is difficult to apply the law relating to pawns as contained in the Contract Act to pledges of all classes of documents. Take the case of title deeds. What can the pawnee sell? There is no equitable mortgage even created by their delivery or deposit as collateral security outside Presidency towns. They may be 'goods' in the sense of being pieces of parchment or paper, but what value are they as such? Mere delivery of Government securities gives no property in them for purposes of negotiation or sale, without endorsement.

But no special property can be vested in the pledgee by a mere indorsement of the share certificate as in the case of Government securities. An assignment is necessary. The assignment operates as a constructive delivery of the thing pledged. This principle is recognized in S. 178, Contract Act, where in the case of certain documents of title mentioned therein, a mere delivery of the documents would not be enough, particularly in the case of a bill of lading. As pointed out by their Lordships of the Privy Council, an assignment of a bill of lading whether upon a sale or by way of pledge operates as a constructive delivery of the goods to which it refers: 40 Bom 630[5] at p. 637. The common form which is adopted in England and also in commercial circles, so far as I have known in India, is the delivery of the share certificates and blank transfer forms enabling the pledgee to deal with them by filling up the necessary details at the time of exercising the right of sale under the pledge. Mr. Kuttikrishna Menon relied upon a passage in Halsbury and the decision in (1901) 2 Ch 314.[7] The passage in Halsbury is as follows (Halsbury Vol. 5, page 283):

> A security may be given on shares by a legal mortgage, in which case a transfer to the mortgagee is executed and registered or by an equitable mortgage by deposit of the share certificate, with or without a transfer to the mortgagee or in blank, executed by the mortgagor.

and in the footnote there is the following statement:

> Where a share certificate is deposited without any memorandum, the remedy of the lender is an order for transfer and foreclosure.

The case relied on for it is (1901) 2 Ch 314.[7] On a reference to that case it will be found that Cozens-Hardy J., who dealt with a mere deposit of a certificate of shares observed as follows:

> Now it is plain that a pledgee is in a very different position from an ordinary mortgagee. He has only a special property in the thing pledged. He may obtain a sale but he cannot obtain a foreclosure. I do not think that this is properly a case of pledge. A share is a chose in action. The certificate is merely evidence of title, and whatever may be the result of the deposit of a bearer bond .... I think I cannot treat the plaintiff as a mere pledgee. The deposit of the certificate by way of security for the debt which is admitted, seems to me to amount to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage.

This is relied upon by Mr. Kuttikrishna Menon for the purpose of showing that Cozens-Hardy J. was inclined to treat the deposit in that case as even more than a pledge and as conferring a greater interest than in the case of a pledge and that therefore it follows that a mere deposit of the shares would be sufficient to create an interest in the pledgee entitling him to obtain an order for sale. I am not able to agree with him in this contention. Under the English law as pointed out by Coote in his book on Mortgages and also from the observations of Cozens-Hardy J. extracted above, a person taking a deposit of share certificates and blank transfer forms by way of security is treated as an equitable mortgagee and not

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6. ('18) 5 AIR 1918 Cal 947 : 33 I C 891 : 22 C W N 297, Lala Jyoti Prakash Nandi v. Lala Mukti Prakash Nandi.

7. (1901) 2 Ch 314 : 70 L J Ch 562 : 85 L T 45 : 49 W R 646 : 8 Manson 304 : 17 T L R 545, Harold v. Plenty.

a pledgee. So also a person who takes a deposit without a transfer. This is how Coote explains it :

> A share is a chose in action and where there is a simple deposit of certificate of shares unaccompanied by any transfer, the deposit will operate as an equitable mortgage like a deposit of title deeds of land and be deemed to give a right to a legal transfer of the shares, carrying with it the remedies incident to a mortgage, including the right to foreclosure. (Vol. I, Edn. 9, page 315.)

It will be thus seen that a deposit of certificates is treated on the same footing as a deposit of title deeds of land. But this principle will not be applicable to India where even with reference to immovable property, as pointed out in 22 C W N 297[6] the principle is of limited application being confined only to presidency towns. Further, as pointed out in Robbins on Mortgages on which the treatise by Coote is founded, a depositee of shares cannot exercise the right of sale unless the deposit is accompanied by a transfer of the shares. But if the deposit is accompanied by a delivery of blank transfer forms the English decisions seem to describe such a transaction indiscriminately as a pledge or as a mortgage and Coote points out that there is very little of practical importance in calling it by one name or the other because in such a transaction it is always open to the person who holds the shares to sell them, if a date is fixed for payment, on the expiry of the said date and if no date is fixed for payment, to sell them after reasonable notice, *vide* (1940) 1 Ch 632,[8] so that the legal incidents of sale which are attached to a pledge is also available with reference to such a transaction. And in fact the learned author points out, commenting upon (1886) 11 A C 426[9] that English cases loosely use the expression "pledge" when the transaction should be described only as an equitable mortgage. This is how he remarks on p. 316 of his book :

> In one case where share certificates were deposited with a bank as security accompanied with a blank transfer, which was inoperative as a transfer the transaction was throughout the judgments referred to as a pledge; but it seems that the term was not used in a strictly technical sense and that if any necessity had arisen for taking into account the distinction between a pledge and a mortgage, the transaction would have been treated as one of equitable mortgage by deposit.

It seems to me therefore that as the law stands at present in India a mere deposit of share certificate would not be enough to create a valid pledge. In the result the appeal is allowed; the decree of the learned subordinate Judge is set aside and the decree of the District Munsif is restored with costs throughout. Leave to appeal granted.

C.R.K./G.N. *Appeal allowed.*

8. (1910) 1 Ch 632 : 79 L J Ch 420 : 102 L T 444, Stubbs v. Slater.
9. (1886) 11 A C 426 : 56 L J Ch 43 : 55 L T 362: 34 W R 705 : 3 Morrell 207, Colonial Bank v. Whinney.

A. I. R. 1941 Madras 397

WADSWORTH J.

Civil Revn. Petn. No. 1707 of 1939, Decided on 18th December 1940, to revise order of Dist. Munsif, Kulitalai, D/- 4th March 1939.

Raman Chettiar — *Petitioner*

v.

Perumal Udayar — *Respondent.*

Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 and 19—Promissory note executed in renewal of earlier notes and comprising principal and interest of earlier notes—Payments towards principal—Decree for balance — Decree how to be scaled down stated.

A promissory note was executed in renewal of earlier notes and comprised principal and interest of earlier notes. Payments were made towards principal and a decree was passed for the balance :

Held that in scaling down this decree under S. 19 the appropriations towards principal should be treated as having been made towards principal of the suit note which comprised principal and interest of earlier notes. [P 397 C 2]

M. S. Vaidhyanatha Iyer—for Petitioner.

T. V. Ramanatha Iyer — for Respondent.

Order. — The respondent on 26th June 1932 executed a promissory note for Rs. 463 in renewal of two earlier notes, the principal of which totalled Rs. 350. On 26th June 1934, Rs. 111-8-0 was paid for interest and Rupees 323 was paid for principal, leaving a balance of Rs. 140 due. On 15th December 1934, Rs. 8 was paid for interest and Rs. 40 for principal having a balance of Rs. 100. The suit was filed in December 1937 for Rs. 100 and subsequent interest and a decree was given on 4th March 1938. In scaling down this decree under S. 19 of Madras Act 4 of 1938, the lower Court has treated the appropriations towards principal as having been made, not towards the actual principal of the suit note but towards the notional principal as calculated according to the explanation to S. 8. This is an error. The parties actually intended to appropriate these payments towards the real principal of the suit note, which comprised both principal and interest of the earlier notes. The debtor cannot prove that there was an appropriation to the principal only of the earlier notes or that any interest was left outstanding on those notes to be cancelled as on 1st October

1937. The petitioner is therefore entitled to a decree for Rs. 100 with interest at 6¼ per cent. from 1st October 1937 up to the date of the decree and subsequent interest at 6 per cent. and costs and interest thereon at 5 per cent. from the date of the decree to 22nd March 1938 and thereafter at 6 per cent. Petitioner will be entitled to his costs in revision.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1941 Madras 398

HORWILL J.

Civil Revn. Petn. No. 1652 of 1937, Decided on 20th September 1940, to revise order of District Munsif, Manamadura, D/- 14th August 1937.

Manikka N. Perumal Iyer — *Petitioner*

v.

Srinivasa Ayyangar — *Respondent.*

(a) Civil P. C. (1908), O. 33, R. 5 (d)—Application not suggesting that there was no cause of action — Court cannot look into counter of defendant and other evidence in order to dismiss application under R. 5 (d).

An application can only be rejected on ground of R. 5 (d) if the allegations in the application itself do not show a cause of action. For deciding whether the application should be rejected on that ground, arguments of the other side may be very helpful but hardly the evidence. It is true that in cases in which something is said in the application which suggests, although not very directly, that there may not be a cause of action, the court may look into the counter and have regard to evidence in order to clarify what is already in the application but in a case where there is admittedly nothing in the application which even suggests that there is no cause of action, Court cannot consider the counter and other evidence in order to dismiss the application under R. 5 (d). [P 398 C 2; P 399 C 1]

(b) Civil P. C. (1908), O. 33, R. 5 (d)—Omission of plaintiff to set out in plaint defences open to defendant would not make his application liable to be dismissed under R. 5 (d).

The plaintiff is not bound to set out in the plaint defences that may be open to the defendant. Even if he ought to have done so, this omission to do so would not make his application liable to be dismissed under O. 33, R. 5 (d). [P 399 C 1]

(c) Civil P. C. (1908), O. 33, R. 5 (d) and S. 115 — Court dismissing application under O. 33, R. 5 (d) after looking into counter of defendant and other evidence — High Court can interfere in revision.

Order 33, R. 5 gives five grounds upon which an application for permission to sue in forma pauperis can be rejected. If a Court rejects it on some other ground not set out in O. 33, R. 5, that Court acts without jurisdiction and High Court has therefore jurisdiction to interfere in revision. Hence, where Court dismisses application under R. 5 (d) after seeing the counter of the defendant and looking into certain evidence, it acts without jurisdiction and High Court can interfere in revision: 1937 M W N 415, *Expl.*; A I R 1927 Mad 441 and 13 M L J 292 (F B), *Rel. on.* [P 399 C 1]

K. Vaidhyanathan — for Petitioner.

S. Krishnaswami Iyengar and R. Kesava Iyengar — for Respondent.

Order. — This is a revision petition against the order of the District Munsif of Manamadura dismissing an application for leave to sue in forma pauperis on the ground that the application did not disclose any cause of action. It is conceded that the application itself did disclose a cause of action; but the learned District Munsif, after seeing the counter of the defendant and looking into certain documents produced by him, held that the suit was barred by res judicata. The question that arises in this petition is whether the Court was right in considering the counter and documents and dismissing the application on that account. A further point arises whether, even if he ought not to have done so, this Court can entertain a revision petition on the ground that there was an act without jurisdiction. Order 33, R. 5, Civil P. C., says that the Court shall reject an application for permission to sue as a pauper if any one of five conditions is fulfilled. The condition with which we are here concerned is set out in sub-rule (d), "where his allegations do not show a cause of action." Rule 6 says that where the Court sees no reasons to reject the application on any of the grounds stated in R. 5, it should fix a day for receiving evidence in proof of pauperism and for hearing any evidence adduced in disproof thereof.

Rule 7 (2) says that (on the day of hearing after notice) the Court shall also hear any argument which the parties may desire to offer on the question whether on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in R. 5. Rule 7 thus makes it clear that although the Court may admit an application, it is still open to it, after hearing the other side, to reject the application on any of the grounds set out in sub-rr. (a) to (e). With regard to sub-rr. (a), (b), (c) and (e), evidence may be necessary before it is possible to decide whether the application should be rejected or not; but it is difficult to see how evidence can help the Court with regard to sub-r. (d); for the application can only be rejected on ground (d) if the allegations in the application itself do not show a cause of action. For deciding whether the application should be rejected on that ground, arguments of the other side may be very helpful but

hardly the evidence. One can however envisage cases in which something is said in the application which suggests, although not very directly, that there may not be a cause of action. In such cases it is perhaps arguable, although I should be very reluctant to accede to the argument, that the Court may look into the counter and have regard to evidence in order to clarify what is already in the application. But in the present case there is admittedly nothing in the application which even suggests that there is no cause of action. The learned Munsif thought that the plaintiff was playing a fraud on the Court in not mentioning the previous litigation which would operate as res judicata; but I do not think that the plaintiff is bound to set out in the plaint defences that may be open to the defendant. Even if he ought to have done so, this omission to do so would not make his application liable to be dismissed under O. 33, R. 5 (d). A I R 1925 Cal 990[1] has been relied on by the learned advocate for the respondent in support of the lower Court's order; but I do not find in it anything which helps the respondent.

The other question is whether this Court should interfere in revision. Order 33, R. 5 gives five grounds upon which an application for permission to sue in forma pauperis can be rejected. If a Court rejects it on some other ground not set out in O. 33, R. 5, that Court acts without jurisdiction and this Court has therefore jurisdiction to interfere in revision. The learned advocate for the respondent relies on a decision of Beasley C. J., in 1937 M W N 415.[2] In that case, there was something in the application to sue in forma pauperis which indicated that the suit might be barred by res judicata, and the lower Court admitted certain evidence which threw further light on this reference to earlier litigation in the application. The learned Chief Justice, while finding that the lower Court ought not to have gone into such an enquiry, thought that its doing so was not an act in excess of its jurisdiction. That was a case such as I referred to in the last paragraph, in which there were grounds set out in the application which afforded a basis for the lower Court's order and where it might be said that the enquiry helped to elucidate something that was set out in the application. Where, however, there is nothing in the application which suggests that the Court has no jurisdiction, then clearly the Court cannot reject the application on the ground that "his allegations do not show a cause of action." Sundaram Chetty J. says in 52 M L J 330[3]

> the non-existence of the cause of action should appear clearly on the face of the application itself and the Court acts without jurisdiction in travelling beyond the four corners of the application.

The learned Chief Justice in the Full Bench decision of this Court in 13 M L J 292[4] says with regard to the old Act which contained the same provisions:

> I consider the Munsif acted illegally in allowing evidence to be put in on behalf of the defendant with reference to the merits of the claim of the party applying for leave to sue in forma pauperis and in dismissing the application on the ground that on the evidence on record the applicant had no subsisting cause of action.

That decision was given in a revision petition and the order of the lower Court seems to have been set aside. This petition is therefore allowed with costs in this Court and the application is restored to file and remitted to the lower Court for disposal according to law.

C.R.K./D.S. *Petition allowed.*

1. ('25) 12 A I R 1925 Cal 990 : 87 I C 787, Sourendranath v. Jatindranath.
2. ('37) 1937 M W N 415, Subbayyar v. Vellappa Ambalam.
3. ('27) 14 A I R 1927 Mad 441 : 101 I C 18 : 52 M L J 330, Ramachandra Raju v. Venkiah.
4. ('03) 13 M L J 292 (F B), Rathnam Pillai v. Pappa Pillai.

A. I. R. 1941 Madras 399

WADSWORTH J.

Civil Revn. Petn. No. 707 of 1940, Decided on 20th November 1940, to revise order of City Civil Court, Madras, D/- 15th March 1940.

Ambujammal — Petitioner

v.

P. Thangavelu Chettiar and another — Respondents.

Civil P. C. (1908), O. 21, Rr. 89 to 92 and S. 151 — Execution sale in favour of stranger purchaser—Before confirmation decree set aside — Sale must nevertheless be confirmed—S. 151 cannot be invoked to set aside sale in such circumstances.

Even though the decree has been set aside after the execution sale and before confirmation, a sale in favour of a stranger-purchaser must nevertheless be confirmed if the sale cannot be set aside under the provisions of O. 21, Rr. 89 to 91: A I R 1933 Mad 598; A I R 1931 P C 33 and A I R 1938 Nag 525, *Rel. on;* A I R 1920 Cal 99 and A I R 1921 Nag 121, *Expl., and not followed.* [P 400 C 2; P 401 C 1]

Whether or not there should be a right to challenge a sale under a valid decree being purely a question of policy and not a question of justice, the inherent powers of the Court cannot be called in aid to justify the setting aside a sale under such circumstances so as to safeguard the judgment-debtor by doing an injury to the innocent auction-

purchaser when the Code contains no provision for such a power. [P 401 C 1, 2]

V. V. Srinivasa Iyengar and V. R. Srinivasan — for Petitioner.

V. T. Rangaswami Iyengar, K. S. Sankararaman, V. Govindarajachari and V. Natesan — for Respondents.

Order.—This revision petition challenges the correctness of an order confirming a sale when the decree upon which the sale was based had been set aside in appeal in the interval between the holding of the sale and the passing of the order of confirmation. Under this decree there were two sales. At the first the decree-holder was the purchaser and the sale was set aside. On 11th December 1939 there was a fresh sale and the present respondent, a stranger, purchased the property. Against this sale also there was an application under O. 21, R. 90, Civil P. C. That application was dismissed on 25 January 1940; but for some reason the sale was not immediately confirmed. On 30th January 1940, the defendant's appeal succeeded and the suit was dismissed. On the following day the executing Court was apprised of this result and the matter of the confirmation of the sale was adjourned. Meanwhile a review application was filed against the dismissal of the application under O. 21, R. 90. This review application was rejected on 15th March 1940 and the sale was forthwith confirmed. It is contended that the executing Court had no jurisdiction to proceed with the execution of a decree which had ceased to have a judicial existence and that consequently the confirmation of the sale which is a step-in-aid of execution is an invalid act which has to be set aside.

Mr. Venkatachari for the petitioner admits that the decision of Madhavan Nair J. in 56 Mad 808,[1] is against him, but he contends that this decision is wrong. In support of this contention he points out that the learned Judge has been led astray by relying upon an incorrect head-note in order to differentiate the case in 55 I C 547=24 C W N 73.[2] The facts of the latter case are rather complicated, but I have satisfied myself that the head-note in the Indian Cases report is incorrect and that this was a case in which a sale was held under a decree which at the time of the sale subsisted, but by the time when the sale came up for confirmation after a long series of judicial events which I need not elaborate, that decree had ceased to exist. The learned Judges held that in such a case confirmation of the sale ought to be refused. A similar view was also taken in a decision by a Bench of the Nagpur Chief Court: *vide* A I R 1921 Nag 121.[3] But I doubt very much whether this view is now tenable having regard to the more recent decisions of the Privy Council.

In the case in 60 M L J 423,[4] the Privy Council had to deal with the case of a sale to a third party under a decree which was satisfied by a compromise between the parties in the interval between the sale and the confirmation. Their Lordships held that the parties to the suit could not get rid of the sale to a third party merely by asserting that the decree had been satisfied out of Court and that the only means by which the sale could be avoided were those embodied in O. 21, and that if within 30 days of the sale there is no such application, it was obligatory on the Court under R. 92 to pass an order confirming the sale notwithstanding the circumstance that the decree-holder had admitted satisfaction of the decree. In this case it is pointed out that when the interests of a third party intervene, it is no longer a matter between the decree-holder and the judgment-debtor and that the process of confirmation follows automatically under R. 92 when there had been no application under Rr. 89 to 91 or any such application has been disallowed. That is essentially the view taken by Madhavan Nair J. in the case already referred to. The learned Judge points out that under S. 316 of the Code of 1882 there was a proviso the effect of which was that confirmation should follow provided that "the decree under which the sale took place was still subsisting at that date" and under that section the date of the sale was the date of the confirmation. Under S. 65 of the present Code the property is deemed to vest in the purchaser from the date of the actual sale and not from the date of the confirmation and there is a significant omission of this proviso making the existence of the decree an essential condition for the confirmation of the sale. The learned Judge comes to the conclusion in the light of this alteration of the Code as well as of the mandatory language of R. 92 that even though the decree has

1. ('33) 20 A I R 1933 Mad 598 : 148 I C 854 : 56 Mad 808 : 65 M L J 253, Sorimuthu Pillai v. Muthukrishna Pillai.
2. ('20) 7 A I R 1920 Cal 99 : 55 I C 547 : 24 C W N 73, Ariatullah v. Sashi Bhusan Hazrah.
3. ('21) 8 A I R 1921 Nag 121 : 61 I C 571, Hariram v. Gopikisan.
4. ('31) 18 A I R 1931 P C 33 : 130 I C 686 : 27 N L R 95 : 58 I A 50 : 60 M L J 423 (P C), Seth Nanhelal v. Umrao Singh.

been set aside after the sale and before confirmation a sale in favour of a stranger-purchaser must nevertheless be confirmed if the sale cannot be set aside under the provisions of Rr. 89 to 91 of O. 21. The same view has been taken by a Bench of the Nagpur High Court in a recent case, A I R 1938 Nag 525.[5] So far as I am aware the decision of Madhavan Nair J., which was passed in 1932 has not been doubted by any decision of this Court.

It is argued by Mr. Venkatachari that there are circumstances in which the Court is entitled not to confirm a sale and he quotes 46 Mad 583,[6] as illustrating the fact that the Court may under its inherent powers refuse to confirm a sale in a case where the sale has been brought about owing to a fraud on the Court. Granting so much, it seems to me that there could be no question of the exercise of the inherent powers in the present circumstances so as to safeguard the judgment-debtor by doing an injury to an innocent auction-purchaser. Whether or not there should be a right to challenge a sale under a valid decree is to my mind purely a question of policy and not a question of justice. There must be a power in the Court to enforce its decrees. That power is in many cases the power of sale. Certain safeguards are given whereby judgment-debtors can get a sale cancelled within a certain time. There is no provision in the Code for the cancellation of a sale merely because of the cancellation of the decree and though it is in accordance with justice that a person who has succeeded in appeal should get from the opposite party such restitution as is possible, there is no principle of justice whereby an innocent third party who has purchased in a valid auction held by the Court should be deprived of his property, merely because the decree under which the sale was held has been cancelled in appeal. On general principles the judgment-debtor can look to the decree-holder to give restitution when the decree has been set aside in appeal, but there is no general principle which would give him a similar right to look to a third party who has for good consideration purchased the property sold through the Court. It seems to me to follow therefore that the inherent powers of the Court cannot be called in aid to justify a power for which the Code contains no provision, when the desirability of the existence of such a power is purely a matter of policy upon which two opinions may quite well be taken. It seems to me therefore that the balance of authority is in favour of the view taken by Madhavan Nair J. and personally I see no reason to take a different view. The petition is therefore dismissed with costs of respondent 2.

C.R.K./G.N. *Petition dismissed.*

5. ('38) 25 AIR 1938 Nag 525 : 179 I C 256 : ILR 1940 Nag 302, Birdichand v. Ganpatsao.
6. ('23) 10 A I R 1923 Mad 635 : 72 I C 545 : 46 Mad 583 : 44 M L J 680, Raghavachariar v. Murugesa Mudali.

A. I. R. 1941 Madras 401

KING J.

Civil Revision Petns. Nos. 722 and 723 of 1937, Decided on 13th August 1940, to revise decrees of Dist. Munsif, Krishnagiri, in S. C. S. Nos. 1 and 9 of 1937.

K. G. Govindarajulu Naidu—*Petitioner*

v.

M. S. Gopalaswamy Chetty and another — *Respondents.*

Transfer of Property Act (1882), S. 76 (c)— Usufructuary mortgage by lessee — Landlord cannot proceed directly against mortgagee for recovery of rent.

Section 76 deals only with the relative rights and duties of the mortgagor and mortgagee and does not confer upon a third party to their mortgage the right of proceeding directly against the mortgagee for the recovery of rent. Consequently, in the case of a usufructuary mortgage of the lease-hold by the lessee the landlord cannot recover arrears of rent of the lease-hold directly from the mortgagee: I L R (1938) 1 Cal 21, *Foll.* [P 401 C 2]

C. S. Venkatachariar and D. Ramaswamy Iyengar — for Petitioner.

Alladi Ramaswamy Iyer — for Respondents.

Order. — These petitions arise out of small cause suits filed by a landlord for rent or jodi due to him for faslis 1343, 1344 & 1345. He has however not sued his original lessee but has sued the petitioner who is a usufructuary mortgagee from that lessee. The District Munsif has given him a decree on the ground that the provisions of S. 76 (c), T. P. Act, lay it down that a usufructuary mortgagee in possession of the mortgaged property is bound to pay the land revenue or similar public charges due on that property. This decree has been challenged in revision. It is argued that s. 76, T. P. Act, deals only with the relative rights and duties of the mortgagor and mortgagee and cannot possibly confer upon a third party to their mortgage the right of proceeding directly against the mortgagee for the recovery of rent. This objection seems to me unanswerable and is supported by the authority of 66 C L J 10.[1]

1. ('38) I L R (1938) 1 Cal 21 : 66 C L J 10 : 41 C W N 1141, Sachindramohan Ghose v. Commissioner for the Port of Calcutta.

The respondent, however, although he does not seriously attempt to support the argument adopted by the learned District Munsif, contends before me that he is entitled to proceed against the petitioner on the ground that he has recognized the transfer of the lease by way of the mortgage and has accepted rent from the petitioner for five faslis before the faslis with which these suits deal. I have analysed such evidence as is available and I find that it is true as a matter of fact that the defendant has paid the rent for faslis 1338 to 1342. There is nothing however in the documents filed in the case to prove that he paid this rent as the assignee of the mortgagor or in substitution for the mortgagor's liability to pay and that he did not pay it as agent of the mortgagor. On the evidence put forward in the case therefore there is no material for any positive finding as to the capacity in which the petitioner paid. So far as the plaint is concerned it is quite clear that the claim was not made upon this principle of law at all. The only ground upon which the claim was made was that the defendant as mortgagee was in actual use and occupation of the land. In his written statement the defendant pleaded that there was no contract between him and the plaintiff and further asserted that his mortgagor had actually sold the equity of redemption to one Venkatasami Naidu and that it was Venkatasami Naidu from whom the plaintiff should seek payment of the rent. I understand that the plaintiff thereupon attempted to implead Venkatasami Naidu but that the Court refused to allow the application which was belated. This state of the pleadings will amply show that there was no obligation at all upon the defendant to explain the capacity in which he actually paid the rent.

It is now argued finally on behalf of the respondent that I should call for a finding on this question namely whether the defendant paid the rent during the preceding five faslis as agent for the mortgagor or in substitution for him. In view of the fact that the plaintiff did not base his claim upon the previous payment and did not even refer in his plaint to the fact of the previous payment by the defendant, I see no reason why I should order a remand to establish a matter which was clearly outside the scope of the suits as laid and as defended. The result is that the decrees of the learned District Munsif cannot be upheld and must be set aside. These petitions are accordingly allowed and the plaintiff's suits dismissed with costs throughout.

C.R.K./G.N. *Petitions allowed.*

A. I. R. 1941 Madras 402

BURN J.

Civil Revn. Petn. No. 461 of 1939, Decided on 3rd September 1940, to revise order of District Munsif, Parappanangadi, D/- 1st October 1938.

Gopala Menon — *Petitioner*

v.

Punnoli Korath Meenakshi Amma Karnavastri and others — *Respondents.*

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 23—Decree satisfied—Judgment-debtor cannot apply.

The person who makes an application under S. 23 must be a judgment-debtor at the time he makes the application. The Act does not say that any person who was a judgment-debtor may apply. Consequently, when satisfaction of the decree has been entered up and the decree itself has been wiped out the judgment-debtor cannot apply under section 23. [P 403 C 1, 2]

(b) Civil P. C. (1908), O. 41, R. 22—Respondent can file cross-objections against co-respondent.

In a memorandum of cross-objections a respondent can raise a question that arises only between him and a co-respondent : A I R 1915 Mad 648 (F B), *Foll.* [P 403 C 2]

K. Kuttikrishna Menon — for Petitioner.

A. P. Krishna Menon, A. P. Kuttisankara Menon and C. K. Viswantha Iyer — for Respondents.

Order.—This is a revision petition against the order passed by the learned District Munsif of Parappanangadi in E. A. No. 587 of 1938 in S. C. No. 204 of 1935 on the file of the Sub-Court, Calicut. The application (E. A. No. 587 of 1938) was made by defendants 2 and 3 in the small cause suit. It was a petition under S. 23, Madras Act, 4 of 1938. It contained an allegation that three items of immovable property had been sold on 28th October 1937 in execution of the Small Cause Court's decree. It contained an allegation that the petitioners are agriculturists and persons eligible to be admitted to the benefits of the Agriculturists' Debt Relief Act and an allegation that the petitioners propose to file a petition in the Sub-Court, Calicut, to scale down the debt under the Agriculturists' Debt Relief Act. The prayer in the petition therefore was that the sale of the three items of immovable property held on 28th October 1937 be set aside under S. 23, Madras Act, 4 of 1938. Respondent 1 to this petition was the decree-holder in the small cause suit who had himself purchased item 2. Respondent 2 in the petition was

the purchaser of item 1. He was a third party. Item 3 appears to have been purchased by some other party. The learned District Munsif allowed the application in so far as items 1 and 2 are concerned and directed that the sale be set aside. The third party purchaser of item 1 has preferred this revision petition from that order and the decree-holder purchaser of item 2 has filed a memorandum of objections in which he supports the petitioner and questions the validity of the order of the lower Court on the same grounds as those put forward by the petitioner. The point taken by Mr. Kuttikrishna Menon on behalf of the petitioner is a point of law based upon the wording of S. 23, Madras Act, 4 of 1938. Section 23 runs as follows:

Where in execution of any decree any immovable property, in which an agriculturist had an interest, has been sold or foreclosed on or after the 1st October 1937, then notwithstanding anything contained in the Indian Limitation Act, 1908, or in the Code of Civil Procedure, 1908, and notwithstanding that the sale has been confirmed, any judgment-debtor, claiming to be an agriculturist entitled to the benefits of this Act, may apply to the Court within 90 days of the commencement of this Act to set aside the sale or foreclosure of the property, and the Court shall, if satisfied that the applicant is an agriculturist entitled to the benefits of this Act, order the sale or foreclosure to be set aside, and thereupon the sale shall be deemed not to have taken place at all:

Provided that no such order shall be made without notice to the decree-holder, the auction-purchaser, and other persons interested in such sale or foreclosure and without affording them an opportunity to be heard in the matter.

Mr. Kuttikrishna Menon points out that the application which may be made under this section must be made by a "judgment-debtor" claiming to be an agriculturist entitled to the benefits of the Act. His contention is that on 6th April 1938 when the application to the lower Court was made the applicants were not judgment-debtors. Both the items of property with which this petition is concerned had been sold as already mentioned on 28th October 1937; the sale was confirmed on 30th November 1937 and on the same date satisfaction of the decree was entered up. That being so, Mr. Kuttikrishna Menon contends that on 6th April 1938, nearly five months afterwards, there was no judgment-debtor in Small Cause No. 204 of 1935 because the decree itself had been wiped out. This contention appears to me to be sound and learned counsel who has appeared for the respondents judgment-debtors has not been able to adduce any arguments to meet it. It is, I think, clear that the person who makes the application under S. 23 of Madras Act, 4 of 1938, must be a judgment-debtor at the time he makes the application. The Act does not say that any person who was a judgment-debtor may apply. It simply says "any judgment-debtor . . . may apply." This petition must therefore be allowed and the order of the lower Court must be set aside in so far as item 1 is concerned. For the same reason I must allow the memorandum of objections preferred by the decree-holder purchaser. It is at first sight rather startling to find that in a memorandum of objections a respondent may raise a question that arises only between him and a co-respondent. But there is the authority of a Full Bench of this High Court for such a method of proceeding: *vide* 38 Mad 705.[1] The order of the lower Court as regards items 1 and 2 is therefore set aside and the application of the judgment-debtors dismissed. The petitioner will recover his costs from the judgment-debtors in both the Courts.

C.R.K./G.N. *Petition allowed.*

1. ('15) 2 AIR 1915 Mad 648: 27 I C 323: 38 Mad 705: 27 M L J 740 (F B), Munisami Mudali v. Abbu Reddi.

A. I. R. 1941 Madras 403

WADSWORTH AND PATANJALI SASTRI JJ.

Appeal No. 36 of 1940, Decided on 28th October 1940, against appellate order of Sub-Judge, Tinnevelly, D/- 16th October 1939.

S. Venkiteswara Aiyer—*Appellant*

v.

T. N. Ramasami Aiyar and others — *Respondents.*

Madras Agriculturists' Relief Act (4 of 1938), S. 19 — Payments made by debtor adjusted towards debt — Debtor not showing that they had been adjusted in reduction of principal — He cannot be said to be in position to show that there was on 1st October 1937 interest outstanding.

Where debtor has made payments and these payments have been adjusted towards the debt, they must have been adjusted in reduction of either interest or principal and if the debtor is not in a position to show that they have been adjusted in reduction of the principal, it follows that to the extent of these payments he cannot show that there was on 1st October 1937 interest outstanding.

[P 404 C 2]

S. Ramaswami Iyer—for Appellant.

T. M. Ramaswami Iyer—for Respondents.

Wadsworth J. — This appeal raises a question of appropriation with reference to an application under S. 19, Madras Act, 4 of 1938. The appellant, who is the applicant in the Court below, was defendant 1 in this suit. The debt, so far as we need trace it back, starts with a principal of Rs. 7250 as on 27th April 1925 when a security bond was executed. Before the suit there were cer-

tain payments, the exact figure of which seems to be doubtful. The suit was filed in 1928 for a sum of Rs. 11,500. It ended in a decree which, so far as defendants 3 to 5 were concerned was based on a compromise and the same decree was made applicable to defendants 1 and 2 who allowed the suit to proceed ex parte. The decree provided for a payment of Rs. 12,116 within four months or in default for payment of Rs. 14,116, with interest at six per cent. No payment was made. The hypotheca mortgaged under the security bond was sold and realized Rs. 5420 which was credited to the decree and part satisfaction was recorded. An application was preferred for a personal decree for the balance. We have not got this actual application before us, but the personal decree indicates that Rs. 5420 realized by the sale was credited and presumably it must have been credited first towards interest due on the decree amount and then towards the principal sum decreed. For the balance, a personal decree was passed. Thereafter, there were two payments aggregating to Rs. 2476 made in 1932 and 1933. In 1937 the decree was assigned to the present respondent who took out execution for a sum of Rs. 11,156-5-5 on 23rd September 1937. While this execution was pending, Madras Act, 4 of 1938 came into force and defendant 1 applied for a stay of sale and filed the present application under S. 19 on 20th September 1938. It is not disputed that the way in which the lower Court has treated this application is incorrect. The learned Judge has treated the decree as a compromise decree (which, so far as defendant 1 is concerned, it was not) and has taken the principal of the decree as the principal of the debt, a procedure which, even on the footing of its being a compromise decree, could hardly be supported on the facts of this case.

It is contended for the appellant that both the payments made before the suit and the amount of Rs. 5420 realized by the sale in 1930 must be regarded as open payments and that the interest outstanding on 1st October 1937 must be wiped off without regard to these payments. The contention with reference to the payments before suit is that these were payments credited to a debt which carried compound interest, that there was no benefit to be derived by the creditor in adjusting these payments to interest rather than to principal and that on the basis of the decision in (1898) 2 Q B 460[1] there is no presumption in such a case that the payments were first appropriated to interest. With reference to the sale amount credited to the decree at the time of the application for a personal decree, the contention is that though there may have been an appropriation towards the interest which had then accrued due on the amount decreed, there was no appropriation towards interest except to this extent and that at least the balance after deducting the accrued interest on the decree must be treated as an open payment.

We find ourselves unable to accept either of these contentions. The question is not whether the creditor can prove positively an appropriation of these amounts towards interest, but whether the debtor is in a position to show that on 1st October 1937 these amounts had not been adjusted in reduction of interest and consequently that interest was outstanding unrealised. In the case of the payments before the suit, they were certainly adjusted to the debt and a balance was struck and the suit claim proceeded on the footing of this balance with interest thereon. They cannot therefore be regarded as unadjusted payments. When once it is conceded that these payments have been adjusted towards the debt, they must have been adjusted in reduction of either interest or principal and the debtor not being in a position to show that they have been adjusted in reduction of the principal, it follows that to the extent of these payments he cannot show that there was on 1st October 1937 interest outstanding.

Similarly, with reference to the payments made as a result of the sale after the decree, there is a demonstrable appropriation towards interest due under the decree. The balance of the payments has certainly been adjusted towards the decree debt which itself is made up of principal and interest. Thus, with reference to this balance though the creditor is not able to prove that the money was appropriated towards the interest, the debtor is unable to prove that the payment was appropriated towards principal. He is therefore not in a position to show to the extent of this payment that interest was outstanding on 1st October 1937. The two later payments made in 1932 and 1933 have not been shown to have been adjusted to the debt before the Act came into force. They cannot therefore be regarded as having reduced the amount of interest outstanding on 1st October 1937. The position therefore is that on 1st October 1937

1. (1898) 2 Q B 460 : 67 L'J Q B 851: 47 W R 42, Parr's Banking Co. v. Yates.

there was a sum of Rs. 7250, the principal of the debt and two payments aggregating Rs. 2476 which had not been appropriated and were available to go in reduction of the principal as on that date. The balance, Rs. 4774, will carry interest at the decree rate of six per cent. from 1st October 1937. The decree will be amended accordingly. As each party has succeeded to some extent, each party will bear his own costs in this Court. No separate orders necessary on the memorandum of cross-objections.

C.R.K./D.S. *Decree amended.*

A. I. R. 1941 Madras 405

VENKATARAMANA RAO J.

Second Appeal No. 546 of 1937, Decided on 9th September 1940, against decree of Sub-Judge, Amalapuram, in A. S. No. 44 of 1933.

Peri Kameswar Rao, minor by Guardian Peri Reddamma — Appellant

v.

Peri Jagannadha Sastry —Respondent.

Madras Hereditary Village Offices Act (3 of 1895), Ss. 21 and 13 — Civil Court's jurisdiction is excluded only where suit is cognizable under S. 13 by revenue Court — Defendant's adoption standing in way of plaintiff's succession to village office — Suit for declaration that defendant is not adopted son is cognizable by civil Court under S. 42, Specific Relief Act — Revenue Court has no jurisdiction to entertain such suit.

Where the defendant's adoption stands in the way of the plaintiff's succession to a village office the plaintiff is entitled to maintain a suit in the civil Court under S. 42, Specific Relief Act, for a declaration that the defendant is not the adopted son. The jurisdiction of the civil Court is excluded only in cases where a suit is cognizable by the revenue Court under S. 13 which contemplates only a suit for the recovery of a village office. S. 13 (1), however, does not expressly or by necessary implication oust the jurisdiction of the civil Court to entertain a declaratory suit and the proviso to that section cannot be relied on for the said purpose. The proviso on the other hand expressly enacts that it is not the province of a revenue Court to grant a declaratory decree : 15 Beng L R 83 (P C) and 1 All 688 (P C), *Rel. on.* [P 405 C 2; P 406 C 1]

G. Lakshmanna and G. Balaparameswari Rao — for Appellant.

P. C. Parthasarathy Iyengar and T. K. Subramania Pillai — for Respondent.

Judgment. — The question for decision in this second appeal is whether the suit out of which this appeal arises is barred by S. 21, Madras Hereditary Village Offices Act. The facts are few and not in dispute. The office of the Village Munsif of Peruru became vacant in 1928 consequent on the resignation of defendant 1. Defendant 2 was put forward as the adopted son of defendant 1, but the plaintiff's father opposed his claim on the ground that he was entitled to succeed thereto because defendant 1, the plaintiff's father and the natural father of defendant 2 were brothers and sons of the same father. The revenue authorities referred the plaintiff's father to a Court of law. The plaintiff's father subsequently died and thereupon the plaintiff filed this suit for a declaration that defendant 2 was not the adopted son of defendant 1. Both the Courts below have held that the suit is maintainable. Mr. Lakshmanna on behalf of defendant 2 (appellant) contends that under S. 21, Hereditary Village Offices Act, the present suit is excluded from the cognizance of a civil Court. The question is whether this contention is tenable. Section 21 of the Act runs thus :

> No civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office or except as provided in proviso (ii) to sub-s. (1) of S. 13, any claim to recover the emoluments of any such office.

It is settled by a uniform course of decisions of this Court that the jurisdiction of a civil Court is excluded only in those cases where a suit is cognizable under S. 13, Hereditary Village Offices Act, which runs thus:

> Any person may sue before the Collector for any of the village offices specified in S. 3 or for recovery of the emoluments of any such office on the ground that he is entitled under sub-s. (2) or (3) of S. 10, Madras Proprietary Estates Village Service Act, 1894, or under sub-s. (2) or (3) of S. 10 or sub-s. (2) or (3) of S. 11 or S. 12 of this Act, as the case may be, to hold such office and enjoy such emoluments; or being a minor, may sue before the Collector to be registered as heir of the last holder of any such office.

Giving S. 13 its plain meaning, the suit that is contemplated in S. 13 is only a suit for the recovery of a village office. But Mr. Lakshmanna lays stress on the proviso "no suit shall be entertained for a mere declaratory decree" as implying that a suit for a declaration is cognizable only by the revenue Court and that the plaintiff ought to have sued in the revenue Court for a declaration that defendant 2 was not the adopted son and also for recovery of the office. I have given due consideration to this argument and it seems to me that it is untenable. A suit for a declaration that a certain person is not the adopted son is primarily cognizable by a civil Court and unless such a suit is expressly excluded by any provision of the Act or by necessary implication, it will lie.

It is the right of every litigant, as observed by their Lordships of the Privy Council in 1 ALL 688[1] at p. 705, to come to the Court to have a document or an act which obstructs title or enjoyment of property cancelled or set aside or for an injunction against such obstructions and such right would be sufficient to sustain a declaratory decree. So long as the question of adoption is left outstanding, it will be an impediment in the way of the plaintiff succeeding to the office. A suit such as this is maintainable in a civil Court under S. 42, Specific Relief Act, and the only relief which the plaintiff can claim in the suit and which the Court can grant is a declaratory decree because the consequential relief to which he may be entitled namely the recovery of the office, is not a relief which a civil Court can grant.

As their Lordships of the Privy Council again observed in 15 Beng L R 83,[2] a suit for a declaration is cognizable where it is required as a step to relief in some other Court. Therefore if the plaintiff succeeds in establishing his right he will be enabled to file a suit under S. 13, Hereditary Village Offices Act and recover the office on the ground that he is entitled under sub-s. (2) of S. 10 of the Act to hold the office relying on the judgment which has removed all impediment to his succession. The proviso to S. 13 on which Mr. Lakshmanna relies does not warrant the contention put forward by him. Section 13 (1) of the Act is very plain and the proviso cannot be relied on for the purpose of enlarging the scope of S. 13 (1). It may be that in a suit for the recovery of the office the revenue Court may incidentally go into the question of adoption, but it is not the province of the revenue Court to grant a declaration as to status such as adoption. Where the enactment S. 13 (1) does not expressly or by necessary implication oust the jurisdiction of the civil Court to entertain a suit of the nature in question, the proviso to the enactment cannot be relied on for the said purpose. The proviso on the other hand expressly enacts that it is not the province of a revenue Court to grant a declaratory decree. This necessarily implies that it is rather the province of a civil Court to do so. The use of the expression "mere" connotes that the revenue Court is debarred from granting a substantive relief of the nature contemplated in S. 42, Specific Relief Act. It seems to me therefore that the view taken by the lower Courts is sound. In the result the second appeal fails and is dismissed with costs. I reduce the pleader's fee awarded by the lower Court from Rs. 50 to Rs. 25. The memorandum of cross-objections is dismissed, but I make no order as to costs. Leave to appeal refused.

G.N./R.K. *Appeal dismissed.*

1. ('75-77) 1 All 688 : 5 I A 87 : 3 Sar 807 : 3 Suther 529 (P C), Sheo Singh Rai v. Dakho.
2. ('75) 15 Beng L R 83 : 2 I A 169 : 23 W R 314: 3 Sar 456 (P C), Strimathoo Moothoo Vijia Raghunadah Kolanda Puree Nachiar v. Doraisingha Thevar.

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* A. I. R. 1941 Madras 406

KING J.

Appeal No. 118 of 1939, Decided on 26th August 1940, against appellate order of Sub-Judge, Mayavaram, D/- 19th December 1938.

Kesavan Chettiar — *Appellant*

v.

Pakshi Ramaswami Chettiar and others — *Respondents.*

* Limitation Act (1908), S. 20 (2) — Final decree in case of usufructuary mortgage—Mortgagee subsequently remaining in possession and appropriating income of mortgaged property — Application for execution brought more than three years after final decree is barred and is not saved by aid of S. 20 (2).

A final decree in mortgage suit puts an end to the contract and in regard to payment substitutes new terms to regulate the rights of the parties. After final decree in case of usufructuary mortgage if the mortgagee remains in possession and appropriates to himself the income of the mortgaged property that is no longer an action to which the mortgagor, who is then the judgment-debtor, has consented—and is therefore in no sense any acknowledgment by him. It can be regarded in law as the action of the mortgagee decree-holder alone — and nothing that a claimant himself does can avail him to extend his period of limitation. Hence S. 20 (2) cannot be called in aid to save an application for execution brought more than three years from final decree : 28 Mad 473 (F B), *Expl.* [P 407 C 2]

T. R. Srinivasan — for Appellant.

K. S. Sankara Iyer — for Respondents.

Judgment.—This appeal raises an interesting point in the law of limitation. It arises out of proceedings taken in execution of the final decree in a mortgage suit, O. S. No. 181 of 1931. That suit was upon two mortgages of 1921, the more important of which was a usufructuary mortgage by the terms of which the mortgagee was put in possession of five shops and permitted to appropriate the total income from the shops in part payment of the interest due to him. The final decree was obtained on 18th September 1933, and on 10th March 1938, i. e., four and half years later, the legal representatives of the mortgagee decree-holder brought the present application for execution. During that period he and they had

remained in possession of the shops receiving the income therefrom as before. They rely on sub-s. (2) of S. 20, Limitation Act, to bring their application within time and both the Courts below have held that the application is not barred. The question before me is whether that decision is right or wrong. Sub-section (2) runs as follows :

> Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-s. (1).

It is contended for the appellant that the income received from 1933 to 1938 was not received by the mortgagee and the respondents in their capacity as mortgagees, but only in their capacity as decree-holders. It is contended for the respondents that the mere fact of the passing of the final decree does not affect the status of the mortgagee who remains as much a mortgagee after the decree as before. It is not disputed that from the date of the final decree the decree-holder was entitled to interest at only 6 per cent. and not according to the terms of the mortgage bonds; and also that he was entitled to this interest not upon the amount borrowed on the bonds, but upon the total amount declared to be due in the final decree. I think the contention of the appellant in this appeal must prevail. In 34 Cal 150[1] at p. 161, the effect of the provisions of a mortgage decree is considered and it is pointed out that when the mortgaged property is not redeemed within the time allowed the matter passes

> from the domain of contract to that of judgment, and the rights of the mortgagee henceforth depend not upon the contents of his bond, but upon the directions in the decree.

It is also pointed out that the practice of allowing interest in the decree upon the aggregate sum then found due is justifiable only upon the assumption that the mortgagee is now treated as a decree-holder or judgment-creditor. In 49 Mad 691,[2] it was held that when a final decree for sale was obtained by a mortgagee who continued in possession without executing it, the mortgagor was debarred on the principle of res judicata from instituting a suit for redemption. On page 703 it is pointed out that payments made before a final decree are payments by a mortgagor: payments made after it are by a judgment-debtor. Now it is true that in neither of these cases just quoted was any question of limitation in issue, but I think, nevertheless, that they are of primary importance in the decision of this appeal. What, after all, is the principle underlying the law of limitation? Surely it is this, that a claimant must take action within the time prescribed by law but that that time can be extended by some action on the part of his opponent who acknowledges the claim. The most common form which this action takes is that of payment. Now the receipt of rent by a mortgagee in possession is not payment by the mortgagor in the ordinary sense of that word. Section 20 says that it shall be deemed to be payment. Why? Clearly, I think, because the mortgagor has himself consented to it in his contract with the mortgagee. It is thus an acknowledgment, continually repeated so long as the contract is in force, by the mortgagor of the mortgagee's claim under the mortgage. But a final decree puts an end to the contract and in regard to payment substitutes new terms to regulate the rights of the parties. It is no longer open to the mortgagee, who has become the decree-holder, to appropriate the income of the mortgaged property towards his interest. That interest is limited to 6 per cent. and he must recover it by sale of the mortgaged property. If he remains in possession and appropriates to himself the income of the mortgaged property that is no longer an action to which the mortgagor, who is now the judgment-debtor, has consented—and is therefore in no sense any acknowledgment by him. It can be regarded in law as the action of the mortgagee decree-holder alone—and nothing that a claimant himself does can avail him to extend his period of limitation. I am of opinion therefore that S. 20 cannot successfully be called in aid by the respondents on the facts of this case. I need refer only briefly in conclusion to an authority cited for the respondents, 28 Mad 473.[3] This ruling also does not deal directly with any question of limitation, being concerned with the question of the adjustment of a decree under what is now O. 21, R. 2, but on p. 478 occur these words :

> Reference was next made to the case of a mortgagee in possession of the mortgaged property and in receipt of the usufruct even after the mortgage decree was passed. No doubt under S. 20, Limitation Act, such receipts are treated as payments to the mortgagee.

Now this is of course obiter dictum, but being the dictum of a Full Bench of three

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1. ('07) 34 Cal 150 : 34 I A 9 : 11 C W N 249 : 5 C L J 106 (P C), Sunder Koer v. Rai Sham Krishen.
2. ('26) 13 A I R 1926 Mad 816 : 96 I C 607 : 49 Mad 691 : 50 M L J 612, Ellarayyan v. Nagasami Iyer.
3. ('05) 28 Mad 473 : 15 M L J 126 (F B), Vaidhinathasamy Iyer v. Somasundara Pillai.

Judges is entitled to the very greatest respect and might well be followed if it applied to the facts of the present case. I do not think that it does so apply. According to the law as then in force the equivalent of what is now the final decree in a mortgage suit was then an order absolute for sale. In the order of reference on p. 474 nothing is said about any such order absolute, and it may, I think, be assumed that no such order had been passed. I do not therefore find any obstacle in 28 Mad 473[3] to my holding, for the reasons already given that S. 20 does not save the present application. In the result this appeal must be allowed, the order of the lower appellate Court set aside, and the respondents' execution application dismissed with costs throughout. Leave granted.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 408

KING AND VENKATARAMANA RAO JJ.

Second Appeal No. 205 of 1936, Decided on 11th October 1940, against decree of Dist. Court, South Malabar, in A. S. No. 359 of 1933.

Kuthiravattath Kongasseri Puthukulangare Ukkali and another—*Appellants*

v.

Pallassena Kizhakke Gramom S. Sivarama Krishna Pattar — *Respondent.*

(a) Malabar Tenancy Act (24 of 1930), S. 17 — Finding as to proper renewal fee payable under S. 17 is one of fact.

A finding as to the amount of proper renewal fee payable under S. 17 being one of fact cannot be interfered with in second appeal. [P 409 C 1]

(b) Malabar Tenancy Act (24 of 1930), Ss. 17, 25 (2) and 27 — Word 'same' in S. 17 connotes renewal of kanom on same terms as previous kanom — S. 27 does not apply to aforesaid renewal.

The word 'same' in S. 17 connotes a renewal of the kanom on the same terms as the previous kanom, on payment of the renewal fee specified in the section. S. 27, does not apply to such a case. This view derives support from S. 25 (2) of the Act. [P 409 C 1]

C. Unnikanda Menon — for Appellants.

R. Srinivasa Iyer — for Respondent.

Venkataramana Rao J. — This second appeal arises out of a suit to recover arrears of michavaram under a kychit, Ex. A, dated 17th August 1931, executed by the defendant in favour of the plaintiff. What was sought to be recovered was 30 paras of paddy and one anna three pies payable for the year 1931-32. Exhibit A purports to be a renewal of a prior kanom under which the michavaram payable was 10 paras 1 edangali of paddy and one anna three pies. The defendant pleaded that the provision for the payment of increased michavaram was inserted in Ex. A without his knowledge and by the fraud of plaintiff's kariasthans, that he had agreed to take a renewal only on the same terms as those contained in the previous kanom, Ex. I, that the stipulation in Ex. A for payment of increased michavaram was unsupported by consideration and was also opposed to the provisions of the Malabar Tenancy Act and that therefore it was not enforceable. Both the lower Courts have concurrently found that Ex. A was executed by the defendant with full knowledge of its contents and that no fraud was practised on him as alleged. This finding has not been challenged in second appeal.

Both the lower Courts have however nonsuited the plaintiff on the ground that the provision for payment of increased michavaram was contrary to the provisions of Ss. 17 and 32, Malabar Tenancy Act. The view taken by the learned District Munsif was that since the plaintiff's case was that the increased michavaram was the consideration for granting the renewal, it was invalid under S. 32 of the Act. This was based upon a statement made by P. W. 2 in the witness box that the proper renewal fee would be about Rs. 200 and that in cases where the tenants were not prepared to pay the renewal fees according to the Act, michavaram was increased. But the learned District Munsif observed that it was not possible to find out how far the amount paid at the time of the execution of Ex. A was more or less than the renewal fee payable if calculated in accordance with the Act because there was no satisfactory evidence to prove what such amount would be. The learned District Judge on appeal did not give any specific finding except merely stating that he agreed with the reasons given by the learned District Munsif in para. 6 of his judgment. He was clearly of the opinion that the increased michavaram was contrary to the provisions of S. 32 of the Act, at the same time observing that the said conclusion might be reached on a reasonable interpretation of Ss. 17 and 25 of the Act. It seems to us that it is not satisfactory to dispose of the matter in the way in which both the lower Courts have done without finding what the proper renewal fee payable under S. 17 of the Act, would have been at the time of the execution of Ex. A, and that a finding on this question is necessary. Before disposing of this appeal we therefore think it desirable to call for a finding on the said question.

We accordingly direct the learned District Judge to submit a finding on the said question within six weeks from the date of the receipt of this order after taking such evidence as may be adduced by the parties. Time for objection, ten days. *[On receipt of the finding from the District Judge, his Lordship delivered the following]*

Judgment

We called for a finding from the District Judge on the following point, "what would have been the proper renewal fee payable under S. 17, Malabar Tenancy Act, at the time of the execution of EX. A (17th August 1931)?" and the finding is that the proper fee would have been Rs. 71-13-9. Mr. Unnikanda Menon sought to challenge this finding of fact with which we cannot interfere in second appeal. The defendant has paid Rs. 90; a few rupees more than the renewal fee which was payable under S. 17 (a), Malabar Tenancy Act. That section provides that on the expiration of the prior kanom under which the kanomdar was holding he is entitled to claim a renewal of the kanom on payment of the renewal fee specified therein and once a claim was made the plaintiff had no option but to grant a renewal of the kanom. The contention of Mr. Unnikanda Menon is that the landlord was bound to grant a renewal but not on the same terms. We are inclined to think that the word "same" in S. 17 connotes a renewal of the kanom on the same terms as the previous kanom. This view derives support from S. 25 (2) of the Act. If the landlord declines to grant a renewal of the kanom on payment of the proper renewal fee, the tenant can seek the aid of the Court. The Court can then determine what the proper renewal fee payable under S. 17 (a) is and on deposit of such renewal fee the Court would execute the renewal deed. Section 25 (2) says that the Court shall execute a renewal deed containing such terms as it determines to be the terms of the expiring transaction as are in accordance with law. The section is very specific in that it provides that the Court should grant a renewal of the kanom only on the same terms as the previous kanoms. Mr. Unnikanda Menon sought to rely on S. 27 of the Act, which according to his own admission does not apply to the facts of this case. If S. 27 does not apply, there is no other section on which he could rely and he has not relied on any other section. It seems to us that the view taken by both the lower Courts that under the kanom deed which the plaintiff sought to enforce he will not be entitled to claim the michavarm stipulated in the deed but only 10 paras and 1 edangali of paddy and as. 1-3 is in accordance with the terms of the previous kanom. We therefore confirm the decrees of both the lower Courts and dismiss the second appeal with costs.

C.R.K./G.N. *Appeal dismissed.*

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* A. I. R. 1941 Madras 409

HORWILL J.

Civil Revn. Petn. No. 703 of 1938, Decided on 22nd November 1940.

Alampalli Athmaramayya — Petitioner

v.

S. Seshappaiyer — Respondent.

* Limitation Act (1908), S. 19— Written acknowledgment — Oral evidence is admissible to prove to what debts it refers.

There is nothing in S. 19, Limitation Act, or in the Evidence Act which precludes the letting in of oral evidence to explain to what debts a document said to be an acknowledgment necessarily refers.

[P 409 C 2]

K. S. Champagesa Iyengar and K. C. Srinivasan — for Petitioner.

Order. — The petitioner filed a suit on a promissory note dated 17th July 1933 and on that promissory note were acknowledgments up to 26th February 1934. The plaint was filed on 1st December 1937, which was more than three years after the last acknowledgment endorsed on the promissory note. To save limitation, the petitioner relied on two post-cards dated 14th January 1935 and 25th March 1935. The District Munsif of Kollegal, in whose Court the plaint was presented, rejected the plaint on the ground that the post-cards of 14th January 1935 and 25th March 1935 did not acknowledge this particular debt. It is true that on the face of these two post-cards it cannot be said that they necessarily refer to the suit debt; but the plaintiff's only contention here is that the plaint should not have been rejected in limine; and that he should have been given an opportunity after the plaint was admitted to prove by evidence that these post-cards related to the suit debt. I do not find anything in S. 19, Limitation Act, or in the Evidence Act, which precludes the letting in of oral evidence to explain to what debts the post-cards necessarily refer. The petition is therefore allowed and the District Munsif ordered to admit the plaint and to dispose of the suit in accordance with law. The costs of this petition will be costs in the cause.

W.N./R.K. *Application allowed.*

A. I. R. 1941 Madras 410

HORWILL J.

Civil Revn. Petn. No. 1335 of 1938, Decided on 16th August 1940, to revise order of Dist. Munsif, Narasapur, in C. M. P. No. 740 of 1938.

Jampa Sattiraju and others — *Petitioners*

v.

Kallepara Venkatasatyam and others— *Respondents.*

Madras Agriculturists' Relief Act (4 of 1938), S. 3 (3) — Advance made by partner to partnership does not entail liability by partners to repay that advance—Such advance is not debt.

There is no reason to suppose that debt in S. 3 (3) is meant to include, contrary to the ordinary usage, an unascertained amount. However that may be, a debt is a liability, and liability must mean a legal liability, a liability enforceable at law. An advance made by a partner to the partnership does not entail a liability by the partners to repay that advance, but rather a mere right in equity to have a claim on the assets to the extent of the advance at the time of the dissolution of the partnership. Such advance is therefore not debt within the meaning of S. 3 (3) : (1866) 1 Ch A 369 and A I R 1925 Mad 841, *Expl.*; A I R 1918 Mad 1145 (FB), *Ref.* [P 411 C 1]

P. Satyanarayana Rao and S. Venugopala Rao — for Petitioners.

T. Satyanarayana — for Repondents.

Order. — The plaintiffs and the defendants were partners and had advanced various sums of money to the partnership. The plaintiffs filed the present suit for accounts and after the preliminary decree had been passed and the matter was in the hands of the Commissioner who was directed to take accounts the defendants filed an application asking the Court to direct the Commissioner to work out the individual debts of the partners in accordance with the provisions of the Madras Agriculturists' Relief Act. The petition was dismissed on the ground that although all the partners were agriculturists, the Act could not apply to a partnership or to money advanced by partners to their business. The defendant's case as put in this Court, is that from the very inception these debts were debts within the meaning of S. 3 (3) of the Act. It seems to me that this argument cannot be accepted. When the money was advanced, it was advanced to the partnership and although a partnership has no corporate existence, yet one can speak of partnership assets and these advances were intended to be assets of the partnership. The right of the partners to recover these advances could only arise upon a dissolution of the partnership. No obligation arose, at the time the advances to the partnership were made, to return upon demand or otherwise the money so advanced. A debt implies a legal liability to repay; and while the partnership was in being, there was no legal liability on the other partners to repay the advances made to the partnership. The only way in which the advance could be recovered was by the equitable action of the Court at the time of the dissolution of the partnership. Even then, there is no obligation to one partner by the other partners with regard to individual advances. The partner who made the advance had merely an equitable right to have the advance repaid out of the assets of the partnership.

A further difficulty that arises in accepting the contention of the learned advocate for the petitioners is, that until the Court passed a final decree — or at any rate had passed orders after receiving the Commissioner's report and hearing objections thereon—it was impossible to know what amount should be paid to the various partners. Until all the disputes arising between the partners had been considered and adjudicated upon by the Court, there could have been no debt and therefore nothing to which the Act could be applied. Until the final decree was passed, there was no debt by one partner to another. (1866) 1 Ch A 369[1] has been quoted to show that loans to a partnership stand on a different footing from capital advances by the partners. That may be so; but in that particular case, the distinction between loan and capital was to be found in the agreement between the partners at the time the partnership came into existence. Such an agreement would be enforced by the Court when the assets were distributed upon dissolution. I find nothing in that case to suggest that there was any legal liability on one partner to another to repay these advances. In 40 Mad 31,[2] a Full Bench of this Court was called upon to consider whether a promise by a partner to pay what was due on accounts on winding up was a promise to pay a debt which would operate to save limitation. The learned Judges felt themselves called upon to define the word 'debt.' They say :

> We think the word 'debt' . . . . . must be taken to have been used in its ordinary meaning of a sum payable in respect of a money demand recoverable by action.

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1. (1866) 1 Ch A 369 : 35 L J Ch 547 : 12 Jur (N S) 555: 14 W R 621, Wood v. Scoles.
2. ('18) 5 AIR 1918 Mad 1145: 39 I C 220: 40 Mad 31: 32 M L J 422 (F B), Doraisami Padayachi v. Vaithialinga Padayachi.

An opinion was expressed by Sir John Wallis C. J. that a debt has always meant an ascertained amount. It is argued that the word 'debt,' as defined in the Madras Agriculturists' Relief Act, has a wider meaning than that ordinarily given to it. 'Debt' is defined in the Act as "any liability in cash or kind whether secured or unsecured, due from an agriculturist . . . . ." There is no reason to suppose that debt is meant to include, contrary to the ordinary usage, an unascertained amount. However that may be, it is quite clear from this definition that it is a liability, and 'liability' must mean a legal liability, a liability enforceable at law. An advance made by a partner to the partnership does not entail a liability by the partners to repay that advance, but rather, as I have already pointed out, a mere right in equity to have a claim on the assets to the extent of the advance at the time of the dissolution of the partnership. 21 M L W 606[3] has been referred to to show that the word 'liability' is not always given the meaning that I have given to it above, but the question that arose there was whether a son is liable to pay what his deceased father would have had to pay by way of mesne profits. In considering that point, the learned Judges were not concerned with the definition of the English word 'liability,' which is a word which has acquired a technical meaning, but rather to ascertain whether the ancient texts required the son under the circumstances to pay mesne profits. I do not find anything in that judgment which has any material bearing on the point at issue in the present case. I need not discuss 57 Mad 1074[4] in which there was a transfer of an actionable claim; and in which it was held that there can be a debt even though some calculation may be necessary to ascertain how much it is. In the result, this petition fails and is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

3. ('25) 12 A I R 1925 Mad 841 : 90 I C 165 : 21 M L W 606, Ramasubramania v. Sivakami.
4. ('34) 21 A I R 1934 Mad 461 : 151 I C 353 : 57 Mad 1074: 67 M L J 158, Mathu v. Achu.

A. I. R. 1941 Madras 411

LEACH C. J. AND PATANJALI SASTRI J.

Civil Revn. Petn. No. 725 of 1937, Decided on 2nd October 1940.

Raja of Vizianagaram represented by Manager and Estate Collector and others — Petitioners

v.

Mudunuru Narayana Raju and others — Respondents.

Madras Estates Land Act (1 of 1908), S. 25— Ryot agreeing to pay premium and let into possession before making payment — Landholder cannot recover that amount from him afterwards.

The words "become liable" should be read as "be liable." The ryot may pay the premium if he chooses to do so, but he cannot be held liable to pay. Hence, when a ryot has agreed to pay a premium and has been let into possession before making the payment the landholder cannot recover the amount from him afterwards. [P 411 C 2; P 412 C 1]

K. Kuttikrishna Menon — for Petitioners.

Leach C. J. — The only question which arises on this petition is with regard to the effect of para. 2 of S. 25, Madras Estates Land Act, 1908. Paragraph 1 of the section states that a ryot admitted by the landholder to possession of ryoti land shall not, unless otherwise provided in the Act, be bound to pay rent at a rate exceeding the rate prevailing for similar lands in the neighbourhood or, where the rate cannot be ascertained, anything more than what the Collector decides is fair and equitable. Paragraph 2 reads as follows :

> Nothing in this section precludes the landholder from receiving any premium when the ryot is admitted into possession, but a ryot so admitted shall under no circumstances become liable to make any payment to the landholder after his admission by way of premium or other consideration for such admission ; nor shall any holding of the ryot be subjected to any charge in respect of any such premium or consideration or part thereof.

The question which the Court is called upon to answer is this: When a ryot has agreed to pay a premium and has been let into possession before making the payment, can the landholder recover the amount from him afterwards ? In the present case the Raja of Vizianagaram sued in the Court of the District Munsif of Vizianagaram to recover from the respondents a sum which was in part made up of an amount which the respondents had agreed to pay as a premium in respect of lands held by them from him. The District Munsif held that S. 25, Madras Estates Land Act, precluded the plaintiff from recovering the premium and on this footing gave a decree only for the balance of the claim. In our opinion the District Munsif rightly construed the section. The section expressly permits the landholder to receive an agreed premium at the time the ryot is admitted into possession of the land, but then goes on to provide that once the ryot has been admitted into possession he shall under no circumstances become liable to make any payment to the landholder of premium or other consideration for being allowed to take possession. The

object of this provision is to prevent a ryot agreeing to make a payment beyond his means in order to gain possession. If he is in a position to pay a premium and he agrees to do so, the landholder is not prohibited from receiving payment before the ryot goes into possession; but he is prohibited from enforcing payment afterwards.

Mr. Kuttikrishna Menon has laid great stress on the word "become." He argues that the word "become" signifies that the prohibition is only against a ryot agreeing to pay a premium after he has entered on the holding and that there is nothing in the section which prohibits a landholder enforcing at any time payment of an amount agreed upon before the ryot goes on to the land. If the intention of the Legislature had been to allow a landholder to enforce at any time payment of a premium agreed upon before the tenancy commenced, it could very easily have said so. It has not said so and when para. 2 of the section is read as a whole it clearly discloses a contrary intention. In our opinion the words "become liable" should be read as "be liable." The word "become" is not well chosen, but the context leaves no doubt in our minds what was meant. The ryot may pay the premium if he chooses to do so, but he cannot be held liable to pay. If the landlord permits him to go into possession without payment he does so at his own risk. There is no liability after entry. For these reasons we consider that the District Munsif was right, and the petition must be dismissed.

C.R.K./D.S. *Petition dismissed.*

A. I. R. 1941 Madras 412

LEACH C. J. AND HAPPELL J.

Letters Patent Appeal No. 93 of 1938, Decided on 28th November 1940, against order of Wadsworth J., *Reported in A. I. R. 1939 Mad 17.*

V. Panchapakesa Iyer — Appellant

v.

Secretary of State represented by the Collector of Tanjore — Respondent.

Government of India Act (1915), Ss. 72A and 129A—Rules under — Madras Electoral Rules, Rr. 12 and 48—Decision of Governor as to interpretation of R. 12 is final — Civil Court has no jurisdiction to entertain suit based on interpretation of R. 12.

Rule 48 provides a special agency for the interpretation of the rules in doubtful or disputed cases. That special agency is the Governor and his decision as to interpretation of R. 12 is final and civil Court has no jurisdiction to entertain a suit based on the interpretation of R. 12: A I R 1928 Mad 475 and A I R 1924 Mad 528, *Rel. on.* [P 413 C 1, 2]

M. S. Venkatarama Iyer — for Appellant.

Government Pleader — for Respondent.

Leach C. J.—The appellant was the unsuccessful candidate at a bye-election for the Governor's Legislative Council held on 10th March 1930. He secured 1618 votes against 11,299 valid votes cast for his opponent. The total number of votes was 13,373, but 456 votes were found to be invalid. Under R. 12 (1), Madras Electoral Rules, framed under Ss. 72A and 129A, Government of India Act (the Act of 1915) a candidate is required to deposit with the returning officer the sum of Rs. 250 in cash or in Government promissory notes. Under sub-r. (3), if a candidate is not elected and the number of votes polled by him does not exceed in the case of a constituency returning one or two members one-eighth of the total number of votes polled, or in the case of a constituency returning more than two members, one-eighth of the number of votes polled divided by the number of members to be elected, the deposit shall be forfeited to the Government. Sub-rule (4) says that for the purpose of sub-r. (3) the number of votes polled shall be deemed to be the number of ballot papers other than spoilt ballot papers counted. Excluding the invalid votes the appellant secured one-eighth of the votes polled, but including them he had less than one-eighth of the total. The appellant applied to the returning officer for the return of his deposit, claiming that the invalid votes should be treated as spoilt ballot papers and therefore should not be counted. The returning officer passed an order declaring that the deposit was forfeited to Government. The appellant petitioned the Local Government against the returning officer's order, but his petition was rejected. Rule 48, Electoral Rules, states that if any question arises as to the interpretation of the rules, otherwise than in connexion with an election inquiry held thereunder, the question shall be referred for the decision of the Governor and his decision shall be final. The decision of the Government must for the purpose of this case be taken to be the decision of the Governor under this rule.

As the appellant's petition was rejected, he filed the suit out of which this appeal arises in the Court of the District Munsif of Tanjore against the Secretary of State for India in Council for the recovery of the Rs. 250 deposited by him. The District Munsif decreed the suit, but his decision was reversed on appeal by the subordinate Judge of Tanjore, who held that the suit did not lie. The ap-

pellant then appealed to this Court and his appeal was heard by Wadsworth J. who agreed with the subordinate Judge, but gave a certificate under Clause 15 of the Letters Patent which has permitted the present appeal to be filed. Wadsworth J. was of the opinion that the suit did not lie because the electoral rules provide a special agency for the interpretation of the rules in doubtful or disputed cases and therefore the jurisdiction of the civil Court was ousted. He also held against the appellant on the interpretation of the rules. If the appellant's deposit had been wrongly withheld from him, he certainly would have a right of suit and that has been conceded by the learned Government pleader, who however says that in this case the deposit has not been wrongly withheld from the appellant. The only tribunal competent to decide whether the appellant is entitled to the return of the deposit is the Governor and his decision is against the appellant. We consider that the argument of the learned Government Pleader must prevail. It is based on two decisions of this Court which are binding upon us. In 47 Mad 585,[1] the question arose whether a civil Court had authority to interpret the rules framed under the Madras District Municipalities Act. Section 303 of the Act then in force provided that the Governor in Council might make rules to carry out all or any of the purposes of the Act not inconsistent therewith. In particular and without prejudice to the generality of this general power he might make rules with reference to all matters relating to elections or appointments of councillors not expressly provided for. Rule 31 of the election rules framed in pursuance of that power stated that

if any question arises as to the interpretation of these rules otherwise than in connexion with an election inquiry, the question shall be referred to the Local Government, whose decision shall be final.

That rule is on all fours with R. 48 of the Madras Electoral Rules. Schwabe C. J. and Wallace J. held that a decision by the Local Government under that rule would be final and the civil Court would only have jurisdiction, if the proper tribunal had declined jurisdiction and the aggrieved party was bereft of his statutory and constitutional remedy. In 47 Mad 325,[2] Kumaraswami Sastri and Waller JJ. came to a similar decision under the Madras Local Boards Act. The sections in the Government of India Act conferring powers to make rules are differently worded, but we think that S. 72A, sub-s. (4) (c), read with S. 129A, gives ample power to the Governor-General in council with the sanction of the Secretary of State in Council to frame R. 48 putting the final interpretation with the Governor. Section 72A, sub-rule (4) (c) gives power to frame rules with regard to the method of election and any matters incidental or ancillary thereto. There is here power to frame rules with regard to deposits and their return or forfeiture. If there is power to make such rules, there must be power to provide for their interpretation, as this Court has recognized in the two cases referred to. The Governor having the power to decide finally whether the appellant was entitled to the return of his money and having decided the case against him, the suit does not lie. For these reasons the appeal must be dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

1. ('23) 10 A I R 1923 Mad 475 : 73 I C 619 : 47 Mad 585: 45 M L J 23, Sarvothama Rao v. Chairman, Municipal Council, Saidapet.
2. ('24) 11 A I R 1924 Mad 523: 78 I C 91: 47 Mad 325: 46 M L J 60, Thimma Reddi v. Secy. of State.

A. I. R. 1941 Madras 413

WADSWORTH AND PATANJALI SASTRI JJ.

Appeals Nos. 488 to 491 of 1940, Decided on 25th November 1940, against orders of Sub-Judge, Narasapur, D/- 20th September 1939.

In re Kadiyala Venkata Satyanarayanamurti — Appellant.

Madras Agriculturists' Relief Act (4 of 1938), S. 3 (iii), proviso C — Rate of assessment actually fixed must govern application of S. 3 (iii), proviso C — Court cannot go into propriety of assessment.

The rate of assessment actually fixed must govern the application of S. 3 (iii), proviso C and not some theoretical figure which might have been, but was not, adopted. The Court therefore for the purpose of S. 3 (iii), proviso C cannot go into the propriety of the assessment: AIR 1941 Mad 73, *Ref.*

[P 413 C 2; P 414 C 1]

K. Kameswara Rao — for Appellant.

Judgment. — The contention in these appeals is that for the purpose of proviso C to S. 3 (iii) of Act 4 of 1938 the Court can go into evidence not merely as to the correctness of the certificate under S. 27 (as was held in (1940) 2 M L J 468[1]) but also as to the propriety of the assessment on the basis of which the person is to be qualified or disqualified as an agriculturist. We cannot

1. ('41) 28 AIR 1941 Mad 73: (1940) 2 M L J 468, Kamakshi Chetti v. Alaganan Chettiar.

accept this contention. If in fact there has been an assessment at a certain rate it is this assessment which must govern the application of the proviso and not some theoretical figure which might have been, but was not, adopted. The appeals are dismissed under O. 41, R. 11, Civil P. C.

C.R.K./G.N. *Appeals dismissed.*

A. I. R. 1941 Madras 414

LEACH C. J. AND HAPPELL J.

Letters Patent Appeal No. 21 of 1939, Decided on 12th December 1940, against judgment of Wadsworth J., *Reported in A I R 1939 Mad 651.*

Sree Rajah Venkata Ramayya Appa Rao Bahadur Zamindar Garu of Nuzvid—*Appellant*

v.

Secretary of State represented by Collector of Kistna—*Respondent.*

Madras Local Boards Act (14 of 1920), S. 79 (3)—Owner of tank merely selling right to catch fish in tank for a period — Purchaser not given right to use bed of tank for fishing purposes—Purchaser cannot be deemed to be in occupation of land holding fishery — Beneficial occupation of land forming bed of tank being in landholder, land cess can be levied on value of land which should be gauged by value of right to fish in water lying above land.

The land which holds a tank in which there are fish (that is fish in quantity) has a rental value because the right to catch fish can be let. If the owner of the tank merely sells the right to catch for a period without any right in the purchaser to use for this purpose the bed of the fishery, the purchaser cannot be deemed to be in occupation of the land which holds the fishery. In such circumstances, the landholder must still be in beneficial occupation of the land forming the bed of his tank and consequently a land cess can be levied on the value of the land, which is to be gauged by the value of the right to fish in the water lying above the land: (1912) 1 K B 270; (1913) A C 197 and (1829) 9 B & C 95, *Rel. on*; Reasoning in A I R 1939 Mad 651, *Not approved.* [P 415 C 1, 2; P 416 C 1]

Y. Govindarajulu—for Appellant.

Government Pleader—for Respondent.

Leach C. J. — The question involved in this appeal is whether the appellant as the owner of a tank in which there are fish is liable to land cess under the Madras Local Boards Act, 1920. The appellant let the right to catch the fish in the tank, whereupon the Collector of Kistna called upon him to pay land cess based upon the annual rental value of the fishery. Having been compelled to pay the sum demanded the appellant filed a suit to recover the amount with interest. There were other demands which the appellant had met under protest and the appellant asked for the repayment of all the sums recovered from him. The District Munsif of Bezwada who tried the suit held that it did not lie, and accordingly dismissed it. On appeal to the subordinate Judge it was held that the appellant was not liable to pay land cess in respect of the fishery, but that he was liable for the other demands made by the Collector. In S. A. No. 161 of 1935* the Government appealed against that part of the judgment of the subordinate Judge in which it was held that the appellant was not liable to be assessed to land cess in respect of the fishery, and the appellant appealed in S. A. No. 177 of 1935 against the rest of the judgment of the subordinate Judge. Both the appeals were heard by Wadsworth J. who allowed the appeal filed by the Government, but dismissed that filed by the appellant. He granted a certificate in the former appeal, but refused a certificate in respect of S. A. No. 177 of 1935 and therefore the present appeal is only concerned with the appellant's case so far as it concerns the fishery.

Section 74B, Madras Local Boards Act 1920, states that a land cess being a tax on the annual rent value of lands, shall be levied in accordance with the provisions of the Act. Section 78 says that the land cess shall be levied on the annual rent value of all "occupied" lands on whatever tenure held, and S. 79 (iii) makes the landholder or the sub-landholder of a zamindari land liable to pay the land cess. The tank with which this appeal is concerned admittedly lies in the zamindari land of the appellant. It is quite clear from S. 78 that the land cess can only be levied in respect of lands which have a rental value. It has been said that the right to catch fish is an incorporeal hereditament and that the Madras Local Boards Act does not permit of land cess being levied in respect of such a right, but it is admitted that if the appellant is the occupier of the bed of this tank and the bed has a rental value the order of the Collector is correct.

The reasons given by the learned Judge for holding that the appellant is liable to land cess are these. The leasing of a fishery in England normally implies the grant of a right to catch fish with rod and line or with net in a river or a permanent sheet of water, but the leasing of a fishery in a South Indian tank involves nothing of the kind. He says that ordinarily the land is dry for a portion of the year and the fish, though they are denizens of the water in the cold weather are denizens of the land and the mud in the

* See A I R 1939 Mad 651.

hot weather "for they go down into the mud when the tank goes dry." The fish are caught when the water has almost gone and the fisherman drives the fish into a shallow muddy depression and catches them with his hands. Therefore, the tank is essentially land though to some extent covered with water for a considerable part of the year. I am unable to agree with the learned Judge that this description of a South Indian tank can be taken to have universal application so far as the Province of Madras is concerned. Some tanks may become dry owing to their shallowness, but many tanks in South India in which there are fish do not go dry and in such cases this method of catching fish cannot of necessity be resorted to. Moreover, there is no evidence on the record that this particular tank becomes dry in hot weather and the Court cannot decide the appeal on the basis that it does. At the same time I am of the opinion that the judgment can be supported on other grounds.

The learned Judge did not think it was necessary to refer to English law, but it is manifest that the English law of rating can usefully be referred to for the purpose of deciding this appeal. By the Poor Relief Act, 1601, occupiers of "lands, houses, tithes impropriate, propriations of tithes, coal mines or saleable underwoods" were liable to be taxed for the relief of the poor. Under the statute of Elizabeth, the holder of an incorporeal hereditament was not liable to the tax, and it was not until the Rating Act, 1874, that the right of fowling, shooting, taking or killing game or rabbits, or fishing (referred to in the Act as a right of sporting) came within the rating law. Before the passing of this Act, the land on which there was a fishery was assessable, but the owner paid the poor rate as the occupier of the land. By the passing of the Act of 1874 the owner of the land was assessable on the value of the land, if he had not parted with the right of sporting, but if he had severed the right of sporting from the occupation of the land either he or the lessee could be rated as the occupier. There has been no such legislation in India and the appellant can only be assessed to land cess if he is in occupation of the bed of the tank within the meaning of the Act of 1920 and it has a rental value. There can be no doubt that the land which holds a tank in which there are fish (that is fish in quantity) has a rental value because the right to catch fish can be let. If the owner of the tank merely sells the right to catch for a period without any right in the purchaser to use for this purpose the bed of the fishery, the purchaser cannot be deemd to be in occupation of the land which holds the fishery. In such circumstances the occupation of the land must still be in the landholder. In (1912) 1 K B 270,[1] the Court of appeal had to consider whether a Municpal Corporation was in occupation of land forming the catchment area of its water supply, the land being used for no other purpose. It was held that the use of this land for this purpose was sufficient to make the land assessable to poor rate. Vaughan Williams L. J. said :

> I assume, in accordance with the observations of Lord Atkinson in (1910) A C 7,[2] that, although the ownership of a hereditament does not necessarily imply occupation for the purpose of rating, and although a person or company may be an occupier within the meaning of the Statute of Elizabeth who has no proprietary interest in the soil, as was decided in (1895) A C 117[3] at p. 121, yet owners in possession are prima facie occupiers—'in possession' there does not mean physical possession, it means who are in possession by title—unless it be shown that the occupation is in some one else; *see* per Buller J. in (1790) 4 T R 21.[4]

In the same case Buckley L. J. said :

> The fact that the alleged occupier is not physically upon the property either in person or by works done or chattels placed upon the property is not necessarily the test. . . . An owner who retains property in hand, and gets benefit from it, is rateable to the extent of that benefit (per Blackburn J. in (1865) 6 B & S 591[5] at p. 597).

That case went to the House of Lords and the judgment of the Court of appeal was upheld: (1913) A C 197.[6] The judgment was delivered by Lord Atkinson who referred to (1829) 9 B & C 95: 109 E R 36,[7] in this connexion and said :

> In the first mentioned case —(1829) 9 B & C 957 — the undertakers, the respondents, were empowered by statute to deepen and straighten the bed of portions of the rivers Irwell and Mersey so as to make them navigable. The exclusive right (a most valuable one) of navigating the portions of these rivers where those works were effected was conferred upon them, subject only to this, that the

1. (1912) 1 K B 270: 81 L J K B 426, Liverpool Corporation v. Chorley Union Assessment Committee.
2. (1910) 1910 A C 7: 79 L J K B 95: 101 L T 616: 26 T L R 90: 74 J P 49: 8 L G R 75: 54 S J 80, Winstanley v. North Manchester Overseers.
3. (1895) 1895 A C 117: 64 L J M C 113: 11 R 98: 71 L T 818: 59 J P 566, Holywell Union v. Halkyn District Mines Drainage Co.
4. (1790) 4 T R 21, Rex v. Mayor of London.
5. (1865) 6 B & S 591: 34 L J M C 206: 11 Jur (NS) 1036: 13 W R 861, Harter v. Salford Overseers.
6. (1913) 1913 A C 197: 82 L J K B 555: 108 L T 82: 77 J P 185: 11 L G R 182: 57 S J 263: 29 T L R 246, Liverpool Corporation v. Chorley Assessment Committee.
7. (1829) 9 B & C 95: 4 M & Ry 84: 7 L J (OS) M C 70: 109 E R 36, Rex v. Mersey and Irwell Navigation & Co.

riparian owners of land abutting on the streams had also the right to navigate the rivers, but only with pleasure boats. The respondents had acquired for the purpose of this navigation certain towing paths and locks in respect of which they were admittedly rateable. The point at issue was whether they were also rateable as occupiers of the subaqueous soil, the bed of the river. They were held not to be so, because they were not the owners of the bed and soil, but only entitled to an easement over it. It is quite clear however from the judgments of Bayley and Parke JJ. that, had they been owners of the bed and soil, they would have been held to be rateable as the occupiers of it, though the only way in which they used the soil was to navigate the waters lying above it.

I fail to see any difference in principle between that case and the present one. Lord Atkinson here clearly indicated that if those who had the right to navigate the river had been the owners of the bed they would have been in occupation of the land forming the bed for the purpose of assessment to the poor rate. In the present case the appellant is admittedly the owner of the bed of the tank and the right to the fish in the tank is his. Therefore, it seems to me that there is no escaping the conclusion that the appellant is in beneficial occupation of the land forming the bed of his tank and that the Collector was acting in accordance with law in levying land cess on the value of the land, which is to be gauged by the value of the right to fish in the water lying above the land. For these reasons the appeal fails and must be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. 1941 Madras 416

HORWILL J.

Criminal Revn. Case 1006 of 1940 (Case Referred No. 43 of 1940), Decided on 23rd January 1941; referred by Dist. Magistrate, Cuddapah, D/- 15th November 1940.

Pothapu Timma Reddi — Accused

v.

Kondalu Rami Reddi — Complainant.

Criminal P. C. (1898), S. 523 — Magistrate of opinion that offence of misappropriation in respect to property had been committed has discretion in disposing of it — He is not bound to return it to person from whom it was recovered.

Where a case is struck off as being of a civil nature, it means that the Magistrate has come to the conclusion that a criminal offence has not been made out and that it is only after adjudication by a civil Court that the ownership of the property can be determined. He is therefore bound to return the property to the person from whom it is taken and to direct the complainant to have recourse to a civil Court if he is so advised. Where, however, the Magistrate is of opinion that an offence had been made out but that it was one of misappropriation and not of the receipt of stolen property knowing or having reason to believe the same to be stolen, the Magistrate has discretion in disposing of property which is the subject-matter of a complaint and is not bound to return the property to the person from whom it was recovered : AIR 1939 Mad 905, *Disting.* [P 416 C 2; P 417 C 1]

P. Chandra Reddi — for Complainant.

Public Prosecutor — for the Crown.

Order. — One Kondalu Rami Reddi was given possession of a cow and a calf by its owner for the purpose of grazing in a certain forest. While there, this cow and calf were missing and the information of the complainant was that it had been stolen by Sugalis. According to the facts found during the police enquiry, the complainant searched for these cattle for many months and at last traced them to the house of the accused. The accused said that the cow and a calf were his and that he purchased them long before from some Sugalis. As he would not return them, the complainant informed the police who investigated this as an offence coming under S. 411, I. P. C. They came to the conclusion upon the acceptance of certain information that the offence committed was not one punishable under S. 411, I.P.C., but one under S. 403, I. P. C., which is criminal misappropriation. This offence is not cognizable and so the police sent a referred charge sheet to that effect. The Magistrate agreed with the police and ordered the cattle to be returned to the complainant. The accused preferred an appeal to the District Magistrate, who, as no appeal lay, had to dismiss it ; but he nevertheless considered that the Taluk Magistrate had erred in not returning the property to the person from whom it was recovered. He thereupon made a reference to this Court for action under S. 438, Criminal P. C.

The District Magistrate relied on a case reported in 1939 M W N 739[1] in which Lakshmana Rao J. considered a case where a complaint of theft had been preferred and the case eventually struck off as being of a civil nature. That case is clearly distinguishable from the present one. Where a case is struck off as being of a civil nature, it means that the Magistrate has come to the conclusion that a criminal offence has not been made out and that it is only after adjudication by a civil Court that the ownership of the property can be determined. He is therefore bound to return the property to the person from whom it is taken and to direct the complainant to have recourse to a

1. ('39) 26 A I R 1939 Mad 905 : 185 I C 440 : 1939 MWN 739 : 41 Cr L J 203, Subbayya v. Emperor.

civil Court if he is so advised. In the present instance, the Magistrate was of opinion that an offence had been made out but, that it was one of misappropriation and not of the receipt of stolen property knowing or having reason to believe the same to be stolen. The Magistrate in disposing of property which is the subject-matter of a complaint, has a discretion. Section 523 empowers the Magistrate to pass orders with regard to the disposal of property which is alleged or suspected to have been stolen or is found under circumstances which create suspicion of the commission of any offence. These conditions were fulfilled here, and I am not prepared to say that the learned Magistrate did not exercise his discretion judicially. Notice has gone to the accused in this case but he has not put in any appearance. The reference is not accepted and the papers will be returned.

C.R.K./D.S. *Reference rejected.*

** A. I. R. 1941 Madras 417

FULL BENCH

LEACH C. J., KING, SOMAYYA, PATANJALI SASTRI AND HAPPELL JJ.

Second Appeal No. 1093 of 1937, Decided on 20th December 1940, against decree of Dist. Court, South Arcot at Cuddalore, D/- 19th August 1937.

Sivagurunatha Pillai — Appellant

v.

Padmavathi Ammal and another — Respondents.

(a) Negotiable Instruments Act (1881), S. 28 —Effect of S. 28 is not same as that of S. 26, English Bills of Exchange Act.

The effect of S. 28 is not the same as that of S. 26, English Bills of Exchange Act, and consequently the English decisions can be of no assistance in construing S. 28, Negotiable Instruments Act : A I R 1916 Mad 293 (F B), *Not approved.*

[P 425 C 2]

**** (b) Negotiable Instruments Act (1881), Ss. 27 and 28—Pronote—Maker whether excluding personal liability — Court cannot look into surrounding circumstances — Instrument alone should be looked at and its effect judged from words used—But pronote in vernacular cannot always be construed according to its literal English translation — Pronote in vernacular — Executant giving his description and adding that he is agent of another—Executant must be taken to act as other's agent: *58 Mad 735=AIR 1935 Mad 447=155 IC 581(FB), OVERRULED.***

The Court cannot look into the surrounding circumstances when deciding whether the maker of a promissory note has executed it as the agent or the representative of another. It is the instrument alone which has to be looked at. Of course, if the authority of the agent is questioned his authority must be established before the instrument is looked at. It is the duty of the Court to read the instrument and judge its effect from the words used but a promissory note drawn up in vernacular language cannot always be construed according to the literal translation into English. Nor can the English rules of construction be applied in interpreting documents executed by the people of India in their own vernacular. When in a pronote written in any Indian language the person after giving his own description adds that he is the agent of another it means that he is acting as the other's agent in the matter of the execution of the document : A I R 1918 P C 146, *Rel. on*; 58 Mad 735=A I R 1935 Mad 447=155 I C 581 (FB), *OVERRULED*; Judgment of Sundara Iyer J., in 23 Mad L J 417, *Approved*; (1924) A C 625; (1883) 8 A C 733; (1925) 2 K B 301; (1816) 105 E R 1077 and (1858) 157 E R 434, *Expl.* and *Disting.*; A I R 1916 Mad 293 (F B), *Expl.*

[P 421 C 2; P 424 C 2; P 426 C 1, 2; P 427 C 1]

K. Rajah Ayyar and S. Ramachandra Ayyar — for Appellant.

T. S. Venkatesa Iyer, G. R. Jagadisan and N. C. Vijayaraghavachariar — for Respondents.

ORDER OF REFERENCE

Venkataramana Rao J. — This second appeal arises out of a suit to recover a sum of Rs. 4808-4-0 being the principal and interest due on a promissory note dated 24th November 1932 executed by defendant 2 since deceased in favour of the plaintiff. Defendant 1 is the wife of defendant 2. She was sought to be made liable on the ground that defendant 2 executed the promissory note as her agent. Two main questions which arose for decision were : (1) Whether the suit promissory note was executed by defendant 2 acting as the agent of defendant 1, and (2) whether defendant 2 is personally liable on the promissory note. The learned subordinate Judge took the view that defendant 2 executed the promissory note as the agent of defendant 1 and defendant 1 alone was liable. He gave a decree against defendant 1 and dismissed the suit as against defendant 2. On appeal the learned District Judge took a different view. He was of the opinion that though defendant 2 acted really as the agent of defendant 1 in executing Exhibit A, on a fair interpretation of the document defendant 2 as the maker of the promissory note was personally liable to pay the amount. He therefore set aside the decree against defendant 1 and passed a decree against defendant 2. The plaintiff has preferred this second appeal.

The question for decision is, is defendant 1 liable? Before deciding this question it is necessary to state a few facts. Defendant 1 got from her paternal uncle Shanmugasundaram Pillai considerable property under a will dated 22nd May 1928. By the said will she was also directed to pay the debts of the

testator. One of the debts was the amount due to Swarnathammal under a promissory note, Ex. C, dated 21st February 1927, for Rs. 2420 which carried interest at 9 per cent. per annum. Swarnathammal endorsed this promissory note to Ramasami Pillai on 28th October 1929. Thus this was one of the debts which admittedly had to be discharged by defendant 1. She, being a female, executed a power of attorney in favour of her husband Ex. I, in and by which she empowered him to manage her property including the property she got from Shanmugasundaram. She also gave him authority to discharge all the debts payable by her. In pursuance of this power defendant 2 executed a promissory note to Ramasami Pillai, Ex. B, dated 11th December 1929 for Rs. 3000 carrying interest at 9 per cent. per annum. Ramasami Pillai endorsed Ex. B in favour of the plaintiff on 1st January 1930. In discharge of Ex. B defendant 2 executed the suit promissory note Ex. A. The question now is whether defendant 1 or defendant 2 is liable under the note. This would depend upon the fact whether defendant 2 executed Ex. A as a mere agent of defendant 1 excluding his personal liability therefor.

The description in Tamil of the preamble to the promissory note clearly indicates that he as defendant 1's power agent was executing the note and prominence is given to defendant 1. On a literal rendering of the Tamil the description is "Kuppusami Pillai's daughter and my wife Padmavati's power agent Velayudham Pillai's son Srinivassa Pillai." In the body of the note the debt due by Shanmugasundaram is referred to. This is how the reference is made : "in respect of the debt due by Shanmugasundaram Pillai, my wife's junior paternal uncle." This is a debt which is primarily payable by defendant 1. If this fact is considered in relation to the power of attorney executed by defendant 1 in favour of defendant 2 the intention of defendant 2 in executing the promissory note was to act on behalf of defendant 1 and not to make himself personally liable. This conclusion can only be arrived at by taking into consideration the description in the preamble, the evidence furnished by reference to Shanmugasundaram in the body of the note and the will of Shanmugasundaram which fastens the liability on defendant 1 and the power of attorney and the prior pronotes. So far as the will and the power of attorney and the prior pronotes are concerned, they would be evidence *de hors* the document. But for that evidence, the contents of the document cannot be said to be self-explanatory. The Full Bench decision in 38 Mad 482[1] seems to be an authority for the position that such evidence cannot be looked into. Before dealing with 38 Mad 482,[1] I shall refer to S. 28, Negotiable Instruments Act. It runs thus :

> An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

On the grammatical interpretation of the section, an agent in order to escape personal liability, must on the note indicate that he signs as an agent or that he does not intend thereby to incur personal liability. It therefore follows that even if a person does not sign as agent, if on the note he has sufficiently indicated that he did not intend to incur personal responsibility, he would escape liability. The question arises, whether the provision in the enactment that the indication of non-incurring of personal liability should be on the note, excludes any evidence oral or documentary outside the document and the conclusion as to non-liability must be arrived at on a consideration of the terms of the note alone. A literal interpretation of the section would seem to exclude all evidence outside the note. The following observations of the Privy Council in 46 Cal 663[2] at pp. 668 and 669 also seem to lend support to this view:

> It is of the utmost importance that the name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand ..... It is not sufficient that the principal's name should be in some way disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills.

Emphasis can legitimately be laid on the use by their Lordships of the expression 'on any fair interpretation of the instrument.' Mr. Rajah Iyer however contends that those observations are in support of his view and in aid of that interpretation evidence can be admitted. The question did arise in 38 Mad 482[1] whether the Court could travel outside the note for arriving at a decision whether an agent did not intend

1. ('16) 3 AIR 1916 Mad 293 : 21 I C 417 : 38 Mad 482 : 25 M L J 425 (F B), Koneti Naicker v. Gopala Iyer.
2. ('18) 5 AIR 1918 P C 146 : 50 I C 216 : 46 Cal 663 : 46 I A 33 (P C), Sadasuk Janki Das v. Sir Kishan Pershad.

to incur personal liability. The case was originally heard in the High Court by a Bench consisting of Sundara Iyer and Sadasiva Iyer JJ. The note in that case ran as follows :

12th August 1907. . . . . Promissory note executed to you both, one Gopala Iyer and (2) Nagasami Iyer. . . . by R. P. Koneti Nayudu Garu, son of . . . . agent, holding power of attorney from the zamindar, Dorairaja Avergal residing in . . . . . Amount due to you including principal and interest up to date upon settlement of account of dealings which was standing against the name of Rani Chakkani Ammal on cloths, etc., having been purchased ere this for the Vellikurichi Palace is Rs. 694-6-0. On demand, I promise to pay this sum with interest at Rs. 5-8-0 per cent. per mensem from this date either to you or order and shall take this back with the endorsement of payment thereon.

Koneti Nayudu was defendant 3 in that case. Defendants 1 and 2 were sought to be made liable on the ground that the debt was incurred for the benefit of defendants 1 and 2 and that defendant 1 executed a power of attorney in favour of defendant 3, on the strength of which the promissory note was executed. The evidence in that case established the fact that defendant 3 acted as the agent of defendant 1. The cloths were purchased for the use of defendants 1 and 2 by Chakkani Ammal referred to in the promissory note, the mother of defendant 1, when defendants 1 and 2 were minors. Sundara Iyer J. was inclined to hold that defendant 3 was not personally liable and that defendants 1 and 2 were liable. He observed thus in 23 M L J 417[3] :

Now the debt is said to have been incurred by defendant 1's mother and for the Vellikurichi palace, that is, the palace of defendant 1. It is contended that it was not stated who Chakkani Ammal was. That is entirely unnecessary. The plaintiffs well knew who she was and they well knew that the Vellikurichi palace was the palace of defendant 1. Then follow the words of promise : "I promise to pay this sum of Rs. 694-6-0." The question is, has or has not defendant 3 indicated on the note that he does not intend to incur personal responsibility for the debt? He has described himself as the agent of defendant 1 holding a power of attorney from him. He has described the debt as one binding on defendant 1 and incurred by defendant 1's mother. In instruments executed by the people of this country, it is, in my opinion, very uncommon for the executant to describe himself as agent of another, unless the contract is entered into by him as an agent. In this case the justification for his acting as an agent is also referred to, namely that he holds a power of attorney from defendant 1.

Sadasiva Iyer J. took a different view. He observed thus :

A mere description in the body of the promissory note (that the maker is an agent) will not exempt him from personal liability. The body of the promissory note only sets out the occasion on which the promissory note came to be executed. Why should a holder of a negotiable instrument be driven to make inquiries whether a man who puts his unequivocal signature to it is really an agent of some other person as he described himself in the body or whether he had authority to bind that principal? The very object of the law merchant might be defeated if, when the executant does not choose expressly to repudiate his own personal liability to the holder (whoever he may be) according to the law merchant, he should be allowed to spell out an implied non-liability on his part by involved arguments and by appeals to the negligent practices of people in the mofussil.

Sadasiva Iyer's judgment prevailed. There was then a Letters Patent appeal which was heard by three Judges (White C. J., Ayling and Oldfield JJ.) who confirmed the judgment of Sadasiva Iyer J., in 38 Mad 482.[1] This is how White C. J. sums up his conclusion :

It seems to me that, reading the note in question as a whole, on the construction of the document and on authority, the maker is personally liable.

It is clear from this decision that the view of Sundara Iyer J. that one can look into surrounding circumstances for coming to the conclusion whether an agent intended to incur personal liability was not accepted and the view of Sadasiva Iyer J. that one cannot travel outside the document seems to have prevailed. If this decision is followed it seems to me that the plaintiff's appeal should fail and Mr. Rajah Iyer concedes it. But he contends that in view of the later decisions of this Court this decision ought not to be followed. In the Full Bench decision reported in 58 Mad 735,[4] Ramesam J., delivering the judgment of the Full Bench at p. 739, made the following observations :

One must look at all the surrounding circumstances in inferring the intention. Seeing that the note was in renewal of earlier promissory notes ultimately leading up to the father's liability, I think this is the proper inference to draw.

In that case the mother executed a promissory note on behalf of her sons but in executing the document she did not describe herself as mother and guardian though the preamble stated it. But the learned Judges referred to the evidence as showing that the note on which the suit was brought was itself a renewal of an earlier promissory note executed by the mother and that earlier promissory note was itself in renewal of an earlier promissory note executed by the father of the minors. The earlier promissory notes were taken into consideration for coming to the conclusion whether the mother was personally liable. This seems to be in

3. ('12) 23 M L J 417 : 16 I C 869 : (1912) M W N 984 : 12 M L T 367, Koneti Naicker v. Gopal Iyer.

4. ('35) 22 A I R 1935 Mad 447 : 155 I C 581 : 58 Mad 735 : 68 M L J 540 (F B), Satyanarayana v. Mallayya.

direct contravention of the decision of the Full Bench in 38 Mad 482,[1] which unfortunately was not referred to. No doubt on the actual facts of the case the decision of the Full Bench in 58 Mad 735[4] may be distinguishable because the makers of the promissory note were stated to be minors and not the mother. This decision was applied by my Lord the Chief Justice and Madhavan Nair J. in 1938 M W N 677.[5] In that case a promissory note was executed by one Venkataratnamma as the mother and guardian of the minors. In the operative part she stated, "I shall pay the same." The signature of Venkataratnamma alone was appended to the note but she did not add the words describing herself as the mother and guardian of the minors. It was elicited in the evidence that that promissory note was executed by her in renewal of a prior promissory note which itself was executed in substitution of a note given by her husband, the father of the minors. Following the observations of the Full Bench in 58 Mad 735,[4] they held that the mother was not liable. I may point out that the decision in 38 Mad 482[1] was not referred to. I may refer in this connexion to one or two English decisions showing the view taken in England in regard to this. In (1925) 2 K B 301,[6] Bankes and Scrutton L. JJ. were of the view that surrounding circumstances could be looked into for coming to the conclusion whether a person signed as agent. In that case the question was whether the directors of a company, called Fashions Fair Exhibition Ltd., were liable on an endorsement made by them. The form of the endorsement ran thus: "Accepted payable at the W. Bank—A B and C D, Directors-Fashions Fair Exhibition Ltd." Bankes L. J. while holding that from the form of the endorsement they were liable, remarked thus:

> I go further and I think that for the purpose of construing the indorsement it is permissible to take into consideration the circumstances under which it was made, and the cases in (1883) 8 A C 733[7] and (1924) A C 625,[8] seem to me to be authorities for that proposition. The circumstances in which the indorsement was written were that the plaintiff refused to enter into the transaction except upon the terms which he made perfectly plain in his letter to Mason of 8th February, that the bill was 'to be indorsed by your Company's directors on the back.'

Scrutton L. J. observed thus:

> I go somewhat further. A Court which is called upon to construe a document is not for that purpose restricted to the perusal of the particular document itself. As is said in Taylor on Evidence, para. 1148: 'While the controversy is between the original parties, or their representatives, all contemporaneous writings relating to the same subject-matter are admissible in evidence, provided only that they be of equal solemnity with the principal document and that no oral testimony be required for the purpose of connecting them therewith.' Now here I find that on 8th February the plaintiff sent to the company for acceptance two drafts one of which was that now sued upon, enclosed in a letter in which he insisted that: 'These drafts are to be indorsed by your company's directors on the back;' and the defendant Mason when returning the acceptance on the same date wrote: 'I enclose herewith two drafts ..... duly signed by two directors as requested by you' therein referring to the endorsements. I think I am entitled to take those letters into consideration as tending to show that the defendants were undertaking personal liability when putting their signatures on the back.

From the observations of these two learned Judges it is clear that they were referring to the evidence *de hors* the document. But from the observations of Scrutton L. J. it would seem that he would confine the evidence only to contemporaneous writings and exclude all oral evidence. It is not clear whether he would allow prior promissory notes which were relied on in 58 Mad 735[4] and (1938) M W N 677[5] to be looked into. It is also not clear whether oral evidence should be excluded even to explain the recitals in the note. The reliance by the learned Judge on the passage in Taylor on Evidence which he extracted in his judgment would seem to indicate that such oral evidence would be excluded. I think I should also refer to the decision of Horridge J. reported in (1928) 138 L T 158.[9] In that case the question was whether one Kettle was entitled to sue. He was appointed receiver on behalf of the debenture-holders of a company called Ford Paper Works Ltd. The bill on which the action was based ran thus: "On 10th August next after date pay to my order" and for value received "and they are signed: R. Kettle, Receiver, Ford Paper Works Ltd." On behalf of the defendants it was contended that those were drawn on behalf of the Ford Paper Works Ltd., and Kettle was entitled to sue. It was also contended in that case that if the surrounding circumstances were looked into Kettle could not sue. The surrounding cir-

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5. ('38) 25 A I R 1938 Mad 716 : 182 I C 961:1938 M W N 677, Seetharamayya Garu v. Sathiah.
6. (1925) 2 K B 301 : 94 L J K B 807 : 133 L T 624 : 41 T L R 631, Elliott v. Bax Ironside.
7. (1883) 8 A C 733 : 52 L J P C 70 : 49 L T 446 : 32 W R 730, Macdonald v. Whitefield.
8. (1924) 1924 A C 625: 93 L J K B 610: 131 L T 428 : 29 Com Cas 313 : 68 S J 594 : 40 T L R 530, Macdonald & Co. v. Nash & Co.
9. (1928) 138 L T 158 : 43 T L R 770, Kettle v. Dunster and Wakefield.

cumstances relied on were that the goods were in fact supplied by the company and that Kettle himself had stated that he had accepted no personal liability. *Held* those circumstances could not be looked into. This is how Horridge J. observed :

> It was argued before me that in looking at the face of these documents I must take into consideration all the surrounding circumstances, but when those surrounding circumstances come to be analysed they seem to me not to be surrounding circumstances at all . . . . . What I have got to do is to take the document itself and from that and from nothing else, except surrounding circumstances, which may really be surrounding circumstances, draw the inference what it means. I think that is quite clear from the case of *Chapman* v. *Snethurst*[10] where Kennedy L. J. quotes with approval the language of Channell J.: 'I am of the same opinion on both points. I agree with Channell J., when he says that the question depends upon the intention of the parties, which intention, I think, must be gathered from the terms of the document alone.' Applying those tests to this document, I am clearly of opinion that the words 'Receiver, Ford Paper Works (1923) Ltd.' are only words of description and that the documents do not purport to have been made on behalf of the Company at all, and that therefore Mr. Kettle is both liable to be sued and able to sue upon these bills of exchange.

The learned Judge does not explain what he meant when he observed except surrounding circumstances which may really be surrounding circumstances? Would the learned Judge permit both oral and documentary evidence to prove surrounding circumstances? The learned Judge refers with approval to the judgment of Scrutton L. J. in (1925) 2 K B 301[6] who as already pointed out would exclude all oral evidence but would only admit contemporaneous writings when the question arises between immediate parties. It would seem therefore that Horridge J. would exclude all oral evidence. Probably the learned Judge would admit documentary evidence of surrounding circumstances. The question again arises, would the surrounding circumstances be limited only to the explaining of any recitals in the note which by themselves are not explanatory? But the citation from Kennedy L. J.'s judgment would seem to indicate that the intention must be gathered from the terms of the document alone. I think it unnecessary to refer to the other decisions of our High Court which take one view or the other. In this state of authorities I think it desirable that this matter should be decided by a Bench.

Mr. Viraraghavan raised a point that defendant 2 had no authority to execute the promissory note on behalf of defendant 1. He put his contention thus. Though Ex. B was executed in substitution of an earlier promissory note in favour of Swarnathammal by Shanmugasundaram, the promissory note was executed by defendant 2 in his individual capacity without indicating anywhere on the note that he was executing as an agent and on the execution of Ex. B the prior note was cancelled and thus the liability of defendant 1 must be deemed to have ceased. But the concurrent finding of both the Courts was that Ex. B was executed with the knowledge and at the instance of defendant 1. As the debt was primarily one which defendant 1 had to discharge and therefore her debt and as defendant 2 was empowered under the power of attorney to discharge her debts, it seems to me that he had sufficient authority to execute the promissory note as her agent. I do not see much force in this contention. In view of what I have stated above, I direct that the papers be placed before my Lord the Chief Justice for being posted before a Bench.

Judgment of the Full Bench

Leach C. J.—This appeal has been placed before a Full Bench of five Judges as its decision calls for the settlement of a conflict which exists in the decision in 38 Mad 482[1] and 58 Mad 735,[4] each of which was decided by a Full Bench of three Judges of this Court. Stated broadly, the question is whether the Court can look into the surrounding circumstances when deciding whether the maker of a promissory note has executed it as the agent or the representative of another. In 38 Mad 482[1] the Court held that the surrounding circumstances could not be inquired into. The question of liability could only be decided on the reading of the instrument. In 58 Mad 735[4] it was, however, said that one could look at all the surrounding circumstances in inferring the intention of the maker.

The appeal arises out of a suit filed by the appellant to recover the amount due on a promissory note of which he was the holder. The promissory note was executed by respondent 2, who is the husband of respondent 1. Respondent 1 had granted her husband a power of attorney, and it has been suggested on behalf of respondent 1 that this power did not give him authority to execute a negotiable instrument on her behalf. The question of authority has been investigated by the Courts below and they

10. (1909) 1 K B 927 : 78 L J K B 654 : 100 L T 465 : 16 Manson 171 : 14 Com Cas 94 : 53 S J 340 : 25 T L R 383.

have agreed that respondent 2 was duly authorised to execute promissory notes on his wife's behalf. The promissory note in suit was a renewal of a previous promissory note, and the subordinate Judge of Cuddalore who tried the suit and the District Judge of South Arcot on first appeal both held that the earlier promissory note was executed by the husband with the knowledge and at the instance of his wife. The husband was empowered under the power of attorney to discharge his wife's debts, and we concur in the finding, as Venkataramana Rao J. did in his order of reference, that the husband had authority to execute the promissory note in suit as the agent of his wife. The promissory note in suit reads as follows:

Promissory note executed on 24th November 1932 in favour of Sivagurunatha Pillai, son of Ramanujam Pillai, residing in Thunisaramedu village, Chidambaram taluk, by me, Srinivasa Pillai, son of Velayudham Pillai, the husband agent under power of attorney of Padmavathi Ammal, daughter of Kuppusami Pillai, residing in Gunamangalam village, Chidambaram taluk:

As you have obtained an assignment on 1st January 1930 of the promissory note executed by me on 11th December 1929 for Rs. 3000 (Rupees three thousand) in favour of Therku Virudangan Ananta Pillai's son, Ramasami Pillai, in respect of the debt due by Shanmugasundaram Pillai, my wife's junior paternal uncle, the amount of principal and interest due on the said promissory note is Rs. 3797-4-0 (Rupees three thousand seven hundred and ninety seven and annas four). As I have received this sum in manner stated above, I shall pay interest on the said sum at 15 annas per cent. per mensem from this day and pay you, or your order, on demand, the aggregate principal and interest and take back this document after endorsement of payment made thereon.

V. Srinivasa Pillai.

It will be observed that while the signature of the maker is not followed by any words indicating the capacity in which he signed, in para. 1 of the note he is described as the husband and agent under the power of attorney of his wife. The wife denied that her husband executed this promissory note as her agent and the husband maintained that he had. Holding that the husband had authority to sign for his wife and had executed this promissory note as her agent, the subordinate Judge granted the appellant, who is the payee of the promissory note, a decree for the amount claimed. The District Judge, while concurring in the finding of the subordinate Judge that the husband had authority from his wife to execute the promissory note and had in fact executed it as her agent, held that as the wording of the instrument did not exclude the husband's personal liability he was liable. Accordingly he granted a decree against the husband and dismissed the suit against the wife. The decree-holder has appealed and he asks for the restoration of the decree of the trial Court. Before examining the judgments in 38 Mad 482[1] and 58 Mad 735,[4] I propose to state the relevant provisions of the Bills of Exchange Act, 1882 and the Negotiable Instruments Act, 1881, because the provisions of the two Acts with regard to the execution of a negotiable instrument by an agent are not the same and English decisions may not always be in point. Section 23, Bills of Exchange Act, is in these words :

No person is liable as drawer, indorser, or acceptor of, a bill who has not signed it as such; Provided that

(1) where a person signs a bill in a trade or assumed name, he is liable as if he had signed it in his own name,

(2) the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

Section 26 reads as follows :

Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

The corresponding sections of the Negotiable Instruments Act are Ss. 27 and 28 respectively and they read as follows :

27. Every person capable of binding himself or of being bound, as mentioned in S. 26, may so bind himself or be bound by a duly authorized agent acting in his name.

A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not of itself import an authority to indorse.

28. An agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

Under the English Act, if an agent is to escape liability as a drawer, indorser or acceptor he should add words to his signature indicating that he is signing for and on behalf of his principal. Of course if in the body of the instrument the maker expressly excludes his personal liability this would have the same effect as the adding of suitable words to his signature, but in England negotiable instruments are not usually drawn in this way. Under the Indian Act there is more latitude in the matter of construction.

The question is not whether there has been express exclusion from personal liability, but whether on a fair construction of the instrument as a whole the exclusion of personal liability can be inferred. The importance which S. 26 of the English Act, attaches to words of exclusion following the signature was not a feature of the decisions in England before the passing of the Bills of Exchange Act in 1882. What was insisted upon was that on the face of the instrument the maker should clearly indicate that he was signing for another, otherwise he would be liable personally. In (1816) 5 M & S 345=105 E R 1077[11] Lord Ellenborough C. J. said :

> Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe,' he becomes liable. . . Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not so done and therefore has made himself liable.

When *Lindus* v. *Melrose*,[12] was before the Court of Exchequer, Pollock, C. B. did say, [(1857) 2 H & N 296=157 E R 123] :

> On reading the instrument as I have suggested, and looking to the surrounding circumstances, I entertain not the slightest doubt that in fact it was intended as the note of the company,

but there is no indication that the surrounding circumstances were used to add to the instrument and when the case was before the Exchequer Chamber on appeal it is obvious that it was decided merely on an examination of the words of the note. It has been argued that (1925) 2 K B 301[6] is direct authority for the proposition that the Court may look beyond the document and examine the surrounding circumstances when deciding whether personal liability has been excluded by the maker of a negotiable instrument such as we have here, but an examination of the judgments shows that they do not render support for the argument. A bill of exchange was accepted in the following form :

> Accepted, payable at the Westminster Bank Ltd., Piccadilly Branch, H. C., Bax Ironside, Honald A Mason, directors, Fashions-Fair Exhibition Ltd.

When the drawer sent the bill to the company for acceptance he wrote saying that as a condition of his doing the work for which the bill was drawn he should require it to be indorsed by the directors as well as accepted by the company. As the result of this letter the two directors indorsed the bill as follows : "Fashions-Fair Exhibition Ltd., A B and C D, directors," and one of them when returning the accepted bill drew attention in his letter to the fact that it was duly indorsed by two directors of the company as had been requested. Bankes and Scrutton L. JJ. were of the opinion that the Court was entitled to look at the surrounding circumstances under which the bill was signed, including the letters which passed between the parties on the subject of the indorsement, from which it was to be inferred that the defendants by indorsing intended to guarantee the payment of the bill. Sargent L. J. agreed in holding that the directors were liable, but he preferred to base his judgment merely on the contents of the particular bill. In holding that the surrounding circumstances might be looked into, Bankes and Scrutton L. JJ. placed reliance on (1883) 8 A C 733[7] and (1924) A C 625.[8] (1883) 8 A C 733[7] was an appeal to the Privy Council from Canada, and in delivering the judgment of the Board Lord Watson observed :

> But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them.

These remarks are confined to the parties who put their signatures upon the instrument. In that case the directors of a company agreed with each other to become sureties to the bank for the same debts of the company and as the result of this agreement successively indorsed three promissory notes to the company. It was held that they were entitled and liable to equal contribution inter se. The rule stated by Lord Watson in that case obviously does not apply in the present case. The appellant has not signed the promissory note, he is merely the payee and the question is whether the maker or a third party, whose signature does not appear on the instrument, is liable.

In (1924) A C 625,[8] the position was this. The appellants sold 19,000 cases of tinned soup, but as the buyers were unable to find the money they applied for financial assis-

11. (1816) 5 M & S 345 : 17 R R 345 : 105 E R 1077, Leadbitter v. Farrow.
12. (1858) 3 H & N 178 : 157 E R 434.

tance to the respondents, who undertook as between themselves and the buyers to find 75 per cent. of the purchase price. The appellants, the respondents and the buyers then agreed that the respondents should indorse a series of eight bills of exchange, seven for £1000 each and one for £117 odd, to be drawn by the appellants on the buyers, payable six months after date to the appellants' order, and that the appellants, in consideration of the bills being duly indorsed by the respondents, should hand to the respondents delivery orders for the balance of the cases, some 3000 cases having been taken up by the buyers. The bills were drawn by the appellants on the buyers, expressed to be payable to the appellants' order, and were accepted by the buyers and indorsed by the respondents. Room was left above the name of the respondents for the indorsement of the name of any person to whom the appellants should direct payment. The respondents then handed the bills to the appellants in exchange for the delivery orders. One bill was discharged, but before the remaining bills became due the appellants indorsed their name as payee above the respondents' signature. On presentation to the buyers these bills were dishonoured and the appellants claimed payment from the respondents, who denied liability. Thereupon the appellants sued the respondents as indorsers. It was held that the respondents must be taken to have intended to make themselves liable to the appellants on the bills and that the appellants had implied authority to fill in their own name as payees.

The decision in (1924) A C 625[8] does not go beyond the rule stated by Lord Watson in (1883) 8 A C 733,[7] and I consider that (1925) 2 K B 301[6] goes no further. In my judgment the English decisions lend no support for the suggestion that in a case like the one now before us the Court can travel beyond the instrument in order to decide whether a person has signed as the agent of another. So far as the Courts in India are concerned, the question is really governed by the decision of the Privy Council in 46 Cal 663.[2] In that case certain hundis had been drawn by one Mohan Lal, who had been employed by Maharaja Sir Kishen Pershad as the superintendent of his private treasury. The hundis were in this form :

By order of Sirkar, may his happiness increase.

To

Mohan Lal, son of Hira Lal.

Six months from the date of the execution of this hundi, please pay to Seth Sadsukh Janki Das Sahu of the Residency Bazaars or to his order the sum of H. S. Rs. 2500 (half of which is Rs. 1250) which sum I have received in cash in the Residency Bazaars from the said Seth Sahib.

Dated 3rd Rabi-us-sani, 1328-H (14th April 1910).

Mohan Lal (in Urdu)
Acting Superintendent of the Private Treasury of His Excellency Sir Maharajah, the Prime Minister of H. H. the Nizam.

(on the back)

This hundi has been accepted by Mohan Lal, son of Hira Lal, in favour of Seth Sadsuk Janki Das, inhabitant of the Residency Bazaars, Hyderabad.

Dated 3rd Rabi-us-sani, 1328 Hijiri.

Mohan Lal (in Urdu).

The question was whether Mohan Lal or the Maharaja was liable. The Privy Council held that the liability rested with Mohan Lal and not with the Maharaja. In delivering the judgment of the Board, Lord Buckmaster said :

It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand. In this case the preliminary words mention no more than that Mohan Lal has been directed to execute the hundis, and they do not necessarily imply that he has been clothed with authority to execute them in any other form than that in which they were actually prepared—a form which it has already been shown constituted nothing more than a personal liability on behalf of Mohan Lal.

After referring to Ss. 26, 27 and 28 of the Negotiable Instruments Act, the judgment proceeds :

It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

There can be nothing plainer than this judgment. It is the instrument and the instrument alone which has to be looked at in deciding whether the maker has excluded personal liability in such a case. Therefore in turning to examine the decisions of this Court in 38 Mad 482[1] and 58 Mad 735,[4] we have this factor well established. Of course, if the authority of the agent is questioned the authority must be established before the instrument is looked at. The case in 38 Mad 482[1] was decided by White C. J. and Alying and Oldfield JJ. It was heard by three Judges as Sundara Iyer and Sadasiva Iyer JJ. who had heard it in the first instance had disagreed. It has been suggested that the judgment of Sundara Iyer J. amounts to an assertion that the surrounding circumstances may be taken into consideration in a case

like the present one, but when his judgment is examined it is clear that he was not stating any such proposition. The real conflict between him and Sadasiva Iyer J. was that he considered that the promissory note itself indicated that it had been signed by the maker as an agent, while Sadasiva Iyer J. took the opposite view. The promissory note read as follows :

12th August 1907 corresponding to 28th Audi Plavanga. Promissory note executed to you both, (1) Gopala Iyer and (2) Nagaswami Iyer, sons of Soothi Seshaiyer, residing in No. 1, Police Station Lane, Madura Town, by R. P. Koneti Nayudu Garu, son of Nanjundappa Naidu Garu, agent, holding power of attorney from the Zamindar Dorai Rajah Avergal and residing in Vellikurichi village, Manamadura Taluk, Madura District.

Amount due to you including principal and interest upto date upon settlement of account of dealings which was standing against the name of Rani Chekkani Ammal on cloths, etc., having been purchased ere this for the Vellikurichi palace, is Rs. 694-6-0. On demand, I promise to pay this sum of rupees six hundred ninety four and annas six with interest at Rs. 5-8-0 per cent. per mensem from this date either to you or order and shall take this back with the endorsement of payment thereon.

(Signed) R. P. Koneti Nayudu.

It will be observed that after stating that he is the son of Nanjundappa Naidu the maker of the note adds he is the "agent, holding power of attorney from the zamindar Dorai Rajah Avergal." The note has very much in common with the note now in suit. The question there was whether R. P. Koneti Naidu was personally liable or whether he had executed the promissory note as the agent of the zamindar. Sundara Iyer J. considered that the promissory note should be construed as an instrument made by R. P. Koneti Naidu as the agent of the zamindar and his reasons may be gathered from the following passage in his judgment: 23 M L J 417[3] at p. 421 :

The question is, has or has not defendant 3 indicated on the note that he does not intend to incur personal responsibility for the debt ? He has described himself as the agent of defendant 1 holding a power of attorney from him. He has described the debt as one binding on defendant 1 and incurred by defendant 1's mother. In instruments executed by the people of this country, it is, in my opinion, very uncommon for the executant to describe himself as agent of another, unless the contract is entered into by him as an agent. In this case, the justification for his acting as an agent is also referred to, namely that he holds a power of attorney from defendant 1. The question whether defendant 3 executed the document as agent and whether he has indicated that he did not intend to be personally responsible for the amount of the note is one of construction. In construing the instrument, I think it is proper and necessary to put oneself in the position of the executant, and to take into consideration the habits of the people of this country in the matter of conveyancing. These habits may not be the same as those of people in England or elsewhere, and the construction to be put on an instrument executed by a Hindu here should not necessarily be made to depend on the construction of a similarly worded instrument executed by an Englishman.

Later in the judgment Sundara Iyer J. said :

Of course, an agent might contract to be personally liable, and it would be open to the payee to prove such an agreement. But, apart from such agreement, I think that in this country, the description itself should be taken to be an indication that the executant should not be personally liable.

Sundara Iyer J. also said that if it was open to the maker to prove that he was only a benamidar for a third person, he saw no reason why he should not be entitled to show that he was only an agent for another, but he went on to add that, perhaps S. 28, Negotiable Instruments Act, would not allow of this and therefore his decision must be taken to have been given on the reading of the promissory note, bearing in mind the manner of expression the maker would ordinarily use. Sadasiva Iyer J. considered that the maker of a negotiable instrument would be personally liable unless in signing he indicated that he was signing as an agent or had expressly excluded his personal liability in the body of the note. He observed :

Why should a holder of a negotiable instrument be driven to make inquiries whether a man who puts his unequivocal signature to it is really an agent of some other person as he described himself in the body or whether he had authority to bind that principal ? The very object of the law merchant might be defeated if, when the executant does not choose expressly to repudiate his own personal liability to the holder (whoever he may be) according to the law merchant, he should be allowed to spell out an implied non-liability on his part by involved arguments and by appeals to the negligent practices of people in the Mofussil.

All the members of the Full Bench read the promissory note in the way it was read by Sadasiva Iyer J., although Ayling J. observed that the question was not free from doubt. White C. J. said that he did not attach importance to the variation of the language between S. 26, Bills of Exchange Act and S. 28, Negotiable Instruments Act, because the Legislature intended in both enactments to reproduce the English Common law, though the language used for the purpose of carrying out their intention was different. As I have already indicated I do not agree that the effect of S. 26 of the English Act is precisely the same as that of S. 28, Negotiable Instruments Act, and before us learned counsel have accepted that there is a difference.

In 58 Mad 735[4] the facts were these. A promissory note was executed by the mother who

was also the guardian of the minor members of a Hindu joint family, without adding any words of qualification to her signature, but in the body of the note the minors were described as the "makers represented by their mother and guardian, Venkayamma." The promissory note was in renewal of an earlier promissory note made by the mother as guardian of the minors and this note was in renewal of a promissory note which had been executed by the father. The judgment of the Court was delivered by Ramesam J. who stated without any qualification that one must look at all the surrounding circumstances in inferring the intention of the maker. The Courts held that the minors' estate was liable on the promissory note and in arriving at this decision took into consideration the surrounding circumstances. This course cannot be supported. With great respect the Court was wrong in looking at the surrounding circumstances when deciding whether the mother as the maker of the promissory note had excluded her personal liability.

As the Court cannot look beyond what is stated in the instrument in a case like the present one, it is now necessary to decide whether the promissory note in suit should be construed in accordance with the judgment of Sundara Iyer J. or the judgments of Sadasiva Iyer J. and White C. J. In my opinion the judgment which should be followed is that of Sundara Iyer J. It is the duty of the Court to read the instrument and judge its effects from the words used, but a promissory note drawn up in a vernacular language cannot always be construed according to the literal translation into English. While I have no knowledge of the Dravidian languages, I have seen sufficient of the translations of vernacular documents which have come before this Court to realize that to give a fair translation words in English have often to be added, and both my learned brothers Somayya and Patanjali Sastri inform me that a Tamil who wished to indicate that he was signing on behalf of his principal might aptly use the language found in the promissory note in suit and that a Tamilian would read it as an instrument signed by the maker on behalf of his principal. I do not suggest that a document in Tamil or of any other language spoken in India should not be given the meaning which the words used ordinarily imply, but in deciding their implication I agree with Sundara Iyer J. that one must put oneself in the position of the writer so far as the language used is concerned. In this country when a person is describing who he is he gives his father's name and says that he is his son. When in a document such as we have here the person after giving his own description adds that he is the agent of another it means that he is acting as the other's agent in the matter of the execution of the document.

In this case I consider that it is beyond reasonable doubt that when respondent 2 added to the statement that he was the son of Velayudham Pillai the statement that he was the husband and agent under power of attorney of respondent 1. he implied that he was executing the document in his capacity as her agent. The matter does not however rest there. The body of the instrument shows that the note was executed in renewal of a previous promissory note executed in respect of a debt owed by respondent 1's junior paternal uncle Shanmugasundaram Pillai, and this gives an indication of the reason why respondent 2 was called upon to act on behalf of his wife. She was lending aid to a relation of hers. On a fair construction of the document bearing in mind that it was written in Tamil by a person who would express agency in this way I hold that respondent 2 signed it as his wife's agent.

Mr. Venkatesa Iyer on behalf of respondent 1 stated in the course of his argument that if the word "as" preceded the words "the husband and agent under power of attorney of Padmavathi Ammal" it would be a fair construction of the document to say that the maker intended to exclude his own personal liability. I do not see what difference the absence of the word "as" makes, because the insertion of the words "husband and agent under power of attorney of Padmavathi Ammal" would be entirely unnecessary unless the intention was to indicate that respondent 2 was signing the document as the agent of his wife.

I would sum up the position thus. In 58 Mad 735,[4] the Court erred in saying that circumstances not disclosed in the instrument could be looked at when deciding whether the maker was personally liable and that the learned Judges who decided 38 Mad 482,[1] erred in refusing to follow the line of approach indicated by Sundara Iyer J. When it is a matter of construing the effect of an instrument written in Tamil or in any other Indian language, the observations of Sundara Iyer J. apply. It follows from what I have said that I consider that the

subordinate Judge was right, and I would allow the appeal with costs here and below.

King J. — I agree. As I was a member of the Full Bench which decided 58 Mad 735,[4] I wish to add that to the best of my recollection the question of the propriety of looking into surrounding circumstances was not raised then. Those circumstances were assumed, as constituting the background of facts upon which the case had to be decided. Now that I have had the advantage of hearing that matter fully argued, I agree that in that respect our decision was wrong.

Somayya J.—I agree with the judgment just delivered by my Lord the Chief Justice. I only wish to add that I entirely agree with the observations of my brother Patanjali Sastri J. as to the mode in which promissory notes and other documents are drafted in this country to indicate that the executant excludes his personal liability and that he is executing the document for another.

Patanjali Sastri J. — I agree with my Lord, the Chief Justice, whose judgment I have had the advantage of reading, and would only add that the appending of the words "agent under power of attorney of etc.," to the name of the executant is a well-known form commonly employed in Tamil documents to indicate execution in a representative capacity and exclusion of personal responsibility. The words are almost invariably regarded as limiting and qualifying the liability and not merely as describing or indentifying the executant. It is indeed difficult to see what descriptive or decorative significance can be ascribed to such words when they are added to a name already adequately described as in the present case.

English decisions holding that words like 'director,' 'secretary,' 'managing agents,' etc., added to the signatures of parties to negotiable instruments are only descriptive and do not have the effect of excluding personal liability are, in my opinion, more misleading than helpful in determining the intention of parties to similar instruments in India and I respectfully endorse the protest of Sundara Iyer J. in 23 M L J 417,[3] against a too rigid and indiscriminating adherence to English rules of construction in interpreting documents executed by the people of this country in their own vernacular. With all respect to Sadasiva Iyer J., whose differing judgment prevailed, it seems to me a curious inversion of true canons of construction to apply the English rule based upon a different mode of drawing negotiable instruments prevalent in England to similar instruments executed in India, brushing aside forms of words commonly used in vernacular to express agency as "negligent practices of people in the mofussil." In England, as pointed out by Lord Ellenborough C. J. in (1816) 5 M & S 345,[11] it was a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable unless he *subscribes it for another or by procuration of another which are words of exclusion* (italics mine). This well established mode of excluding personal liability was recognized and perhaps made more stringent in S. 26, Bills of Exchange Act of 1882, and hence the English rule. But in this part of the country it is the usual practice in drawing a promissory note in vernacular to begin by stating that it is executed by A B to C D, and where such execution is for and on behalf of another, to append the words "agent under power of attorney of X Y," to the name of the executant. No Tamilian would read the promissory note in suit, (Ex. A) except as one executed by the maker for and on behalf of his principal. Promissory notes are not only common among the commercial community in the cities but are popular among the large agricultural community in the mofussil on account of the low stamp duty to which they are subject, and it is to the interest of these communities that no doubts should be thrown on the generally accepted meaning of these words as excluding personal liability on the part of the signatory.

Mr. Venkatesa Iyer placed reliance on the wording of S. 28 as sanctioning the application of the English rule in this country also. He pointed out that the section begins with the words "an agent" and not "a person," thereby indicating that even if the instrument purports to be executed by a person as an agent, that is not sufficient to exclude personal liability. But there is no warrant for supposing that the section presupposes instruments purporting to be executed by an agent as such. All that it means is that a person who is in fact an agent but signs his name without indicating on the instrument that he signs as agent or that he does not intend thereby to incur personal responsibility, is liable as a principal : *c. f.* S. 231, Contract Act, where the words "an agent" obviously refer to a person who is

in fact an agent and not one who purports to act as such.

Happell J. — I agree.

C.R.K./G.N. *Appeal allowed.*

✻ A. I. R. 1941 Madras 428

LEACH C. J. AND HAPPELL J.

Letters Patent Appeal No. 17 of 1939, Decided on 6th December 1940, against decree and judgment of Wadsworth J., *Reported in A I R 1939 Mad 570.*

Hussain Batcha Sahib — Appellant

v.

Secretary of State and another — Respondents.

* Limitation Act (1908), Arts. 120 and 131 — Suit by mutwalli for declaration that he is entitled to receive yeomiah allowance attached to office of mutwalli is governed by Art. 131 and not by Art. 120: *(1939) 1 M L J 476=AIR 1939 Mad 570=186 I C 343, REVERSED.*

A suit by a mutwalli for declaration that he is entitled to receive the yeomiah allowance which is annually paid and which is attached to the office of mutwalli is a suit to establish a periodically recurring right and is therefore governed by Art. 131 and not by Art. 120 : A I R 1920 Mad 447 *held overruled by* A I R 1934 P C 108; A I R 1934 P C 108, *Rel. on*; (1939) 1 M L J 476=A I R 1939 Mad 570=186 I C 343, *REVERSED.* [P 429 C 1, 2]

B. Pocker — for Appellant.

Government Pleader and V. T. Rangaswami Ayyangar — for Respondents.

Leach C. J. — The appellant is the mutwalli and katheeb of a mosque in the village of Sattur which is situated in the Wallajah Taluk of the North Arcot District. In the days of the Nawabs of the Carnatic a yeomiah allowance of Rs. 88-8-0 per annum was granted to the mutwalli of this mosque. The immediate predecessor of the appellant in the office of mutwalli was one Mohamed Ali who died in the year 1918. While he held the office of mutwalli he was in receipt of this yeomiah allowance which is now payable by the Government. After his death the Government paid this allowance to his widow, respondent 2 in this appeal. The appellant's formal appointment to the office of mutwalli took place on 17th December 1919 and having taken up the duties of mutwalli he claimed to be entitled to the yeomiah allowance by virtue of his appointment, but the Government refused to recognize the claim. Apparently, the attitude taken up by the Government was that they were entitled to pay the allowance to Mohamed Ali's widow as an heir of the original grantee.

In 1921 the appellant instituted a suit in the District Court of North Arcot against the widow for a declaration that he was entitled to the office of mutwalli and other offices attached to the mosque. He obtained a decree, but the Government still refused to recognize his claim to be entitled to the yeomiah allowance and consequently the appellant filed the suit out of which this appeal arises to compel payment to him. The suit was filed on 14th December 1931 in the Court of the District Munsif of Ranipet. The appellant claimed inter alia a declaration that he was entitled to the yeomiah allowance by reason of the fact that he was the lawful holder of the office of mutwalli. Originally the only defendant was the Secretary of State, but, on objection being taken by the Secretary of State, the widow was added as a party. The District Munsif held that the appellant was entitled to the offices of mutwalli and katheeb, but that he was not entitled to claim the yeomiah allowance because the suit had not been brought within six years of the death of Mohamed Ali. Following the decision of this Court in 39 M L J 492,[1] he held that the plaintiff's claim fell within Art. 120. In these circumstances the District Munsif did not inquire into the appellant's claim that the yeomiah allowance attaches to the office of mutwalli. The appellant appealed to the District Judge of North Arcot, but the District Judge concurred in the findings of the District Munsif and dismissed the appeal. The appellant then appealed to this Court and again was unsuccessful. The appeal was heard by Wadsworth J. who also considered that the suit was governed by the decision in 39 M L J 492.[1] The learned Judge, however, gave a certificate which has permitted the filing of the present appeal under Cl. 15 of the Letters Patent. If the case is governed by 39 M L J 492[1] it is quite clear that the suit is out of time, but the learned advocate for the appellant contends that this decision has in effect been overruled by the Privy Council in 58 Bom 306[2] and we consider that this contention is well founded.

In 39 M L J 492[1] Ayling and Coutts-Trotter JJ. held that a right to a yeomiah allowance must be classified as a perpetual right and not as a periodically recurring right. Consequently they said that such a suit was governed by Art. 120 and not Art. 131, Limitation Act. Article 120 is the residuary

1. ('20) 7 A I R 1920 Mad 447 : 58 I C 788 : 39 M L J 492, Ghulam Ghouse Khan Saib v. Jannia.
2. ('34) 21 A I R 1934 P C 108 : 148 I C 796 : 58 Bom 306 : 61 I A 190 (P C), Secretary of State v. Parashram Madhavrao.

article in Part VII of the Act. It fixes the period of limitation at six years which commences from the date when the right to sue accrues. Article 131 prescribes a period of 12 years for a suit to establish a periodically recurring right. The time begins to run when the plaintiff was first refused the enjoyment of the right. The learned Judges who decided 39 M L J 492[1] said that

> the mere fact that sums of money are paid periodically does not make the right one which periodically recurs; the right is always there but it is only exercised at such times as the sums fall due.

In 58 Bom 306[2] the plaintiff claimed that he was entitled to receive an annuity consisting of a percentage of the assessments from time to time made on certain villages and payment of arrears on that basis. The Secretary of State averred that the plaintiff was only entitled to a fixed annual sum and said that the suit was barred by the law of limitation. The Privy Council decided that the plaintiff's claim was well-founded and that his suit was not time-barred, because it was governed by Art. 131, Limitation Act, and had been brought within 12 years of the Secretary of State's refusal to accede to the plaintiff's claim. The learned Government Pleader has rightly conceded that the only distinction which can be drawn between 58 Bom 306[2] and the present case is that in the former case the allowance payable to the plaintiff varied from year to year and in this case the allowance is fixed. What difference this makes we are at a loss to understand. If the claim in 58 Bom 306[2] was governed by Art. 131, as it was, this suit must be governed by the same article. Accordingly, we hold that 39 M L J 492[1] should no longer be followed.

The appellant filed the present suit to establish a right to an annual payment which he said was attached to the office of mutwalli of this particular mosque and admittedly it has been filed within 12 years of the Secretary of State's refusal to recognize the validity of the appellant's claim. It has been suggested that because the Secretary of State has conceded that the Government is bound to make this annual payment the suit cannot be classified as one to establish a periodically recurring right, but this argument overlooks the fact that the plaintiff is suing for a declaration that the right to this annual payment attaches to the office which he holds. This is denied. Therefore it is a suit to establish a periodically recurring right alleged to be attached to the office. Looked at in the light of the judgment of the Privy Council in 58 Bom 306[2] the only Article of the Limitation Act applicable is Art. 131. For these reasons we allow the appeal and remand the case to the trial Court to hear and decide the issues left undecided. The appellant is entitled to his costs in the District Court and of the two appeals in this Court. The costs in the trial Court will abide the result of the suit. The appellant is entitled to refund of the court-fee paid on the memorandum of appeal.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 429

LAKSHMANA RAO J.

Criminal Appeal No. 199 of 1940, Decided on 1st August 1940, against order of Juvenile Court, Vepery, Madras, D/- 7th February 1940.

In re Hussain Khan and another — *Appellants.*

Madras Children Act (4 of 1920), S. 26 (1) — Young person pleading guilty to charge under S. 326, Penal Code fined — Father directed to pay fine under S. 26 (1) — Father given no opportunity to show that he had not conduced to commission of offence by neglect—Offence not due to father's neglect — Order under S. 26 (1) cannot be sustained — Proper procedure held was to commit son to father's custody on his executing bond to be responsible for son's good behaviour.

A young person who pleaded guilty to a charge under S. 326, Penal Code, was fined Rs. 50. His father was directed to pay the fine under S. 26 (1), Madras Children Act, but no opportunity was given to him to show that he had not conduced to the commission of the offence by neglecting to exercise due care of the son nor was the offence due to any neglect of the father :

Held that the order under S. 26 (1) should be set aside and that on the materials on record the proper course was to commit the son to the custody of his father on his executing a bond to be responsible for the good behaviour of the son.

[P 429 C 2; P 430 C 1]

P. A. Krishnan Kutty Nair — for Appellants.

Crown Prosecutor — for the Crown.

Judgment. — Appellant 1, a young person, pleaded guilty to a charge under S. 326, I. P. C., and he was sentenced to pay a fine of Rs. 50. Appellant 2, the father, was present in obedience to the notice under S. 21 (1), Madras Children Act, and he was directed to pay the fine under S. 26 (1) of the Act. But no opportunity was given to him to show that he had not conduced to the commission of the offence by neglecting to exercise due care of appellant 1 nor does it appear from the report of the probation officer that the offence was due to any neglect of the father. The order under S. 26 (1), Madras Children Act, is therefore set aside

and on the materials on record the proper course was to commit appellant 1 to the custody of his father on his executing a bond to be responsible for the good behaviour of the son. The sentence of fine is therefore set aside and appellant 1 will be committed to the custody of appellant 2 on his executing a bond for Rs. 100 to be responsible for the good behaviour of appellant 1 for one year.

C.R.K./G.N. *Order accordingly.*

A. I. R. 1941 Madras 430

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Letters Patent Appeal No. 58 of 1939, Decided on 21st November 1940, against judgment of Patanjali Sastri J., in S. A. No. 672 of 1936, D/- 8th August 1939.

Damaraju Venkatarayudu — *Appellant*

v.

T. Narayana and others — *Respondents.*

Transfer of Property Act (1882), S. 35—Surrender by Hindu widow to her immediate reversioners does not amount to conveyance — Doctrine of estoppel or election has therefore no application.

To invoke the doctrine of election there must be a will or a deed which conveys title to a person in properties other than those belonging to himself, before he can be put to election. A surrender by a Hindu widow to her immediate reversioners does not amount to a conveyance, and to a conveyance by her of her property to the surrenderees. The fiction of a civil death is assumed when a surrender takes place; and when the reversioners come in, they come in in their own right, as heirs of the last owner, and not as transferees from the widow. The principle is not displaced by a reasonable provision being made out of the estate for the maintenance of the widow. Hence there is no scope in such a case for the application of the doctrine of estoppel or election. [P 431 C 1, 2; P 432 C 1]

P. Satyanarayana — for Appellant.

K. Kotayya — for Respondents.

Krishnaswami Ayyangar J. — One Venkatanarasimayya died in 1887, leaving him surviving his widow Lakshmamma who succeeded to his properties for a limited estate under Hindu law. In 1923, Lakshmamma executed a deed of surrender by which she relinquished in favour of the then nearest reversioners, the entire estate inherited by her from her husband. The reversioners were Veeraraghavayya and Narayanayya. The deed recites that she had previously received from the reversioners a sum of Rs. 200 for necessary purposes. She also received for her maintenance a further sum of Rs. 300 from one of them—Veeraraghavayya—at the time of the registration of the deed. Of the several properties included in the surrender, the suit property was one, though at the time the title to it was under dispute in a suit then pending between Veeraraghavayya on the one side and the widow and Narayanayya on the other. In that suit Veeraraghavayya denied that it formed part of Venkatanarasimhayya's estate and asserted that it was really his own. Subsequent to the surrender, the two reversioners effected a partition of the properties surrendered, but the suit property was not included in the division. It was for a partition of this property said to have been left undivided that the suit out of which the present appeal has arisen, was instituted by respondent 1, Narayanayya in the Court of the District Munsif of Ongole. He alleged that there was an oral arrangement between him and Veeraraghavayya for the specific allotment of particular shares in the property to each of the two sharers, though effect had not been given to it by actual mutation of possession. The contesting defendant was the appellant who is the representative-in-interest of Veeraraghavayya.

The District Munsif held that the oral arrangement set up by the respondent was not true, but none the less decreed partition, on the ground that the property was the common property of the two reversioners still remaining to be divided between them. Defendant 1, who stood in the position of an assignee from Veeraraghavayya, appealed to the subordinate Judge of Bapatla. The learned Judge allowed the appeal and dismissed the suit. A second appeal was then filed in this Court by Narayanayya. Patanjali Sastri J., who heard it, was of opinion that the decision of the subordinate Judge was incorrect, and he accordingly allowed the appeal and restored the decree of the District Munsif. Defendant 1, who was respondent 1 in the second appeal has preferred this Letters Patent appeal in pursuance of the leave granted to him by the learned Judge. The subordinate Judge has found that the disputed property did not form part of Venkatanarasimhayya's estate, but belonged absolutely to Veeraraghavayya in his own independent title and was, and continued to be in his possession from a date anterior to the surrender. The subordinate Judge was also of opinion that the possession of Veeraraghavayya being a possession held by him in his own right was adverse to Lakshmamma. From these findings, which are binding on us, it is clear that the suit

property should not have been included in the surrender. The reason for the inclusion is, however, obvious. The parties had apparently in mind the rule of Hindu law that for a surrender to be operative it must be complete, that is, it must be of the whole estate. They were afraid of leaving out the suit property which was under litigation at the time. For if it should ultimately turn out that it did in fact form part of the estate, the surrender would be open to the attack that it was partial and therefore invalid. The judgment of Patanjali Sastri J., is entirely based on the view that the rule of estoppel enunciated by the Court of appeal in (1897) 2 Ch 86[1] is applicable to the facts of this case, with the result that he held that the appellant is precluded from putting forward Veeraraghavayya's independent title to the property. The rule is stated in the following words by Lopes L. J.:

> A person having no title to land settles it on *A* for life with remainder to *B*. *A* enters and takes possession and deals with the property as tenant for life ; that person is estopped from telling the truth—his mouth is shut ; he has availed himself of the settlement for the purpose of obtaining possession of the land, and he cannot afterwards seek to invalidate that which enabled him to obtain possession, and this though subsequently he may have acquired a good title. If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed though it did not operate to pass the land in question and if he remains in possession till twelve years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed.

From this statement of the law, it is plain that it is an essential condition for the application of the doctrine, that the person sought to be estopped or his predecessor-in-interest must have obtained possession of the property, under the deed. It is also plain that both in (1897) 2 Ch 86[1] and (1874) 9 Q B 48[2] which was cited in it with approval, the party estopped did not have and did not profess to have any title to the property other than the title he derived from the deed. But the facts of the case before us are wholly different. Veeraraghavayya did not obtain his title under the deed of surrender. Neither did he derive his possession from it. Therefore we consider that the necessary conditions for the application of the rule of estoppel enunciated in (1897) 2 Ch 86[1] are here absent. As we understand his judgment, Patanjali Sastri J. appears to consider that because Veeraraghavayya had approbated the transaction by receiving a substantial benefit under the deed, in the shape of a share in the admitted properties of the estate, he should not be permitted to reprobate it in so far as it purported to convey the suit property even though that property was really his own. But this is a principle different from that which formed the basis of the decision in (1897) 2 Ch 86[1] in which the estoppel was held to arise in respect of the very property received under the grant, and not belonging to the claimant otherwise. The learned Judge here appears to have in mind the doctrine of election which is a different aspect of estoppel, though it is also founded on the same rule, namely the rule against permitting a party to approbate and reprobate the same transaction.

The rule of election is embodied in S. 35, T. P. Act, in regard to deeds, and in Ss. 180 to 190, Succession Act, in regard to wills. To invoke this doctrine we must have a will or a deed which conveys title to a person in properties other than those belonging to himself, before he can be put to election. Here arises a common question as important for the application of the rule in (1897) 2 Ch 86[1] as it is for the application of the principle of election. Does a surrender by a Hindu widow to her immediate reversioners amount to a conveyance, and to a conveyance by her of her property to the surrenderees ? We are clearly of opinion that it does not. It is settled that the true view of surrender under the Hindu law is that it is a voluntary act of self-effacement by the widow, having the same consequence as her death, in opening up the succession to the next heirs of the last male owner. The intermediate estate is merely extinguished and not transferred and the law then steps in to accelerate the succession so as to let in the next reversioners. The surrender conveys nothing in law ; it is purely a self-effacement, which must of necessity be complete; for as the Privy Council has said, there cannot be a widow partly effaced, and partly not, just as there cannot be a widow partly dead, and partly alive. The fiction of a civil death is thus assumed when a surrender takes place; and when the reversioners come in, they come in in their own right, as heirs of the last owner, and not as transferees from the widow. The principle is not displaced by a reasonable provision being made out of the estate for the maintenance of the widow, as it is settled, that a reservation of this character does

1. (1897) 2 Ch 86 : 66 L J Ch 604:76 L T 700 : 45 W R 685, Dalton v. Fitzgerald.
2. (1874) 9 Q B 48 : 43 L J Q B 4 : 29 L T 459: 22 W R 206, Board v. Board.

not detract from the validity of the surrender. We can see no objection to such a provision taking the form of a lump payment by the reversioners, or being fixed, if fixed bona fide, by bargain between the surrendering widow and her reversioners. Indeed it is difficult to imagine how else there could be a satisfactory arrangement for the quantum of the maintenance being duly fixed. What is important however to remember is that a subsidiary arrangement of the kind confined only to maintenance cannot affect the legal character of the main transaction, which still remains a surrender; it extinguishes the widows title, and does not convey it.

From what has been said it is clear that there is no scope here for the application of the doctrine of estoppel or election. We must not in this connexion omit to notice another difficulty in applying the rule against approbating or reprobating, to a transaction by way of surrender. Now it is open to a legatee or donee under an instrument, to elect to retain his own property to himself and refuse to take a benefit in other properties of the giver at the expense of what is his own. If he so elects to whom does the property given go? In an ordinary case, it reverts back to the transferor or if he is dead, to his representatives. But in the case of a surrender under Hindu law, it cannot go back to the widow, as ex hypothesi who is already civilly dead; and if it goes back to the heirs of her husband, all of them including him who refused the gift, would take the property by inheritance, election or no election. It would thus appear that the peculiar transaction known as a surrender to Hindu law does not admit of the application of the rule of election. For the reasons explained, we are unable to concur in the conclusion reached by Patanjali Sastri J. that the appellant is estopped from relying on Veeraraghavayya's title. The result is that the appeal succeeds and is accordingly allowed with costs here and in the second appeal.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 432

WADSWORTH AND PATANJALI SASTRI JJ.

Civil Revn. Petn. No. 2563 of 1939, Decided on 22nd October 1940.

Rama Pattar's son, Parameswara Iyer

v.

Kootallor Manakkal Moopil Stanom Bhramdathan Nambudripad Manager Narayanan Nambudripad's son, Narayanan Nambudripad.

Madras Agriculturists' Relief Act (4 of 1938), S. 15 — To invoke S. 15 (1) rent must be payable by agriculturist — Agriculturist obtaining from tenant assignment of land on which rent was due after Act came into force — Assignee cannot claim benefit of S. 15 (1).

Section 15 (1) requires that there should be rent outstanding on the date of the commencement of the Act which rent must be, as on that date, payable by an agriculturist. Consequently, where an agriculturist obtains from a tenant an assignment of land on which the rent was due on 1st June 1938, that is after the Act came into force, the tenant being his assignor on the date of the commencement of the Act, no rent can be said to be payable by an agriculturist in respect of that land on the date of the commencement of the Act and the mere fact that the land was assigned after the Act came into force to an agriculturist cannot give the latter the benefit of S. 15 : AIR 1941 Mad 201, *Expl.* and *Rel. on.* [P 432 C 2]

K. P. Ramakrishna Iyer — for Petitioner.

D. H. Nambudripad — for Respondent.

Wadsworth J.—This petition arises out of the dismissal of an application under S. 15 (4) of the Madras Act, 4 of 1938. The petitioner who is an agriculturist obtained an assignment of the land on which the rent was due on 1st June 1938, that is to say, after the Act came into force. On the date of the commencement of the Act the tenant was his assignor. The latter is admittedly not an agriculturist. The petitioner claims the benefits of S. 15 of the Act on the ground that he is an agriculturist and has deposited into Court the arrears due for faslis 1346 and 1347. We are of opinion that this petition cannot succeed. We have already expressed the view in (1940) 2 M L J 935[1] that S. 15 (1) requires that there should be rent outstanding on the date of the commencement of the Act which rent must be, as on that date, payable by an agriculturist. In that case we were dealing with a slightly different contention from that now urged, but the essential question was: What is the date with reference to which rent must be payable by an agriculturist to a landholder in order to satisfy the conditions of S. 15 (1) of the Act? Clearly, in the present case, at the commencement of the Act there was no rent payable by an agriculturist in respect of this land and the mere fact that the land has been assigned after the Act came into force, to an agriculturist cannot give the latter the benefit of S. 15. The civil revision petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

1. ('41) 28 A I R 1941 Mad 201 : (1940) 2 M L J 935, Amad Koya v. Appu.

A. I. R. 1941 Madras 433

WADSWORTH J.

Saraswathi Ammal — Petitioner

v.

Arabusa Sahib — Respondent.

Civil Revn. Petn. No. 1704 of 1940, Decided on 11th December 1940, to revise order of Dist. Court, Coimbatore, D/- 11th March 1940.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 8 (1) — Amount realized in execution after 1st October 1937 cannot be appropriated to interest accruing due before 1st October 1937.

An amount realized in execution of the decree after 1st October 1937 cannot be appropriated by the decree-holder to interest accruing due before 1st October 1937 so as to nullify the effect of the application of S. 8 (1) of the Act : A I R 1941 Mad 226, *Rel. on.* [P 433 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 20—Period of limitation begins to run with grant of stay.

The period of limitation prescribed in section 20 begins to run with the grant of a stay. [P 433 C 2]

(c) Madras Agriculturists' Relief Act (4 of 1938), Ss. 19 and 20 — Dismissal of application under S. 20 for default does not bar application under S. 19.

The dismissal of the application under S. 20 for default does not amount to a binding adjudication. When an agriculturist allows his application under S. 20 to be dismissed because it is not necessary, such a dismissal would not bar the substantive application under S. 19. [P 433 C 2; P 434 C 1]

N. Sivaramakrishna Iyer — for Petitioner.

R. Ramamurthy Iyer — for Respondent.

Order. — This petition raises questions under Madras Act, IV of 1938 and arises out of an application under S. 19 of that Act. The lower Court held that an amount realized in execution of the decree after 1st October 1937 could not be appropriated by the decree-holder to interest accruing due before 1st October 1937 so as to nullify the effect of the application of S. 8 (1) of the Act. The appellate Court took the view that when the decree-holder had appropriated to interest money received after 1st October 1937, to re-adjust that money to principal after wiping off interest which accrued due on 1st October 1937 would amount to the ordering of a refund which would be opposed to the provisions of sub-s. (4) of S. 8. That decision is clearly erroneous in the light of the Bench decision in (1940) 2 M L J 547[1] and the decision of the District Munsif is correct on this point. The respondent, however, seeks to support the order of the learned additional District Judge on another ground. The proceedings under Act IV started with an application under S. 20 filed on 22nd August 1938 at a time when the sale in execution was pending. This application was posted for hearing to 5th September 1938 and the sale was adjourned to the same date. On 5th September 1938, the application under S. 20 was dismissed for default. The application under S. 19 was not filed until 29th October 1938. It is contended that the applicant cannot be in a better position when his application under S. 20 has been dismissed than he would have been if a stay had been ordered in the first instance and also that the dismissal of his application under S. 20 bars an application under S. 19. It seems to me that there is no substance in either of these contentions. It was decided by a Bench in I L R (1939) Mad 886[2] that the period prescribed under S. 20 is a period of limitation arising in the circumstances contemplated in that section, that is to say, on the grant of a stay; and the learned Chief Justice observes :

> So long as a debt is enforceable a debtor has a right to apply at any time for the scaling down of the debt, except in the circumstances contemplated by S. 20.

Quite clearly, the period of limitation prescribed in S. 20 begins to run with the grant of a stay. There was no grant of stay in this case. It cannot be held that the dismissal of the application under S. 20 for default amounts to a binding adjudication that the applicant is not entitled to the benefits of the Act. An application under section 20 is heard by the executing Court; whereas an application under S. 19 is heard by the Court which passed the decree. The executing Court has to be satisfied prima facie that the applicant is a person who would be entitled to present an application under S. 19. But S. 20 does not contemplate any final decision on the question of the right of the applicant to apply under S. 19. Moreover, when the applicant allows his application under section 20 to be dismissed for default, he is clearly abandoning only his right to a stay. That abandonment may be due to many causes. For instance, the execution may have stopped for some reasons quite apart from the proceedings under Act IV. In such a case, there is no point in the applicant going on with his proceedings under S. 20 if time is available to him without such proceedings for preparing his application to the Court which passed the decree under S. 19. It would be

1. ('41) 28 AIR 1941 Mad 226 : (1940) 2 M L J 547, Suryanarayanamurthy v. Viramma.

2. ('39) 26 AIR 1939 Mad 613 : 186 I C 379 : I L R (1939) Mad 886 : (1939) 2 M L J 308, Kumaraswami Pillai v. Thiruvengadatha Ayyangar.

impossible to hold that, when an agriculturist allows his application under S. 20 to be dismissed because it is not necessary, such a dismissal would bar the substantive application under S. 19. In the result therefore I allow the revision petition with costs throughout and restore the order of the District Munsif.

C.R.K./D.S. *Petition allowed.*

A. I. R. 1941 Madras 434

KING J.

M. Muni Reddy — Appellant

v.

M. Muni Reddy — Respondent.

Appeals Nos. 116 and 118 of 1940, Decided on 31st January 1941, against appellate order of Dist. Court, Chittoor, D/- 11th April 1940.

Madras Debt Conciliation Act (11 of 1936), S. 18—Debtor having several creditors — Majority of them coming to settlement — Those refusing to agree to settlement already holding decrees and proceeding to execute them — They held entitled to execute their decrees against whole of debtor's assets.

A debtor who made an application under the Act had ten creditors and of these ten, eight came to an amicable settlement with him, the eight representing more than one half of the total indebtedness of the debtor. Under S. 14 the settlement was reduced to writing. The remaining two who refused to agree to the settlement already held decrees as evidence of the debts due to them from the debtor. A certificate was given to the debtor under S. 18. The recalcitrant creditors proceeded to execute their decrees :

Held that they were entitled to execute their decrees against the whole of the assets of the debtor. [P 435 C 1]

K. Bhashyam Ayyangar and T. R. Srinivasan — for Appellant.

B. C. Seshachala Iyer, P. S. Ramachandran and S. Venkatachalam — for Respondent.

Judgment. — These appeals involve the interpretation of certain sections of the Madras Debt Conciliation Act. The appellant is a debtor who made an application under the Act. He had ten creditors and of these ten, eight came to an amicable settlement with him, the eight representing more than one half of the total indebtedness of the appellant. Under S. 14 therefore the settlement was reduced to writing. The remaining two who refused to agree to the settlement already held decrees as evidence of the debts due to them from the appellant. A certificate was given to the debtor under S. 18. The recalcitrant creditors proceeded to execute their decrees and the question now is whether they are entitled to execute their decrees against the whole of the assets of the appellant, which amount to Rs. 5125 standing to his credit in the Co-operative Central Bank, or whether they are to be confined to such portions of those assets as have not been earmarked by the settlement under S. 14 for the benefit of those creditors who agreed to the settlement. The learned District Judge has examined S. 18 of the Act and pointed out that it does not definitely deal with the situation now before us.

The effects of granting to the debtor a certificate that creditors have unreasonably refused to come to an amicable settlement with him are set out in sub-ss. (2) and (3) of S. 18. They deal with the refusal by the Court to grant costs to any such creditor who afterwards sues for his debt or to grant any interest in excess of simple interest at six per cent. and with a restriction against the rights of such a creditor, when he has obtained a decree after the settlement, of proceeding against any of the assets set apart in the settlement until those creditors who agreed to the settlement have been fully satisfied. As the learned District Judge has pointed out, nothing is said in S. 18 about the position of a creditor who at the time of the settlement to which he refused to agree has already obtained a decree. It is argued in appeal that it was unnecessary to make any such provision in S. 18, as the effect of sub-s. (2) of S. 14 was to constitute a charge in favour of such property as is earmarked in the settlement. That sub-section enacts that an agreement made under sub-s. (1) shall within 30 days from the date of the making thereof be registered under the Registration Act and it shall then take effect as if it were a decree of a civil Court and be executable as such. Of course the agreement definitely prescribes what assets of the debtor shall be available for the creditors, but it does not seem to me that that is enough to consitute a charge which is to be binding upon all the world and in particular upon the non-consenting creditors who have already obtained decrees. If that were so, I feel sure that it would have been clearly expressed in the Act itself and not left to deduction from arguments.

The very fact that S. 18 does deal with certain contingencies and not with others seems to me to be an indication that the contingencies not dealt with were deliberately excluded from the effect of the section. It would have been easy for the Legislature to have enacted that where a Debt Conciliation Board was dealing with debts due to

several creditors and was of the opinion that the scheme proposed by the debtor was a reasonable one which all the creditors ought to accept, then if a majority of the creditors accepted it, the scheme should be binding upon all the creditors. There is a provision of this nature, for instance, in S. 38 (2), Provincial Insolvency Act and the omission of any such provision in the Debt Conciliation Act is a very strong indication that those creditors who do not consent to the settlement are not to be adversely affected by their failure to consent in any other way than that laid down explicitly by the Act itself. I am accordingly of opinion that the learned District Judge has rightly held that the Act imposes no obstacle against the execution petitions of the respondents. These appeals therefore fail and must be dismissed with costs. Leave to appeal is refused.

C.R.K./D.S. *Appeals dismissed.*

A. I. R. 1941 Madras 435

KRISHNASWAMI AYYANGAR J.

Messrs. The Stock and Share Exchange Bureau, Rawalpindi by Proprietor Prof. N. L. Kashyap — Petitioner

v.

Messrs. Kothari & Sons — Respondents.

Civil Revn. Petn. No. 837 of 1938, Decided on 26th November 1940, to revise order of Small Cause Court, Madras, D/- 30th June 1938.

(a) Limitation Act (1908), Art. 164—Summons served too late—It is not case of summons duly served.

Where the summons is served on a defendant too late to afford him a sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons 'duly served,' within the meaning of Art. 164. [P 436 C 1]

(b) Limitation Act (1908), Art. 164 — 'Knowledge' is not same thing as 'means of knowledge.'

The word 'knowledge' appearing in Art. 164 cannot be interpreted as equivalent to 'means of knowledge.' The two things are quite distinct and to say that they mean the same thing is doing violence to the language of the statute. [P 436 C 1]

S. Govind Swaminathan — for Petitioner.

John and Row — for Respondents.

Order.—This is a petition by the defendant in a suit on the file of the Court of Small Causes at Madras to revise an order passed by that Court refusing to set aside an ex parte decree passed against him on 30th April 1938. The suit was filed on 26th January 1938 and the first date fixed for hearing was 2nd March 1938. A summons was taken out for service on the defendant with reference to the hearing of 2nd March 1938 but it was not served. The suit was adjourned to 22nd March 1938 for which date a fresh summons was taken out. Unfortunately, this summons was served upon the defendant only on 29th March which is, it will be noticed, a week later than the date fixed for hearing. No further summons appears to have been taken out but on 30th April 1938, the suit was taken up and an ex parte decree was passed against the defendant who did not appear on that date. On 15th June 1938, the defendant applied to the Court for setting aside the ex parte decree with the result already mentioned.

The reason for the refusal of the learned Judge of the Court of Small Causes to set aside the ex parte decree was that the application was barred by limitation under Art. 164, Limitation Act, 1908. In his affidavit in support of the application, the defendant urged—and it was not denied—that he had knowledge of the decree only on 10th May 1938. If the period of 30 days fixed by the Limitation Act is calculated from 10th May 1938, the application would be in time as 9th June 1938, which was the last day of the period, was a holiday and the Court did not sit until 15th June 1938. But the learned Judge was of opinion that when the summons was served upon the defendant on 29th March 1938 he became aware of the institution of the suit and he ought to have taken proper steps for ascertaining the final date for hearing. The learned Judge was apparently of the opinion that if steps had been taken and the enquiry proceeded, the defendant would have known that the suit had been fixed to 30th April 1938. The learned Judge evidently regards this date as the starting point for the calculation of the period of limitation. I am unable to concur in this view. Article 164, Limitation Act, which is the article applicable to the present case fixes the point of time from which limitation is to run as follows :

The date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree.

There are two alternative points of time indicated by the article, (1) the date of the decree when a decree is passed after the service of summons or (2) the date on which the defendant had knowledge of the decree when the decree is one which had been passed without summons having been duly served upon him. The petitioner contends that it is the second clause that has application here, for according to him, this is a case

where the summons was not duly served. He further contends that what is meant by knowledge in the article is actual knowledge and not merely the means of knowledge. The article has reference to an application made under O. 9, R. 13, and it is therefore necessary to go to that rule for understanding the proper meaning to be given to the expression 'duly served' both in that rule and in the article under consideration. I am aware that the same expression also occurs in O. 5, R. 19 but the meaning of the expression for the purpose of that rule, different though it may be, can have no bearing on the construction of the article. The expression 'duly served,' if literally understood, would seem to have reference rather to the mode of service, than to the propriety of the summons where it fixes a day of hearing, on which it would be impossible for the defendant to appear. But the former can hardly be the sense in which the expression is used in O. 9, R. 13 of the Code. It is conceded, and I think rightly, that where the summons is served on a defendant too late to afford him a sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons 'duly served,' within the meaning of the section. In the present case, the date of the hearing was 22nd March 1938 and the defendant was served, as I have said, a week later on 29th March 1938. I am therefore satisfied that this is a case where the summons was not duly served.

The only question then is whether the learned Judge of the Court of Small Causes is right in interpreting the word 'knowledge appearing in the article as equivalent to 'means of knowledge.' The two things are, in my opinion, quite distinct and to say that they mean the same thing is doing violence to the language of the statute. The mere existence of the means of knowledge may in some cases lead irresistibly to the inference that the party had actual knowledge. But that is not the case here. The petitioner might have thought in perfect good faith, that in view of the late service, the Court would issue fresh summons fixing another date for the hearing. That is what I consider the Court should have done in the present case. The omission on the part of the petitioner to prosecute inquiry which might have led to a knowledge of the date of hearing cannot be regarded as culpable or wilful, so as to carry with it the consequences of knowledge. In the present case, the defendant must be held to have had knowledge of the decree only on 10th May 1938, and his application was therefore within time. The order of the learned Judge cannot therefore be sustained and must be set aside. But this is a case in which it is eminently desirable that the defendant should be put upon terms. I see from an order passed by Lakshmana Rao J. on 18th October 1938 that the stay of execution of the decree pending the disposal of the petition was granted on the condition that the petitioner deposited into Court on or before 18th November 1938 the sum of Rs. 2200. Learned counsel for the respondent informs me that this order has not been complied with. In the circumstances of this case, I direct that the petitioner should deposit into Court a sum of Rs. 2200 within a fortnight peremptory from the date; in default of such deposit, the revision petition will stand dismissed with costs. If the defendant makes the deposit within the time limited, the learned Judge in the Court below will take the suit back to his file and dispose of it according to law.

C.R.K./D.S. *Order accordingly.*

A. I. R. 1941 Madras 436

WADSWORTH J.

Thayyita Kalliani — *Petitioner*

v.

Nherakkayyil Kanaran and others — *Respondents.*

Civil Revn. Petn. No. 1994 of 1939, Decided on 20th December 1940, to revise order of Dist. Munsif, Badagara, D/- 13th April 1939.

Madras Agriculturists' Relief Act (4 of 1938)— Agriculturist tenant can get benefit of Act even if there is non-agriculturist co-tenant—But rent cannot be scaled down against landlord if landlord is melcharthdar.

An agriculturist tenant can get the benefit of Act 4 of 1938 by paying the rent on the holding even if there is a co-tenant who is not an agriculturist. But if landlord is a melcharthdar he is not a jenmi or intermediary and the rent cannot be scaled down as against him. [P 436 C 2; P 437 C 1]

P. Govinda Menon — for Petitioner.

K. Kuttikrishna Menon — for Respondents.

Order. — The basis of the decision of the lower Court is erroneous. There appears to be no reason why an agriculturist tenant should not get the benefit of Act, 4 of 1938, by paying the rent on the holding for Faslis 1346 and 1347, merely because there is a co-tenant who is not an agriculturist. But there is an obstacle to the petitioner's success which was raised, though not decided by the lower Court. It appears that the landlord in this case is a melcharthdar and if so

he is not a jenmi or intermediary and the rent cannot be scaled down as against him. The petition is therefore dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

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* A. I. R. 1941 Madras 437

KRISHNASWAMI AYYANGAR J.

Raju Chettiar and another—Appellants

v.

Ramakkal and another — Respondents.

Appeal No. 45 of 1939, Decided on 3rd December 1940, against order of Sub-Judge, Dindigul, D/- 22nd November 1938.

* Civil P. C. (1908), O. 33, R. 8 and O. 17, R. 1 — Pauper plaintiff can be directed to pay day costs as condition precedent to further hearing of suit — Such condition can be enforced by dismissal of suit.

The meaning of R. 8 of O. 33 is clear that when permission is given to a party to sue as a pauper he gets immunity from payment of the court-fee on the plaint and also on any petition, appointment of a pleader, or other proceeding connected with the suit. The pauper plaintiff is not excused from payment of the fees payable for service of process nor is there anything in the language of the rule to warrant the idea that the pauper plaintiff is exempted from liability for the day costs, if and when the Court directs that the same should be paid. When the Court finds a plaintiff constantly defaulting in being ready for the trial it will be justified in directing the payment of the day costs as a condition precedent to the further hearing of the suit. When such a condition is inserted in the order it is valid and could be enforced by the dismissal of the suit : A I R 1922 Bom 385, *Dissent.*; A I R 1928 Rang 306; 21 Mad 403 and A I R 1928 Mad 786, *Rel. on.* [P 437 C 2; P 438 C 1,2]

K. Rajah Aiyar and V. Seshadri—for Appellants.

R. Desikan and G. K. Damodara Rao — for Respondents.

Judgment. — This is an appeal against the order of the subordinate Judge of Dindigul, setting aside the decree passed by the District Munsif of Periyakulam dismissing the suit of the appellant on the ground that she had failed and neglected to perform a condition precedent on the performance of which she was granted an adjournment of the suit. The facts are these: Respondent 1 filed the suit out of which the present appeal has arisen for a declaration that the decree and subsequent proceedings in O. S. No. 156 of 1930 on the file of the District Munsif's Court, Periyakulam, are void and not binding on her and for recovery of possession of certain immovable properties together with mesne profits. She obtained leave to file the suit in forma pauperis. The defendants contested the suit and issues were framed on 20th August 1937 embodying the questions in dispute. The trial was fixed for 12th October 1937. On that day the plaintiff was not ready and the suit was adjourned to 24th November 1937. The plaintiff was again unready and the suit had again to be adjourned to 21st January 1938. On 21st January 1938, the plaintiff was once again not ready and the Court was obliged to adjourn the suit to 8th February 1938. On that day it appeared that the plaintiff was again not ready and she prayed for a further adjournment of the suit. The adjournment was granted but the plaintiff was directed as a condition precedent to pay two sets of day costs of Rs. 5 each, the idea being that the day costs should be paid to the contesting defendants on or before the adjourned date. Subject to the said condition the suit was adjourned to 17th February 1938. Neither on that day nor on any day previous did the plaintiff pay the costs ordered and the District Munsif therefore dismissed the suit. An appeal was preferred to the subordinate Judge of Dindigul who reversed the decree of the District Munsif on the ground that as the appellant was a pauper she should not have been asked to pay the day costs and that her suit ought not to have been dismissed for non-payment of the same. For this view the learned Judge relied upon the decision of the Bombay High Court reported in 47 Bom 104.[1] The only relevant provision of the Code of Civil Procedure on the point is that contained in O. 33, R. 8, which says :

> Where the application (application for leave to sue as a pauper) is granted, it shall be numbered and registered and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fee payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

The meaning of the rule is clear that when permission is given to a party to sue as a pauper he gets immunity from payment of the court-fee on the plaint and also on any petition, appointment of a pleader, or other proceeding connected with the suit. The pauper plaintiff is not excused from payment of the fees payable for service of process nor is there anything in the language of the rule to warrant the idea that the pauper plaintiff is exempted from liability for the day costs, if and when the Court directs that the same should be paid. The decision of the Bombay High Court in the case cited appears to lay down the proposi-

1. ('22) 9 A I R 1922 Bom 385 : 69 I C 207 : 47 Bom 104 : 24 Bom L R 924, Ambaji Balawant Rao v. Hanumantarao Bajirao.

tion that once a person is found to be a pauper and allowed to sue as such the Court has no right to direct the pauper to pay the costs in cash. The Court considered that such an order was 'wholly improper.' With very great respect I am unable to follow this decision. The learned Judges have not taken into consideration the effect of the language employed in O. 33, R. 8, Civil P. C., in coming to their conclusion. If the language of the rule is considered it will be seen that an order permitting a party to sue as a pauper does not operate to confer a general immunity from liability to pay costs or other fees except those specifically mentioned.

The same question arose in 6 Rang 561,[2] where it appeared that an adjournment was granted to the plaintiff on condition that he paid the costs. In default the suit was to stand dismissed. The plaintiff not having paid the costs as directed by the order of the Court the suit was dismissed. It was argued on the authority in 47 Bom 104[1] that the direction that a pauper plaintiff should pay the costs as a condition of the adjournment was wrong and should be ignored. The learned Judges expressed the opinion that the facts in the Bombay case were not parallel to those before them and that they were unable to hold that an order making the payment of costs a condition of the adjournment was unjustified. I am of the opinion that the order of the Court which directed respondent 1 to pay the costs specified in the order as a condition precedent for the further hearing of the suit is not illegal. But it was urged that even assuming that the Court had the power to make the order in question it was not right for the Court to dismiss the suit but that the Court should have merely gone on to try it. Order 17, R. 1, Civil P. C., says :

(1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment.

It is clear from sub-r. (2) that the Court is given ample discretion as regards the conditions subject to which it may adjourn the hearing of the suit in so far as the costs occasioned by the adjournment are concerned. I am not prepared to say that when the Court finds a plaintiff constantly defaulting in being ready for the trial it will not be justified in directing the payment of the day costs as a condition precedent to the further hearing of the suit. When such a condition is inserted in the order it is valid and could be enforced by the dismissal of the suit. The question whether in such circumstances the Court can dismiss a suit arose for consideration in 21 Mad 403.[3] In that case it appeared that an application for the grant of a succession certificate to a widow was opposed by a brother of the deceased. On the day of the hearing the applicant was ready to proceed but the brother applied for an adjournment and it was granted, the Court directing him to pay the costs of the adjournment. On the adjourned date the order for payment of costs not having been complied with the Court proceeded under S. 158, Civil P. C., (corresponding to O. 17, R. 3 of the present Code) and issued a certificate in favour of the applicant. An appeal was preferred to the High Court and the question was as to whether the order of the lower Court not made on the merits could be sustained on the sole ground that there was a default in the payment of costs by the appellant. The learned Judges observed :

Such costs would ordinarily be recoverable in execution, and, in the absence of a specific order making their payment a condition precedent to hearing the counter-petitioner's evidence, the counter petitioner's failure to pay would not render S. 158, applicable.

It is clear from this case that there is nothing illegal in the payment of costs being made a condition precedent and in a case where that is done there is nothing wrong in the Court giving effect to it by the dismissal of the suit itself. To the same effect is another decision of this Court in AIR 1928 Mad 786.[4] In that case the defendant who had not been ready on more than one occasion applied for an adjournment to enable him to cross-examine the plaintiff's witnesses. The application was granted subject to the costs of the other side being paid before the date of the next hearing. The costs were not paid and the Court refused to allow the defendant to cross-examine the plaintiff's witnesses. An appeal against the order of the trial Court was preferred to this Court. Devadoss J. observed as follows :

When the Court grants an adjournment and directs the party applying for the adjournment to pay the costs of the other side before the date of the next hearing, it is well understood that unless the party ordered to pay the costs does pay before

2. ('28) 15 A I R 1928 Rang 306 : 114 I C 677 : 6 Rang 561, Lim Pin Sin v. Eng. Van Hock.

3. ('98) 21 Mad 403:8 M L J 189, Veerabhadrappa Chetti v. Chinnamma.

4. ('28) 15 A I R 1928 Mad 786 : 111 I C 168, Tatayya v. Venkatasubbaraya Sastri.

the date of the next hearing he would have no right to be heard.

These authorities warrant me in coming to the conclusion that it is competent to a Court when it finds that a condition precedent to the hearing of the suit had not been fulfilled, to dismiss the suit and this is precisely what has happened in the present case. The view of the learned subordinate Judge based upon the decision in 47 Bom 104[1] cannot therefore be sustained. The result is that this appeal is allowed and the decree of the District Munsif restored. The respondents will pay the appellant's costs in the appeal here. Leave refused.

C.R.K./D.S. *Appeal allowed.*

A. I. R. 1941 Madras 439

PATANJALI SASTRI J.

The Palghat Electric Corporation, Ltd., at Koppam, Palghat — Petitioner

v.

T. N. Veeraraghava Ayyar—Respondent.

Civil Revn. Petition No. 431 of 1937, Decided on 15th August 1940, to revise decree of District Munsif, Palghat, in S. C. S. No. 921 of 1935.

(a) Electric Rules — Palghat Corporation Rules, part 2 (e), R. 1—'Commercial premises' —Meaning of.

'Commercial premises' means in the context of the classification rules nothing more than premises used for the purposes of business. [P 439 C 2]

(b) Contract Act (1872), S. 72 — Voluntary payment—Excess payment made by consumer claiming commercial rate during period during which consumer's claim was under consideration is payment made under protest and not voluntary payment.

There were excess payments made by the consumer to the Electric Company from 14th February 1934 till 27th February 1935. The correspondence between the company and the consumer showed that the consumer claimed from the beginning of the period in question that he should be charged no more than the "commercial rate" for the supply of electric energy to his premises. The company replied that the consumer's request was under consideration and it was only in May 1935, more than a year after the consumer raised the question that the company definitely informed him that the premises could not be classed as commercial premises :

Held **that in these circumstances, the higher rate charged and paid in the meantime could only be regarded as payments made under protest and not voluntary payments.** [P 440 C 1]

(c) Contract Act (1872), S. 72—Overcharges—Recoverability—Overcharges are recoverable as 'money had and received.'

Overcharges made in violation of an obligation imposed upon public utility companies to charge only at certain specified rates are recoverable as money had and received : (1844) 7 Man & G 253, *Foll.*; A I R 1937 Mad 559, *Disting.* [P 440 C 1]

K. V. Gopalakrishna Nair — for Petitioner.

C. K. Viswanatha Aiyar — for Respondent.

Order.—This is a revision petition preferred by the Palghat Electric Corporation Ltd., against the decree directing the refund to the respondent, a consumer of electricity in Palghat town, of the overcharge alleged to have been collected from him. Two contentions have been urged for the petitioner, namely (1) that the premises where the respondent is running a coffee hotel cannot be regarded as "commercial premises" so as to fall under R. 1, cl. (e) of Part 2 of the rules relating to the terms and conditions under which the petitioner company supplies electric energy in the town of Palghat and (2) that the alleged excess payments made by the respondent to the petitioner company from 14th February 1934 till 27th February 1935 were voluntary payments and therefore are not recoverable. Learned counsel for the petitioner argued that the term "commercial premises" must be understood in the light of the well-marked distinction between the terms "commerce" and "trade." "Commerce," it was said, denotes large scale import and export dealings with foreign countries, while "trade" signifies mercantile operations on a smaller scale within the country itself. Counsel referred in support of this contention to Wharton's Law Lexicon and Oxford English Dictionary. I am unable to accept this contention. Whatever may be the distinction in meaning between the terms "commerce" and "trade," I cannot agree that the term "commercial premises" used in classifying tenements for purposes of fixing rates for supply of electric energy was intended to be understood in contradistinction to "trade premises." I am of opinion that the classification in the rule is clearly intended to include premises where business such as that of the respondent is carried on. It would indeed be odd if the provision of the cheaper rate of charge were intended for big export and import houses of which there may be few or none in the place which the petitioner's undertaking was intended to serve and not for the benefit of the numerous shops and other business premises which are to be found in the locality. The adjective "commercial" is commonly used in a wide sense, without any exclusive reference to large scale international operations of export or import. I think therefore that "commercial premises" means in the context of the classification rules nothing more than premises used for purposes of business.

The second contention of petitioner's learned counsel seems to me to be equally untenable. The correspondence that passed between the company and the respondent (Exs. I, I-A, II and II-A) leaves no room for doubt that the respondent claimed from the beginning of the period in question that he should be charged no more than the "commercial rate" of three annas per unit and was not prepared to pay anything more for the supply of electric energy to his premises. The company replied that the respondent's 'request' was under consideration and it was only in May 1935, more than a year after the respondent raised the question, that the company definitely informed him that his premises could not be classed as "commercial premises." In these circumstances, the higher rate charged and paid in the meantime could only be regarded as payments made under protest and not voluntary payments. The company were admittedly bound by the terms of their undertaking to supply electric energy according to the rates provided for the various classes of premises as classified in these rules, and if the respondent's premises fall within the description of "commercial premises," he was entitled to claim supply of energy at the favourable rate of three annas per unit and any sum charged in excess must clearly be refunded to him. It is settled law that overcharges made in violation of an obligation imposed upon public utility companies to charge only at certain specified rates are recoverable as "money had and received," : *see* (1844) 7 Man & G 253,[1] where it was held that payments, "made in order to induce the company (a railway company) to do that which they were bound to do without them," were not voluntary.

The petitioner's counsel relied upon 1937 M W N 293,[2] which related to payments of profession tax to a Municipal Council. The circumstances in which the payments were made are clearly distinguishable from those of the present case. The decision therefore has no application. The civil revision petition fails and is dismissed with costs.

C.R.K./N.K. *Application dismissed.*

1. (1844) 7 Man & G 253 : 7 Sc (N R) 885 : 13 L J C P 105: 8 Jur 194, Parker v. Great Western Railway Co.
2. ('37) 24 AIR 1937 Mad 559 : 169 I C 330:(1937) 1 M L J 496 : 1937 M W N 293, Municipal Council, Rajahmundry v. Subba Rao.

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* A. I. R. 1941 Madras 440

WADSWORTH AND PATANJALI SASTRI JJ.

Desayi Venkatranga Reddi and others — *Appellants*

v.

Paraku Chinna Sithamma and another — *Respondents.*

Appeal No. 51 of 1939, Decided on 31st October 1940, against order of District Court, Anantapur, D/- 9th January 1939.

* (a) Civil P. C. (1908), O. 21, R. 23 (1) and (2) and S. 11—Execution—Principle of res judicata applies though S. 11 does not—Judgment-debtor failing to appear in response to notice duly served — Order under R. 23 (1) is binding on parties so long as it is unreversed—Order under R. 23 (1) cannot be said to be automatic and therefore not binding—There is no difference between application dismissed after resulting in partial satisfaction of decree and one dismissed without fructification for applicability of principle of res judicata—Order under R. 23 (1) passed on judgment-debtor's failure to appear in response to notice and object—Order precludes judgment-debtor from raising plea of limitation in subsequent proceedings.

It is well settled that the principle of res judicata is applicable to execution proceedings, though S. 11 does not in terms apply : 6 All 269 (P C), *Rel. on.* [P 441 C 2]

An order under O. 21, R. 23 (1) in cases where the judgment-debtor appears and objects but the objections are overruled, being an appealable adjudication binding on the parties so long as it is unreversed, a similar order under R. 23 (1) in cases where the judgment-debtor does not choose to appear in response to the notice duly served on him, must be regarded as having the same effect and therefore can operate as res judicata between the parties. Consequently, there is no justification for the view that an order under R. 23 (1) 'has to be automatic' and that an order under R. 23 (2) alone amounts to an 'adjudication' such as would fall within the definition of a decree. Nor can there be any logical difference for the application of the principle of res judicata between an application which results in partial satisfaction of the decree and is then allowed to be dismissed, and one which is eventually dismissed without any 'fructification'. Therefore an order for execution made after notice to the judgment-debtor who does not appear and offer any objection precludes him from raising a plea of limitation in subsequent proceedings even though the application on which the order was passed does not fructify and is eventually struck off or dismissed : 8 Cal 51 (P C), *Expl. and Rel. on ;* A I R 1936 All 21 (F B), *Disapproved* ; 24 Mad 669, *Approved ; Case law referred.* [P 442 C 2 ; P 443 C 2]

(b) Hindu law — Debts — Father — Sons impleaded in suit against father and decree against son's shares obtained—Decree executable against father but becoming time-barred against sons — Decree-holder cannot proceed against sons' share in execution of decree against father—Sons' pious obligation must be deemed to have merged in decree.

A creditor who impleads the sons also in the suit against the father and obtains a decree against

their shares in the family estate, cannot claim to proceed against such shares in execution of the decree against the father, when it can no longer be executed directly against them owing to the bar of limitation. It is true that the liability of a son arising out of his pious obligation is distinct from that of his father though arising out of the latter's debt, and can be enforced against him by executing a decree obtained against the father alone against the entire family estate including the son's interest therein, provided of course that the debt is neither illegal nor immoral. But when the sons are joined in the suit and a decree is obtained binding their interest also, the claim against them based upon their pious obligation must necessarily be deemed to have been put in suit and merged in the decree, and the only mode of enforcing such claim is by executing the decree against them. The matter is no longer governed by the Hindu law but by the relevant provisions of the Code of Civil Procedure. [P 444 C 1]

Consequently, where a decree is obtained against the father and sons and the Court passes an order for the arrest of the father on an execution application by the decree-holder against the father alone which was obviously time-barred, and the father is precluded, by reason of his failure to appear and object, from raising plea of limitation, the decree though executable against the father cannot be executed against the sons as being barred by limitation against them : A I R 1938 P C 7, *Rel. on;* 27 Mad 243 (FB), *Expl., and Disting.*; A I R 1940 Mad 544, *Expl.*[P 443 C 2; P 445 C 2]

K. Srinivasa Rao — for Appellants.

P. Basi Reddi — for Respondents.

Patanjali Sastri J. — This is an appeal from an order of the District Court of Anantapur overruling certain objections raised by the appellants to the execution of a decree obtained by the respondents and allowing execution to proceed. The appellants are members of a Hindu undivided family, appellant 3 being the father and appellants 1 and 2 his minor sons. The decree passed against them directed delivery of possession of certain immovable properties and payment of a certain sum as mesne profits. The immovable properties have been delivered and the present execution proceedings relate to the recovery of the mesne profits. Under the decree, these were recoverable from appellant 3 personally and from the family properties of all the appellants. There have been numerous applications to execute the decree but none of them has so far proved fruitful owing mainly to the laches of the respondents themselves in the conduct of those proceedings. It is unnecessary, however, to set out all those proceedings for the purposes of this appeal and it is sufficient to refer to one of them, E. P. No. 5 of 1930, instituted against appellant 3 alone on 27th January 1930. It is not now disputed that this petition was barred by time but though notice to show cause why the decree should not be executed was duly served on appellant 3, he did not appear and oppose the application, and the Court ordered the issue of a warrant for his arrest on 22nd February 1930. The respondents, however, failed to pay the requisite fee for the issue of the process and the petition was dismissed on 10th March 1930. There was another application for execution put in 1933 within three years of the previous one and this also having been dismissed for default, the present petition, E. P. No. 86 of 1936, out of which these proceedings have arisen was filed on 7th October 1936. It may be mentioned here that though appellants 1 and 2 have also been made parties to this petition, it is not disputed that it is barred so far as they are concerned as they were not made parties to the earlier proceedings and indeed the respondents have given up their claim to execute the decree directly against their shares of the family properties. But in answer to appellant 3's plea of limitation, based upon E. P. No. 5 of 1930 having itself been filed beyond time, the respondents urge that arrest of appellant 3 having been ordered on that petition, he is precluded by the principle of res judicata from raising the plea, and the first question for determination is whether this contention is correct.

Now, it is well settled that the principle of res judicata is applicable to execution proceedings, though S. 11, Civil P. C. does not in terms apply : *see* 6 ALL 269.[1] But in view of the practice of the Courts, whenever an impediment arises to execution, to dismiss the application allowing the decree-holder to apply again, the question frequently arises as to how far orders passed on previous execution petitions which have been eventually dismissed can be held to preclude parties from raising in subsequent proceedings matters which were not expressly determined by the prior order. After an elaborate consideration of this question, Sulaiman C. J., laid down in 58 ALL 313[2] certain propositions the last of which is relevant to the present case and has been strongly pressed upon us by learned counsel for the appellants :

Where no objection is taken, but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of res judicata from raising the question of limitation later.

1. ('84) 6 All 269 : 11 I A 37 : 4 Sar 489 (PC), Ram Kirpal v. Rup Kuari.
2. ('36) 23 AIR 1936 All 21 : 160 I C 394 : 58 All 313 : 1935 A L J 1189 (FB), Genda Lal v. Hazari Lal.

The learned Chief Justice based this conclusion, apart from certain analogies derived from the application of the principle to findings in favour of defendants in suits which are eventually dismissed, upon the provisions of sub-rr. (1) and (2) of O. 21, R. 23, read with the definition of 'decree' in S. 2, sub-s. (2), Civil P. C. He considered that it was only when the judgment-debtor appeared in response to a notice issued under O. 21, R. 22, that the Court was bound to 'consider' his objections and make an order thereon which would be an 'adjudication' appealable as a decree, but where the judgment-debtor did not appear at all

a mere order that the decree should be executed which under the sub-rule has to be automatic cannot be regarded as an adjudication of the question as between the decree-holder on the one hand and the judgment-debtor on the other, so as to operate as a bar by implication at all subsequent stages in the same proceeding.

The learned Judge however recognized that where the previous application for execution became "fructuous" by which apparently is meant partial satisfaction of the decree, the judgment-debtor would be precluded from questioning the validity of that application, though we find it somewhat difficult to see how the fructification of a petition can have a bearing on the question of the binding character of an order passed upon it under sub-r. (1) of R. 23. The learned Judge was of opinion that the decision of the Privy Council in 8 Cal 51[3] was not opposed to the view he was adumbrating, observing that it "has, in some cases, been misunderstood." With all respect, we are unable to concur either in the learned Judge's conclusion or in his view of the effect of the Privy Council decision. Order 21, R. 22 provides for the issue of a notice to the judgment-debtor to show cause "why the decree should not be executed against him" and R. 23 says:

(1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

It will be noticed that sub-rule (1) covers not only cases where the judgment-debtor does not appear in response to the notice or does not offer any objection to execution, but also those where he appears and objects but fails to satisfy the Court that the decree should not be executed. In all such cases, the Court is required to "order" the decree to be executed. That is to say, even in cases where the judgment-debtor appears and "offers any objection to the execution of the decree" and the Court "considers such objection," it has to act under sub-r. (1) if it is not satisfied that the objection is valid. Where such objection is found to be tenable, the Court has to make, under sub-r. (2) "such order as it thinks fit," that is to say, according to the nature and scope of the objection upheld. There is thus no justification for the view that an order under sub-r. (1) "has to be automatic" and that an order under sub-r. (2) alone amounts to an 'adjudication' such as would fall within the definition of a decree, and we are unable to see any such distinction as the learned Judge supposed to exist between these sub-rules. If therefore the Court's "order" under sub-r. (1) that the decree should be executed is, as it must be held to be, in cases where the judgment-debtor appears and objects but the objections are overruled, an appealable adjudication binding on the parties so long as it is unreversed, it is difficult to see why a similar order under the same provision in cases where the judgment-debtor does not choose to appear in response to the notice duly served on him, should be regarded as not having that effect. It seems to us that there can be no logical difference for this purpose between an application which results in partial satisfaction of the decree and is then allowed to be dismissed, and one which is eventually dismissed without any "fructification." The analogy of a finding in favour of a defendant not operating as res judicata when the suit is dismissed is, we venture to think, somewhat misleading. For, in such a case, a mere adverse finding cannot be appealed against and got reversed as the decree, in spite of such finding, is in favour of the defendant, whereas an "order" directing execution to proceed can be appealed from irrespective of the application eventually proving fruitful or infructuous. Again, even an express adjudication on the objections raised by the judgment-debtor must, on the analogy, be held not to be res judicata if the application on which execution was ordered to proceed is ultimately dismissed, but this has never been suggested to be the case.

We have examined at some length the reasoning in the Full Bench case in 58 ALL 313[2] out of deference to the learned Judges, but we are of opinion that the point is prac-

3. ('82) 8 Cal 51: 8 I A 123: 4 Sar 249: 11 C L R 113 (PC), Mungul Pershad Dichit v. Grija Kant Lahiri

tically concluded by the Privy Council decision in 8 Cal 51.[3] It is no doubt true, as pointed out by the learned Chief Justice in 58 ALL 313[2] that in the case before the Privy Council, the judgment-debtor appeared in the previous execution proceeding in which attachment had been ordered and obtained a stay of the sale, acknowledging the validity of the order for attachment and consenting to its continuance, and that their Lordships rested their conclusion also upon such conduct of the judgment-debtor. But this was not the only ground of their decision. It seems to us that the decision is also based on the conclusiveness of the order for attachment made on the petition of 8th October 1874. They observe at p. 59:

> Admitting, for the sake of argument, but only for the sake of argument, that the decree was barred when the sixth application was made—when the notice was served on 23rd September 1874—and when the petition of 8th October 1874 was presented, and that the subordinate Judge ought to have dismissed the petition upon the ground of limitation, although it was not set up or relied upon by the judgment-debtor, still his order, though erroneous, was valid not having been reversed..... The subordinate Judge had jurisdiction upon the petition of 8th October 1874 to determine whether the decree was barred on 8th October 1874, and he made an order that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the defendant, if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal; and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation.

These passages clearly indicate that the decision proceeded on the principle of res judicata as well, and it has been so understood by almost all the High Courts in India: *see* 24 ALL 282;[4] 15 Bom 24;[5] 31 Cal 822;[6] 24 Mad 669;[7] A I R 1928 Mad 1052;[8] 2 Pat 759.[9] We are unable to agree that the decision in 8 Cal 51[3] has been "misunderstood" in all these cases. *See also* 40 M L J 197[10] where their Lordships applied the same principle where in a previous order for execution the plea of limitation that was raised was not specifically dealt with. We are therefore of opinion that an order for execution made after notice to the judgment-debtor who does not appear and offer any objection precludes him from raising a plea of limitation in subsequent proceedings even though the application on which the order was passed does not fructify and is eventually struck off or dismissed. We may observe that a Bench of two Judges in 24 Mad 669[7] has taken the same view on facts more or less similar to those of the present case, and so far from being convinced by the strenuous argument of the appellants' learned counsel that the decision requires reconsideration, we are inclined to agree with it.

A further contention has been put forward on behalf of the sons, appellants 1 and 2. Assuming that the plea of limitation is not open to their father (appellant 3) and the decree could be executed against his interest in the family properties, their shares in such properties, it is urged, should be exonerated as it is not disputed that the decree is time-barred so far as they are concerned. The learned Judge in the Court below, while recognizing that the decree against the sons could not be executed as such, took the view that the decree being executable against the father, the sons' shares were liable to be proceeded against in such execution by reason of their pious obligation under the Hindu law to discharge the father's decree debt, and the learned counsel for the respondent has attempted to support this conclusion before us.

This somewhat archaic rule of pious obligation is no doubt firmly established in Hindu law although the religious notions on which it is founded have ceased to command general acceptance at the present day, as could be seen from this case where the sons as well as the father, unmindful of the evil consequences which the rule is intended to avert, resist the claim of the creditor, while the latter would apparently rescue them from their doom by enforcing the pious duty. But decisions regarding the scope and incidents of this obligation are by no means uniform. It is however generally recognized that the liability of a son does not extend to the payment of the time-barred debts of the father: *see* 33 Mad 308[11] and Mayne's Hindu Law, Edn. 10, p. 421. It is

4. ('02) 24 All 282: 1902 A W N 63, Sheoraj Singh v. Kameswar Nath.
5. ('90) 15 Bom 24, Mora Joshi v. Ramchandra Dinker.
6. ('04) 31 Cal 822: 8 C W N 672, Caventy v. Tulshi Pershad.
7. ('01) 24 Mad 669, Lakshmanan Chetti v. Kuttayan Chetti.
8. ('28) 15 AIR 1928 Mad 1052: 116 I C 363, Lakshmanan Chetty v. Palaniappa Chetti.
9. ('24) 11 AIR 1924 Pat 122: 74 I C 130: 2 Pat 759, Jago Mahton v. Khirdohar Ram.
10. ('21) 8 AIR 1921 P C 23: 59 I C 880: 48 I A 45: 40 M L J 197 (P C), Raja of Ramnad v. Velusami Tevar.
11. ('10) 33 Mad 308: 7 I C 898: 20 M L J 633, Subramania Iyer v. Gopala Iyer.

therefore argued for appellants 1 and 2 that they are not liable as the decree is really barred even against their father, though the latter is personally estopped by the principle of res judicata from showing this; while the respondent broadly maintains that so long as the decree is capable of execution against the father, the pious obligation of the sons to discharge the decree debt out of the family properties remains and can be enforced.

We are relieved from the necessity of deciding this interesting question of Hindu law which is not altogether free from difficulty, as, whatever might be the position if the decree had been obtained against the father alone, we are of opinion that, the respondent having impleaded the sons also in the suit and obtained the decree against their shares in the family estate, cannot claim to proceed against such shares in execution of the decree against the father, when it can no longer be executed directly against them owing to the bar of limitation. It is true that the liability of a son arising out of his pious obligation is distinct from that of his father though arising out of the latter's debt, and can be enforced against him by executing a decree obtained against the father alone against the entire family estate including the son's interest therein, provided of course that the debt is neither illegal nor immoral. But when the son is joined in the suit and a decree is obtained binding his interest also, the claim against him based upon his obligation must necessarily be deemed to have been put in suit and merged in the decree, and the only mode of enforcing such claim is, as it seems to us, by executing the decree against him. The matter is no longer governed by the Hindu law but by the relevant provisions of the Civil Procedure Code. In 13 Luck 61,[12] the Privy Council had to consider a case where a suit brought by a creditor against the undivided sons and grandsons of a deceased Hindu debtor was dismissed against the grandsons, and their Lordships held that the decree could not be executed against their interests in the family property. Their Lordships observed at page 63 :

> If the debt in question was not contracted for purposes regarded as immoral by the Hindu law, and if the respondents being grandsons of Badri Singh were liable therefor to the extent of their interests in the joint family property, then the subordinate Judge's decree of 13th May 1931 was erroneous. The appellant should have appealed therefrom, claiming that, instead of dismissing the suit as against the respondents the subordinate Judge should have given a decree against them in like manner as against defendants 1 to 3, namely as representatives of Badri Singh for a sum to be realized out of any property of Badri Singh come to their hands.

Similarly, we apprehend, where the creditor's suit is decreed also against the son, the decree must rule. It follows that if such decree is allowed to become barred against the son, the creditor will no longer have any remedy, so far as the son's interest in the family property is concerned.

This Court has no doubt held in 27 Mad 243[13] that a decree obtained against a father creates by its own force a debt against him which his sons are under a pious obligation to discharge and a suit can be brought against the sons to recover the decree debt within six years of the decree against the father. But the decision clearly envisaged cases where a decree was obtained against the father alone, and, the father being dead and the decree not being executable against the family properties according to the view taken by this Court under the old Code, the creditor was held entitled to file a suit against the sons on the decree debt within six years from the date of the decree although a suit on the original debt might be barred. Where, however, the sons were impleaded in the suit against the father and there has been an adjudication as to their liability, it has never been held that another suit would lie against the sons on their pious obligation to pay the decree debt of the father. Obviously, it cannot lie where a decree against the sons has been refused. The same, we conceive, must be the case where a decree has been passed against them. If such a decree is allowed to become time-barred as against the sons, the creditor cannot, it seems to us, in executing the decree against the father attach and bring to sale the entire interest of the family as the father in such proceedings can no longer represent the sons who are judgment-debtors in their own names. The position would of course be different if the creditor had sued the father alone. In that case, as we have already observed, he could bring the family properties to sale including the interests of the sons who would be represented by their father and who could only sue either for a declaration that their shares are not liable to be sold, or for recovery of such shares after they are sold, by showing that the

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12. ('38) 25 AIR 1938 P C 7 : 172 I C 5 : 13 Luck 61 : 32 S L R 221 (PC), Raja Ram v. Raja Baksh.

13. ('04) 27 Mad 243 : 14 M L J 84 (F B), Periasami Mudaliar v. Seetharama Chettiar.

debt was illegal or immoral, or, according to some decisions, did not in fact exist: *see* I L R (1940) Mad 123.[14]

Learned counsel for the respondent has strongly relied upon a recent decision of this Court in (1940) 1 M L J 363,[15] where in a suit on a promissory note executed by a father his sons were also impleaded on the ground that the debt was incurred for family necessity, but in the appeal, the plaintiffs decided not to ask for a decree against the sons who were dismissed from the suit, and obtained a decree against the father alone. In the execution proceedings that followed, the sons objected that having been dismissed from the suit, they could not be held liable for their father's debt. The learned Judges (the Chief Justice and Krishnaswami Ayyangar J.) held that the dismissal of the suit against the sons did not prevent the decree-holder executing the decree against the sons' interests in the family property. It is argued for the respondent that, if a creditor can proceed against the sons' interest in the family estate in execution of a decree obtained against the father even when his suit has been dismissed against the sons, he cannot be in a worse position where the suit has been decreed against the sons and the decree against them has become time-barred. If the principle of res judicata does not apply in the one case, it cannot, it is said, apply in the other. This argument seems to us to proceed upon a misconception of what was decided in the case referred to above. We do not understand the case as deciding that if in a suit against a father and his sons, the sons are found not to be liable in respect of the debt sued upon and the suit is dismissed as against them, the creditor can, in executing the decree against the father, proceed nevertheless against the interests of the sons, as such a conclusion would be plainly contrary to the principle of res judicata.

On the other hand, the statement in the judgment that "in the District Court the appellants decided not to ask for a decree against the sons who were dismissed from the suit" would rather seem to indicate that the learned Judges were dealing with a case where the plaintiffs chose to withdraw the case against the sons, and proceeded with it only against the father. That the learned Judges placed reliance upon the decision in 47 M L W 60,[16] further supports this view. That was clearly a case where the creditor withdrew the suit against the sons and Varadachariar J. who delivered the judgment of the Court pointed out the distinction between a withdrawal of a suit against the sons and its dismissal against them on the merits. The other case relied upon in the judgment of the learned Chief Justice, viz., A I R 1929 Mad 898[17] was also, presumably, one where the suit was withdrawn against the sons. The facts are not stated in the report and the judgment in that case merely refers to the "exoneration" of the sons. We are therefore of opinion that the observation in (1940) 1 M L J 363,[15] viz.:

> A decree was passed against the father after the sons had been dismissed from the suit, and the passing of the decree gave to the decree-holders a new right, which they could enforce against the sons,

must be understood with reference to the facts of the case and as applicable only to cases where the creditor's suit against the sons is dismissed as withdrawn without any adjudication, either express or implied, on his claim against them. In the result, the appeal is allowed so far as appellants 1 and 2 and their shares in the family properties are concerned, and the order of the Court below directing execution to proceed is modified by restricting it to the share of appellant 3 in the family properties. Appellants 1 and 2 will have their costs here and in the Court below and the respondents will have their costs of this appeal from appellant 3.

C.R.K./G.N. *Order accordingly.*

14. ('39) 26 AIR 1939 Mad 867 : 187 I C 816 : ILR (1940) Mad 123, Lakshmadu v. Ramudu.
15. ('40) 27 A I R 1940 Mad 544 : ILR (1940) Mad 815 : (1940) 1 M L J 363, Krishnan Naidu v. Somi Naidu.
16. ('37) 24 A I R 1937 Mad 718 : 176 I C 359 : 47 M L W 60, Periasami v. Vaidhilingan Pillai.
17. ('29) 16 A I R 1929 Mad 898 : 121 I C 863, Doraiswami v. Nagasami.

A. I. R. 1941 Madras 445

LAKSHMANA RAO J.

In re Kodiyala Chandriah and others — *Petitioners.*

Criminal Revn. Case No. 123 and Petn. No. 117 of 1940, Decided on 8th February 1940.

Penal Code (1860), Ss. 143 and 341 — Offence under S. 341 being involved in offence of unlawful assembly separate fine under S. 341 is not called for.

Where the offence under S. 341 is involved in the offence of unlawful assembly a separate sentence of fine under S. 341, is not called for.

[P 446 C 1]

K. S. Jayarama Iyer and P. Sivarama Krishnayya — for Petitioners.

Order. — The offence under S. 341, Penal Code, is involved in the offence of unlawful assembly and the separate sentence of fine under S. 341, Penal Code, is not called for. The sentence of fine under S. 341, Penal Code, is therefore set aside and otherwise this petition is dismissed.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. 1941 Madras 446

VENKATARAMANA RAO J.

Marina Ammayi — *Appellant*

v.

Secretary of State and others — *Respondents.*

Second Appeal No. 553 of 1937, Decided on 30th August 1940, against decree of District Court, East Godawari at Rajahmundry, in A. S. No. 140 of 1936.

* (a) Civil P. C. (1908), S. 80 — S. 80 is mandatory—Plea under S. 80 cannot be waived.

Section 80 is explicit and mandatory. If the suit is filed before the expiration of two months after notice had been delivered or left at the office of the Collector, it is not maintainable and the Court is bound to dismiss it. It is not open to the Collector to waive the plea under S. 80 : A I R 1927 P C 176 and A I R 1938 P C 165, *Rel. on.* [P 447 C 1; P 448 C 1, 2]

* (b) Civil P. C. (1908), S. 80 — In computing period of two months day on which notice was served should be excluded.

Whenever a period of time is to be computed from or after an act done or an event happened, the day on which the act was done or the event happened should be excluded. Hence, in the case of S. 80, which says that no suit should be instituted till after the expiry of two months after the doing of a particular act, that is, the delivery of the notice, the day of the delivery must be excluded in computing the two months: *English cases Rel. on.* [P 447 C 1; P 448 C 1]

G. Lakshmanna for Ch. Raghava Rao and M. Chinnappan Nair — for Appellant.

D. H. Nambudripad — for Respondents.

Judgment. — The question for decision is whether the suit out of which this second appeal arises is liable to be dismissed for want of proper notice under S. 80, Civil P. C. Both the lower Courts dismissed the suit. The question now is whether the dismissal is proper. The notice of suit given to the Collector was dated 20th October 1932. Both the Courts have concurrently found that the notice was served on 21st October 1932. The suit was instituted on 21st December 1932. In the plaint, the allegation is that defendant 1, the Secretary of State for India represented by the Collector of East Godawary acknowledged the notice on 21st October but however failed to comply with the demand therein. The plaintiff claimed exemption of the two months' time occupied by reason of the said notice. The reply of the Collector on behalf of the Secretary of State was that the amount of claim was not mentioned in the said notice and the suit was bad for want of proper notice. The following issue was raised: "Whether the suit is not maintainable for want of proper notice under S. 80, Civil P. C.?" When the case was taken up for trial, the Secretary of State under a mistaken impression contended that the notice was served on him on 22nd October 1932 and the learned subordinate Judge accepted this contention but his decision was reversed on appeal on the ground that notice was actually delivered at the Collector's office on 21st October 1932 and in remanding the appeal the learned District Judge remarked thus :

> It was contended by the Government Pleader that even if the notice had really been received on 21st October 1932 the suit filed on 21st December 1932 would still be within two months of the date of the receipt of the original notice. This point too does not appear to have been brought to the notice of the learned subordinate Judge. I consider that the disposal of the suit in the lower Court is unsatisfactory in the sense that none of these points have been adjudicated upon.

The learned subordinate Judge who dealt with the case after remand came to the conclusion that the suit having been filed within two months of the date of receipt of the notice provisions of S. 80, Civil P. C., were not complied with. He therefore dismissed the suit. On appeal the learned District Judge concurred in this view. Mr. Lakshmanna on behalf of the plaintiff-appellant contends that this view is wrong. He submits that both the lower Courts have wrongly construed S. 80, Civil P. C., and in computing the period of two months the day on which notice was served ought to have been included and not excluded and that if it was so included, the suit was in compliance with S. 80, Civil P. C. He further contends that in any event it must be held that the Government has waived this specific plea. Section 80, Civil P. C., so far as it is relevant for the present discussion runs thus :

> No suit shall be instituted against the Crown, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of a suit against a Provincial Government, delivered to, or left at the office of, a Secretary to that Government or the Collector of the District . . .

This section therefore provides a condition precedent to the institution of a suit. As observed by their Lordships of the Privy

Council in 51 Bom 725[1] at p. 747, S. 80, Civil P. C., is explicit and mandatory. If the suit is filed before the expiration of two months after notice had been delivered or left at the office of the Collector, it is not maintainable and the Court is bound to dismiss it. The question therefore is whether two months expired after the notice in question was served on the Collector. The language of the section indicates that there must be full two months after delivery of the notice. This in my opinion follows from the use of the words "next after." It seems to me the principle that ought to be applied in construing this section is that whenever a period of time is to be computed from or after an act done or an event happened, the day on which the act was done or the event happened should be excluded. In (1838) 8 A & E 577 = 47 R R 664[2] an action was filed by an attorney for recovery of an amount due to him from his client. The defence was that the action was premature. It was based on statute 2, Geo. II, c. 23, S. 23, which provided that

> no attorney or solicitor shall commence any action for the recovery of any fees, charges, or disbursements at law or in equity until the expiration of one month or more after such attorney or solicitor respectively shall have delivered into the party or parties to be charged therewith, or left for him, her or them, at his, her or their dwelling house or last place of abode, a bill.

The bill was delivered on 12th January 1886 and the action was commenced on the ensuing 9th February. The contention of Mr. Alexander on behalf of the defendant was that the words of the statute "the expiration of one month or more after" imply exclusion. This contention was upheld and the plaintiff was non-suited. Littledale J., observed thus :

> The words being 'one month or more' we must suppose that the client was intended to have a full month after the delivery of the bill.

Patterson J., observed as follows :

> Whatever may be the case where the thing is to be done 'within' such a time after an act done, Mr. Alexander's construction is correct here, where the action is not to be brought 'until the expiration of one month or more after' the delivery of the bill.

In (1836-47) 6 M & W 49,[3] the action was for trespass against the defendant, a Magistrate, for breaking and entering the plaintiff's dwelling house and seizing his goods. Under 24 Geo. II, c. 44. S. 1, notice of suit was necessary and the section ran thus :

> No writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on any Justice of the Peace for anything done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, etc., at least one calender month before the suing out or serving the same.

The notice in that case was served on 26th March 1838 and the suit was filed on 26th April and it was held that the action was premature. Parke, B. observed thus :

> When time for a particular period is allowed to a party to do any act, the first day is to be reckoned exclusively.

Alderson, B. agreed with him in that opinion and remarked thus :

> Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time. Here is a case in which one party is required to give notice to another a certain time before a particular act can be done by the former; the party to whom the notice is given cannot fix the period of the day when it is to be given; but the Act of Parliament allows him a month, as an intervening period 'within' which he may deliberate whether he will do a certain act, viz., tender amends; and unless you exclude both the first and the last day, you do not give him a whole month for that purpose.

In the present case the statute allows two months' time within which the Secretary of State can deliberate whether he will comply with the demand made in the notice. In (1789-1817) 33 E R 748,[4] the question arose with reference to a will. Certain properties were devised in trust to the following effect: in case A shall within six calender months after the testator's decease give security not to marry B, then, and not otherwise, to pay to the children of A; with a proviso to go over, if she shall refuse or neglect to give such security. The testator died on 12th January and security was given on 12th July. It was held that the condition precedent of giving security within six months was satisfied on the ground the day of the testator's death must be excluded from the computation of six months. Sir William Grant observed thus :

> It is not necessary to lay down any general rule upon this subject; but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, then that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the

1. ('27) 14 AIR 1927 P C 176 : 104 I C 257 : 51 Bom 725 : 54 I A 338 (P C), Bhagchand Dagadusa v. Secretary of State.
2. (1838) 8 A & E 577 : 3 N & P 553 : 2 Dowl P C 982 : 7 L J (N S) Q B 216 : 2 Jur 542 : 47 R R 664, Blunt v. Heslop.
3. (1836-47) 6 M & W 49, Young v. Huggon.
4. (1789-1817) 33 E R 748, Lester v. Garlond.

compass of it, is no more referable to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed. . . . . In the present case the technical rule forbids us to consider the hour of the testator's death at the time of his death for that would be making a fraction of day. The day of the death must therefore be the time of the death; and that time must be past, before the six months can begin to run. The rule, contended for on behalf of the plaintiffs, has the effect of throwing back the event into a day, upon which it did not happen; considering the testator as dead upon the 11th, instead of 12th January, for it is said, the whole of the 12th is to be computed as one of the days subsequent to his death. There seems to be no alternative but either to take, the actual instant, or the entire day, as the time of his death; and not to begin the computation from the preceding day.

The principle of these decisions was applied and followed in (1885) 29 Ch D 204.[5] When as here, the statute says that no suit should be instituted till after the expiry of two months after the doing of a particular act, that is, in this case the delivery of the notice, the day of the delivery must be excluded. Following the principle of the above decisions, I would hold that the suit was premature and ought to be dismissed. The next question is whether there has been a waiver of the plea. Mr. Lakshmanna has not been able to put forward any argument to convince me that the plea has been waived in this case. The Secretary of State has pleaded that the notice was not a proper notice. No doubt the specific plea as to the suit not having been instituted within two months was not taken but the plaintiff has to make out that he has complied with the provisions of the section because it is a condition precedent to the institution of the suit. Further, having regard to the imperative provisions of the statute it is not open to the Collector to waive this plea. If authority is needed, I would refer to the recent decision of the Privy Council in I L R (1938) ALL 601[6] where their Lordships dealing with the provisions of Ss. 86 and 87, Civil P. C., observed thus :

> As already pointed out, the provisions relating to this matter are statutory. They are contained in Ss. 86 and 87, Civil P. C., they are imperative, and having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court.

I therefore hold that it would not be open to the Secretary of State to waive this plea. In the result the second appeal fails and is dismissed but having regard to the circumstances of this case, I direct each party to bear his own costs throughout. Leave to appeal refused.

C.R.K./D.S. *Appeal dismissed.*

5. (1885) 29 Ch D 204 : 54 L J Ch 720 : 33 W R 595 : 52 L T 731, In re Railway Sleepers Supply Co.

6. ('38) 25 AIR 1938 P C 165 : 174 I C 551 : I L R (1938) All 601 : 65 I A 182 : 32 S L R 531 (P C), Gaekwar Baroda State Railway v. Hafiz Habibulhaq.

A. I. R. 1941 Madras 448

WADSWORTH J.

S. Subbaramayya — Petitioner

v.

Segu Pedda Subbiah and others — Respondents.

Civil Revn. Petn. No. 1551 of 1939, Decided on 10th December 1940, to revise order of Court of Dist. Munsif, Gooty, D/- 6th August 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii), Proviso C, Expl. — Assessment on capital value—Rental value must be calculated at 5 per cent. of capital value — Court cannot take evidence of actual rent paid and capitalise it on 5 per cent. basis.

In the case of assessment on the basis of capital value, under the explanation to S. 3 (ii), Proviso C, the rental value must be calculated at 5 per cent. of the capital value. It is not open to the Court to take evidence of actual rent paid, capitalise this on the 5 per cent. basis and hold that the capital value on which the assessment was based was not the actual figure adopted but the fictitious figure thus calculated. [P 448 C 2]

K. S. Jayaram — for Petitioner.

E. Venkataramana Rao — for Respondents.

Order. — The order of the District Munsif cannot be sustained. The most that can be taken to have been established against the petitioner is that he was assessed on two properties one bearing a capital value of Rs. 3000 and the other a capital value of Rs. 3150. The assessment being on the basis of capital value, under the explanation to S. 3 (ii), Prov. C to Madras Act 4 of 1938, the rental value must be calculated at 5 per cent. of the capital value. It is not open to the Court to take evidence of actual rent paid, capitalise this on the 5 per cent. basis and hold that the capital value on which the assessment was based was not the actual figure adopted but the fictitious figure thus calculated. On the figures in the assessment registers the petitioner is clearly outside the exception in Prov. C. The revision petition is allowed with costs and the application is remitted to the trial Court for fresh disposal in the light of this judgment.

C.R.K./G.N. *Petition allowed.*

* * (28) A. I. R. 1941 Madras 449

FULL BENCH

LEACH C. J., VENKATARAMANA RAO, ABDUR RAHMAN, KRISHNASWAMI AYYANGAR AND HORWILL JJ.

Venkateswara Sarma, Styled Gnanasivacharia Swamigal Matadhipathi and Guru of Perur Mel Mutt

v.

S. N. Venkatesa Ayyar and others.

Appeals Nos. 26 and 27 of 1937, Decided on 17th December 1940, against decrees of Sub-Judge, Coimbatore, D/- 26th August 1936.

(a) Interpretation of Statutes — Ambiguity — History of legislation can be looked at (Per *Venkataramana Rao J., in Order of Reference*).

In construing a statute it is permissible to look at the history of the legislation if any question of ambiguity arises. [P 452 C 1]

(b) Limitation Act (1908), Art. 134-B — "Manager" contemplated in Art. 134-B refers to de jure as well as de facto manager (Per *Venkataramana Rao and Abdur Rahman JJ., in Order of Reference*).

The manager contemplated in Art. 134-B is not necessarily a de jure manager. It also includes a de facto manager : A I R 1933 P C 75, *Rel. on.* [P 454 C 1; P 457 C 2]

(c) Hindu law — Religious endowment — Mahant is not trustee but can enjoy property during his lifetime subject to necessities of math (Per *Full Bench*).

A mahant of a math is not a trustee in the English sense. He has the right to the enjoyment of the properties during his life time, subject, of course, to the necessities of the math : A I R 1922 P C 123, *Rel. on.* [P 460 C 1]

* * (d) Limitation Act (1908), Arts. 134-B, 144 and S. 6—Hindu religious institution — Alienation by manager — Suit by succeeding manager impeaching alienation — Art. 134-B and not Art. 144 applies — Interval of time between death, resignation or removal of previous manager and election or appointment of succeeding manager — Adverse possession starts from death, resignation or removal of alienating manager—Succeeding manager minor at the date of appointment (not automatic but by selection) cannot claim benefit of S. 6 (Per *Full Bench; Abdur Rahman and Krishnaswami Ayyangar JJ., Dissenting*).

Per *majority of Full Bench.*—Where a manager of a Hindu religious institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach that alienation by suit, Art. 134-B and not Art. 144 applies even when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager : A I R 1933 P C 75, *Expl.* [P 459 C 1; P 461 C 1]

Even if Art. 144 does apply the date of the starting point of adverse possession in such a case is the date of the death, resignation or removal of the manager who effected the alienation, and not the date of the election or the appointment of his successor : A I R 1933 P C 75, *Rel. on.* [P 459 C 1; P 461 C 1]

Where the appointment of the minor as a mahant automatically follows the death of the previous mahant of the math the minor can claim the benefit of S. 6, but where his appointment is made after the period of limitation has started to run consequent on the death of the previous manager, S. 6 cannot help him. [P 459 C 1; P 461 C 2]

Per *Abdur Rahman and Krishnaswami Ayyangar JJ.*—Article 134-B applies only to that class of cases where the following or succeeding manager was brought into existence as in cases of hereditary succession or by nomination or election either prior to or on the day when "the previous manager" died, resigned or was removed. Consequently, Art. 134-B does not apply to a case where the manager of a math alienates the math property for a valuable consideration and the succeeding manager seeks to impeach the alienation by suit when there is an interval of time between the death, removal or resignation of the previous manager and the election or appointment of the succeeding manager. The only other article applicable to such a case is Art. 144. Adverse possession starts against the succeeding trustee from the time that he assumes office with the extended period of limitation under S. 6 if he happens to be a minor at the time from which the period of limitation is to be counted : *Case law reviewed.* [P 462 C 2; P 464 C 2]

(e) Interpretation of Statutes—Provision plain and unambiguous—Court must give effect to it unless its doing so leads to absurdity (Per *Full Bench*).

When the Legislature places upon the statute book a provision in terms which are entirely plain and without ambiguity, it is the duty of the Court to give effect to the provision, unless by doing so it is obvious that it would lead to an absurdity. [P 460 C 1, 2]

(f) Limitation Act—Construction — Equitable considerations are out of place — Strict grammatical meaning of words is only guide. (Per *Full Bench*).

Equitable considerations are out of place when construing the Limitation Act. The strict grammatical meaning of the words is the only safe guide : A I R 1932 P C 165, *Rel. on.* [P 460 C 2]

Sir A. Krishnaswamy Iyer (Advocate-General) and P. Govinda Menon — for Appellant.

B. Sitarama Rao, A. V. Viswanatha Sastri, A. C. Sampath Ayyangar, N. C. Vijayaraghavachariar and D. Ramaswami Ayyangar — for Respondents.

ORDER OF REFERENCE

Venkataramana Rao J. — The main question for decision in this appeal is one of limitation. The relevant facts are few and not in dispute. The plaintiff is the matathipathi of Perur Mutt, Coimbatore District. The suit is to recover possession of certain properties belonging to the mutt which were alienated by the plaintiff's predecessor in office Sivasubramania Swamigal. The earliest alienation was in 1876 and the last alienation in 1910. The said Sivasubramania Swamigal died on 15th July 1918 without nominating a successor. The disciples of the mutt appointed the plaintiff as his succes-

sor on 7th June 1922. This suit was instituted on 12th April 1934, admittedly twelve years after the death of Sivasubramania Swamigal but within twelve years from the plaintiff's succession to office. The plaintiff's contention is that the right to sue accrued to him only from the date of his appointment, that is, from 7th June 1922, that under Art. 144, Limitation Act, he can sue within twelve years from that date and that the suit is within time. The contention of the defendants is that Art. 134-B, Limitation Act, applies to the case and the suit is barred by limitation. The learned subordinate Judge upheld the contention of the defendants and dismissed the plaintiff's suit. The question is whether this view is sound.

The learned Advocate-General who appears for the appellant contends that Article 134-B, Limitation Act, would not apply to the case because on the date of the death of Sivasubramania there was no manager in existence, that Art. 134-B would be applicable only to cases where on the death or resignation or removal of an incumbent his successor is in being, that the residuary article, Art. 144, would apply to the case, that if Art. 144 applies the plaintiff is in time because there must be some one against whom adverse possession must run and there was no such person in existence on the date of the death of Sivasubramania. He also contends that columns 1 and 3 of Art. 134-B should be read together and on so reading them that article cannot be applied because there was no manager in existence on the date of the death of Sivasubramania Swamigal. Thus, the substantial questions for decision are (1) whether Art. 134-B or Art. 144, Limitation Act, applies to the case and (2) if Art. 144 applies, whether the suit is in time. Article 134-B of the Act runs thus :

Description of suit.	Period of Limitation.	Time from which period begins to run.
134-B. By the Manager of a Hindu, Muhammadan or Buddhist religious or charitable endowments to recover possession of immovable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the transferor.

Giving the language its plain meaning, it prima facie applies to the case. The present suit is by the manager of a mutt, a religious endowment within the meaning of Art. 134-B to recover possession of the immovable property of the mutt, that is, property comprised in the endowment which has been transferred by the previous manager for a valuable consideration. As observed by their Lordships of the Privy Council in 36 Cal 1003[1] at page 1014 :

> Statutes of limitation, like all others, ought to receive such construction as the language in its plain meaning imports.

Again dealing with an argument based on hardship, their Lordships in 60 Cal 1,[2] in construing Art. 182 (2), Limitation Act, remarked thus :

> They think that the question must be decided upon the plain words of the article ..... There is in their Lordships' opinion no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary and may frequently result in hardship. But in construing such provisions, equitable considerations are out of place and the strict grammatical meaning of the words is, their Lordships think, the only safe guide.

But it is said that that "safe guide" ought not to be followed in the present case because unless there be a manager in existence on the date mentioned in column 3 of the article, the period of limitation which is provided by that article would be abridged and it could never have been the intention of the Legislature so to do and all statutes of limitation must be construed subject to the general principle that limitation must only be deemed to run from the date when a cause of action accrues and a cause of action does not exist unless there is a person in existence capable of suing. I am not able to agree with this contention of the learned Advocate-General because the principle that is sought to be applicable is not such a general principle that every article of the Limitation Act must be construed as being governed by it. To test the soundness of this contention it may be necessary to examine the scope of the said principle and how it has been applied both in English and Indian law. In (1916) 1 A C 603[3] at p. 610, Lord Parker

1. ('09) 36 Cal 1003 : 4 I C 449 : 36 I A 148 : 10 C L J 284 : 14 C W N 1 (P C), Abhiram Goswami v. Shyama Charan Nandi.
2. ('32) 19 A I R 1932 P C 165 : 137 I C 529 : 60 Cal 1 : 59 I A 283 (P C), Nagendranath Dey v. Sureshchandra Dey.
3. ('16) 3 A I R 1916 P C 202 : 35 I C 323 : 43 I A 113 : (1916) 1 A C 603 : 85 L J P C 179 : 114 L T 1002, Meyappa Chetti v. Subramaniam Chetti.

enunciated this principle as follows :

> For the purpose of the English Statutes of limitation time runs from the accruer of the cause of action but a cause of action does not accrue unless there be some one who can institute the action.

If the provisions of the several English Statutes are examined, it will be found that in most of the cases time runs only from the accruer of the cause of action. The earliest case where this principle was enunciated was the case in (1821) 5 B & Ald 204 at p. 217=24 R R 325.[4] In that case the Statute of Limitation which was considered was 21 Jac. 1, Chap. 16, S. 3, under which all actions upon the case, etc., shall be brought within six years next after the cause of such action. In considering this provision Abbott C. J. observed :

> Independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing.

It may be said that even now this is the rule with reference to cases of simple contract debts and personal actions to which the Statute 21 Jac. applies where the period of limitation begins when the cause of action accrues. Even with reference to suits in ejectment the principle applicable was the same because the relevant words of that statute are :

> No person or persons shall make entry into any lands, etc., but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same.

In construing this provision, Abbott C. J. remarked :

> The object manifestly is to limit the time of entry or suit to a person in esse capable of entering or suing and nothing more.

Therefore where a statute of limitation specifically fixes the cause of action as the starting point of limitation there can be no doubt of the application of the principle contended for. Even in English law it will be seen that this principle is not applied in all cases. In 1833, when the Real Property Limitation Act was passed, 3 and 4 William 4, Ch. 27, it was provided by S. 6 of that Statute that for the purpose of that Act an administrator claiming the estate or interest of a deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there would be no interval of time between the death of such a person on the ground of letters of administration. In (1887) 34 Ch D 558,[5] where letters of administration were granted to the estate of a deceased man 37 years after his death, it was held that the right to recover the property by the administrator was barred by limitation. This principle was extended even to cases arising under S. 40 of the said Act which related to enforcement of charges on land. Examining the provisions of the Indian Statute of limitation enacted from the earliest time the principle that is contended for was not kept in view in all cases; for example S. 17, Limitation Act, which provides that

> Where a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

is not made applicable to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of an hereditary office. It may be instructive to note that Whitley Stokes who drafted the bill which subsequently became Act 9 of 1871 which replaced Act 15 of 1859 in his introduction to the Limitation Act of 1877 in his Anglo-Indian Code on p. 945 gives the principal amendments made by the Act of 1877 and one of such amendments is stated thus :

> Except in the case of suits for the possession of land and hereditary offices, a right to sue is not to accrue unless there is at the time a person in existence capable of suing as also a person in existence capable of being sued.

If the various articles of the Limitation Act are examined, it will be seen that in many cases the fixation of periods is more or less arbitrary and in those cases it may safely be said that the Legislature had in view the paramount public policy of quieting titles especially with regard to immovable property. In 50 Cal 49[6] at p. 67 a case on which the learned Advocate-General also placed some reliance, Ashutosh Mukherji J. referring to this principle and to the case in (1821) 5 B & Ald 204[4] at p. 217 remarked thus :

> It may be difficult to fit this view into the framework of the provisions of the Limitation Act except in cases which fall within the scope of S. 17. . . .

The scope of the principle was exhaustively considered by Manmathanath Mukherji J. in the case reported in 29 C W N 973,[7] where the learned Judge after examin-

4. (1821) 5 B & Ald 204: 24 R R 325: 106 E R 1167, Murray v. East India Co.
5. (1887) 34 Ch D 558: 56 L J Ch 128: 55 L T 633: 35 W R 182, In re Williams; Davis v. Williams.
6. ('23) 10 A I R 1923 Cal 1: 74 I C 630: 50 Cal 49: 36 C L J 35: Charu Chandra v. Nahus Chandra Kundu.
7. ('26) 13 A I R 1926 Cal 65: 89 I C 1000: 29 C W N 973: 43 C L J 155, Sarat Kamini Dasi v. Nagendra Nath Pal.

ing the various provisions and articles of the Limitation Act and decided cases sums up his conclusion at p. 980 thus :

A careful study of column 3 of the Schedule reveals the outstanding fact which cannot be ignored, namely that the starting point of limitation does not always synchronise with the cause of action; in many cases it does, but in others it dates from some specified events which again are either anterior or posterior to the accrual of the cause of action .... A saving or exception not found in the statute will not therefore be implied however much it may be within the reason of those that are recognized by the statute or however much the ends of justice in a particular case may demand. The periods prescribed by the Act are more or less arbitrary and the fixing of the periods is founded on grounds of consideration of public policy. The statute may bear hardly on individual cases but the individual hardship will upon the whole, be less by withholding from one who has slept upon his right than by taking away from the other what he has long been allowed to consider as his own. These considerations cannot be ignored.

Srinivasa Ayyangar J. in 40 Mad 1040[8] at p. 1063 gives expression to a similar view :

There may no doubt be cases where on grounds of public policy or owing to the difficulty in fixing precisely the time when the cause of action arises, a limited period may be fixed beginning from more or less arbitrary starting points; for example a suit to recover moveable property from a depository or pawnee must, under Art. 145, Limitation Act, be brought within thirty years from the date of the deposit or pawn, though there may be a contract between the parties fixing a time before which the depositor or pawner could not recover the property from the bailee.

As Coutts-Trotter J. remarked in 40 Mad 1040[8] at p. 1055 :

It is no doubt a startling result to say that a man's cause of action can be barred before it has accrued, but if the plain words of the enactment involve that, we cannot rewrite it.

The observations of the Privy Council in 7 Luck 442[9] would show that the starting point of limitation does not always synchronise with the accruer of the cause of action. The learned Advocate-General adverted to the state of the law before the Amending Act 1 of 1929 which amended the Limitation Act by enacting among other provisions Art. 134-B and in support of his contention he stated that the Legislature must have intended that in cases such as the present Art. 144 should apply and not Art. 134-B. I have given due consideration to this contention and my conclusion is that the history of the legislation which it is permissible to look at if any question of ambiguity arises clearly points that the Legislature intended to fix a definite and arbitrary starting point and not to have the date of succession to the office of the manager as the starting point.

Before the enactment of Art. 134-B it was in 44 Mad 831,[10] their Lordships of the Privy Council definitely indicated that Art. 134, Limitation Act, would not apply and that in the case of an alienation made by a manager of a religious endowment Art. 144 would apply. That case was one of a permanent lease. Though the principle of that decision was held to be applicable even in the case of sales and mortgages in later decisions of the Privy Council the matter was not free from doubt. Various High Courts in India interpreted that case differently : *vide* 5 Pat 312.[11] In the case of sales and mortgages, it was held that adverse possession would begin to run from the date of the alienation and not from the date of the termination of the office of manager. In some cases the view was taken that time would run only from the date of succession to the office of the manager. It was to put an end to this state of conflict that the Legislature enacted Art. 134-B. In order to understand the underlying policy of the Legislature in enacting in col. 3 of Art. 134-B an arbitrary starting point, it may be necessary to briefly advert to the legal conception of idol or mutt and the status of a manager in relation thereto. According to Hindu and Mahomedan Jurisprudence, a religious institution such as a mutt is treated as a juristic entity with a legal personality capable of holding and acquiring property. The ownership is in the institution or idol and the manager holds the property of the mutt or the temple merely as a manager save by custom or usage. He may have beneficial rights to the income and that too, for the utilisation thereof for the purposes of institution and not for his personal benefit. In more than one decision of the Privy Council this aspect was clearly pointed out. In a very early case in 13 M I A 270,[12] Lord Chelmsford defined the position of a shebait thus :

The shebait had not the legal property but only the title of manager of a religious endowment. In the exercise of that office she could not alienate the property though she might create proper derivative tenures and estates conformable to usage.

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8. ('19) 6 AIR 1919 Mad 972 : 43 I C 31 : 40 Mad 1040 : 33 M L J 320 (FB), Seetikutti v. Kunhi Pathuma.
9. ('32) 19 AIR 1932 P C 207 : 138 I C 779 : 7 Luck 442 : 59 I A 376 (P C), Lasa Disi v. Gulab Kunvar.
10. ('22) 9 AIR 1922 P C 123 : 65 I C 161 : 44 Mad 831 : 48 I A 302 (P C), Vidya Varuthi v. Balusami Iyer.
11. (26) 13 AIR 1926 P C 9 : 93 I C 280 : 5 Pat 312 : 53 I A 24 (P C), Lalchand Marwari v. Ramrup Gir.
12. ('69-70) 13 M I A 270 : 15 Beng L R 176*n* : 13 W R 18 : 2 Suther 300 : 2 Sar 528 (P C), Maharanee Shibessouree Debia v. Mothooranath Acharji.

Again in 14 Beng L R 450,[13] the position of a manager was thus defined:

It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some persons as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir.

It would be seen from these two decisions that a mutt or an idol is a juristic entity and the manager occupies the position of a guardian of a minor in whom the right to take the necessary action on behalf of the minor is vested for the purpose of safeguarding the estate of the minor. This aspect was very clearly indicated by their Lordships of the Privy Council in 32 Cal 129[14] at page 140 thus:

There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law . . . Assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol.

These observations show that when there is a manager the right of suit is vested in him because he is the person who is legally competent to institute an action on behalf of an idol and if the person entitled to institute a suit be at the time from which the limitation is to be reckoned a minor, he would get the benefit of S. 6, Limitation Act. Once there is a de jure manager, no other person can bring a suit on behalf of the mutt or idol and he alone represents it: *vide* 60 Cal 54[15] at p. 77. It is thus clear that the title to property of a mutt is always in the mutt; it has got juridical status and all rights appurtenant to the ownership of property are possessed by it. When a manager institutes a suit for recovery of property of a religious endowment, the suit is really on behalf of the mutt or idol to assert the right of the mutt or idol. Sir Lawrence Jenkins brings out this aspect of the case in 28 Bom 215[16] at p. 223 thus:

A mutt, like an idol, is in Hindu law a juridical person capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the mutt, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is in the manager, but because it is the established practice that the suit would be brought in that form. But a person in whose name a suit is thus brought has in relation to that suit a distinct capacity; he is therein a stranger to himself in his personal and private capacity in a Court of law.

That an idol has the power of suing and is capable of being sued is established by the judgment of the Privy Council in 52 Cal 809[17] where Lord Shaw at p. 815 remarked thus:

A Hindu idol is, according to a long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law a 'juristic entity.' It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy be given to the manager of the estate of an infant heir.

According to the strict legal theory in view of the fact the idol or mutt is a juristic entity capable of vindicating legal rights, limitation or adverse possession certainly runs against the institution and not against the manager. Then it is stated that it runs against the manager; it does so against him in a representative capacity. This is clear from the following observations of Sir Arthur Wilson reported in 37 Cal 885[18] at page 894:

The learned Judges of the High Court have rightly held that in point of law the property dealt with by the ekrarnama was prior to its date to be regarded as vested not in the mahant, but in the legal entity, the idol, the mahant being only his representative and manager. And it follows from this that the learned Judges were further right in holding that from the date of the ekrarnama the possession of the junior chela, by virtue of the terms of that ekrarnama, was adverse to the right of the idol and of the senior chela, as representing that idol, and that therefore the present suit was barred by limitation.

For the purpose of Art. 144, Limitation Act, that was the view taken in the recent decision of the Privy Council in 57 ALL 159[19] where Sir Shadilal construes col. 3 of Art. 144 at p. 164 thus:

13. ('74) 2 I A 145 : 14 Beng L R 450 (P C), Prosunno Kumari Debya v. Gulabchand Baboo.
14. ('05) 32 Cal 129 : 31 I A 203 : 8 C W N 809 : 8 Sar 698 (PC), Jagodindra v. Hemantakumari.
15. ('33) 20 A I R 1933 Cal 295 : 144 I C 792 : 60 Cal 54, Surendra v. Ishwar Bhubaneshwari.
16. ('04) 28 Bom 215 : 5 Bom L R 932, Babaji Rao v. Lakshmandas.
17. ('25) 12 A I R 1925 P C 139 : 87 I C 305 : 52 Cal 809 : 52 I A 245 (P C), Pramathanath Mullick v. Pradhyumna Kumar Mullick.
18. ('10) 37 Cal 885 : 7 I C 240 : 37 I A 147 : 12 C L J 110 : 14 C W N 889 (P C), Damodar Das v. Lakhan Das.
19. ('35) 22 A I R 1935 P C 44 : 153 I C 1100 : 57 All 159 : 62 I A 47 (PC), Mahadeo Prasad v. Karia Bharthi.

It is common ground that the article of the Limitation Act of 1908 applicable to the claim is Art. 144 which prescribes a period of twelve years from the date when the possession of the appellants became adverse to the mutt . . .

Similar language was used by their Lordships in 12 Pat 251[20] where their Lordships formulated the question of adverse possession thus :

The question then resolves itself into this: Did the possession of the relevant defendant become adverse to the math or to the mahanth as representing the math at the date of the relevant assurance or at the date of the death of Rampat Das ?

However Lord Buckmaster in an earlier case, 46 Mad 751,[21] made the following observations at page 756 :

It follows therefore that possession during his life is not adverse, and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the statute would only run against him as from the time when he assumed the office.

In the former view whether there is a manager or not, limitation would begin to run from the date of the death or termination of the office of the prior incumbent, whereas according to the latter view it would mean from the time when the manager succeeds to the office. It was to quiet this conflict, as I have already stated, that the starting point was fixed in col. 3 of Art. 134B 'death, resignation or removal of the transferor' and not the date of succession to the office and if it is remembered that the suit, although instituted by the manager, was really for the institution, the policy of the Legislature in so fixing the starting point is clear, that is, to quiet title or else there would be uncertainty and insecurity in the title to immovable property. It must be remembered also that the manager contemplated in Art. 134B is not necessarily a de jure manager because it is laid down by the Privy Council in 12 Pat 251[20] that

a person in actual possession of the math is entitled to maintain a suit to recover property appertaining to it, not for his own benefit, but for the benefit of the math.

The Privy Council computed the time from the death of the previous manager and held that as the de facto manager instituted the suit within 12 years therefrom, the suit was held to be in time. If therefore it is not necessary that there should be a de jure manager to institute a suit on behalf of the mutt and a suit can be instituted by a person who is in actual possession of the mutt and he would for the purpose of the suit be the manager within the meaning of the article of the Limitation Act, there is no point in making succession to the office as the starting point of limitation. Normally speaking, there is no difficulty in the application of the article to the case of a hereditary manager or a manager nominated by a previous manager according to custom. But the question only arises in cases where a person has to be nominated or elected by a religious body. There must necessarily be some interval between the death or resignation or termination of the office of a prior incumbent and the actual nomination or election of his successor. The Legislature must have had in view the law or custom governing the succession to a manager of a religious endowment when they framed the article. What was contemplated by the Legislature was that though there may be no de jure manager there would be some one who will be functioning on behalf of the mutt till a manager is constituted and he would be capable of instituting the suit on behalf of the institution. It has not been shown in this case and the burden is on the plaintiff to show that there was no person who was not in possession of the mutt or its properties and therefore could not have instituted a suit to recover possession of the properties. The correct principle would seem to be as put by Sir Charles Sargent C. J. in an early case reported in 18 Bom 507[22] where the learned Judge dealing with a similar question made the following observation at p. 511 :

If the defendant's possession was adverse to the ownership of a math during the twelve years after Krishnaji's death, the operation of the Act cannot be affected by the circumstance that there was no legal manager of the math during that period.

A similar expression of view was given by Page J. in 51 Cal 953[23] where the learned Judge after discussing the effect of the observations of the Privy Council in 32 Cal 129[14] and 37 Cal 885,[18] remarks as follows :

The law must now be taken to be that laid down in 32 Cal 129[14], although I confess that I feel somewhat perplexed to find that the right to sue for possession is divorced from the proprietary right to the property which is vested in the idol. In such cases where adverse possession of the premises is proved, does time under the statute of limitation run only against the shebait or against the idol as well, notwithstanding that the right to sue for possession is vested solely in the shebait? I

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20. ('33) 20 A I R 1933 P C 75 : 142 I C 214 : 12 Pat 251:60 I A 124 (PC), Ramcharan v. Naurangi.

21. ('28) 10 A I R 1923 P C 175 : 74 I C 492 : 46 Mad 751 : 50 I A 295 (P C), Subbiah Pandaram v. Md. Mustapha Maracayar.

22. ('94) 18 Bom 507, Vithalbova v. Narayandaji Thite.

23. ('25) 12 A I R 1925 Cal 140 : 84 I C 91 : 51 Cal 953, Administrator General of Bengal v. Bal Kissen Misser.

think, however, that 32 Cal 129[14] must be read in the light of the later decision in 37 Cal 885[18] where it was held that adverse possession affects the right and interest of the idol as well as the right and interest of the shebait and in my opinion where adverse possession is proved, time will also run against the idol even in circumstances such as those obtaining in the present case where no shebait has been appointed.

It seems to me that this view is in consonance with the view expressed in 57 ALL 159[19] and 12 Pat 251[20] where their Lordships express the view that adverse possession runs against the mutt. The Legislature must therefore be deemed to have given expression to this view in enacting col. 3 of Art. 134B. I shall now advert to a case on which the learned Advocate-General placed some reliance. 2 M L W 723[24] was referred to. There the learned Judges were construing Art. 120, Limitation Act. Sundara Ayyar J. in delivering the leading judgment observed at p. 724 thus :

> Proceeding on the footing that Art. 120 would be applicable to bar the right to an office which is not claimed as hereditary what is the starting point of limitation in such a case? Article 120 states that it is 'when the right to sue accrues.' In the case of a suit for an office the starting point must be taken to be, by analogy to Art. 124, 'when the defendant takes possession of the office adversely to the plaintiff.' The possession of the office must therefore be adverse to the plaintiff . . . . . There was no trustee from 1901 when the defendants' possession commenced till the date of the plaintiff's appointment in 1907. There was no one during that time who was competent by virtue of his legal right to the office of trustee to claim it from the defendants who were in possession of it.

This case therefore proceeds upon the construction of the word "right to sue" which has been interpreted as synonymous with the accruer of the cause of action. 4 M L W 369[25] also proceeds on the same principles. The decision in I L R (1938) Mad 586[26] is again a decision on Art. 120 as will be seen from the observations of my Lord the Chief Justice at page 596.

The learned Advocate-General lastly contended that cols. 1 and 3 of Art. 134B must be read together and if so read, the article would not apply in the case of a manager who is not in existence on the date of the death of the previous manager. Once again giving the language of those columns its plain meaning they only mean that when a manager brings a suit, the limitation will have to be reckoned from the dates prescribed in col. 3. If the manager is in existence he will have 12 years to sue from the date of the death of the previous manager; if the manager comes into existence later, he will probably have less period of limitation but nevertheless the time is to be reckoned from the date fixed in col. 3.

I may notice that Mr. Govinda Menon who followed the learned Advocate-General in response to a question from me frankly conceded that he could not invoke the aid of S. 6, Limitation Act, and the learned Advocate-General who argued in reply to the arguments on behalf of the respondents did not rely on it. Obviously they could not do so. It is not enough that the plaintiff was in existence on the date of Subramania's death, the date from which the period of limitation has to be reckoned; he must have been manager as well. To use the language of the Privy Council in 47 ALL 165[27] he must be a person entitled to institute a suit at the time from which the period of limitation has to be reckoned. The plaintiff was not such a person. It would therefore seem to me that Art. 134B would apply to the case and the plaintiff's suit would be barred by limitation. As my learned brother feels considerable doubt about the applicability of Art. 134B and is inclined to take a different view and as I am not quite sure that even if Art. 144 applies the suit would be within time, the question not being free from doubt having regard to the recent decisions of the Privy Council, I think it desirable that the following questions should be decided by a Full Bench in view of their importance :

(1) Where a manager of a Hindu religious institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach that alienation by suit, will Art. 134B apply when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager?

(2) If such succeeding manager happens to be a minor at the date of his election or appointment will he be entitled to the benefit of S. 6, Limitation Act?

(3) If Art. 144 be held applicable to the case, when does adverse possession com-

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24. ('16) 3 A I R 1916 Mad 1001 : 28 I C 956 : 2 M L W 723, Palaniyandi Malavarayan v. Vadamalai Odayan.
25. ('17) 4 A I R 1917 Mad 706 : 34 I C 945 : 4 M L W 369, Manickam Pillai v. Thanikachalam Pillai.
26. ('38) 25 A I R 1938 Mad 353 : 174 I C 459 : I L R (1938) Mad 586 : (1938) 1 M L J 334 (F B), Subbiah Thevar v. Samiappa Mudaliar.
27. ('25) 12 A I R 1925 P C 33 : 86 I C 249 : 47 All 165 : 52 I A 69 : 27 O C 343 (P C), Ranodip Sing v. Parameswar Prasad.

mence; is it from the date of the election or appointment of the succeeding manager or from the date of the death, resignation or removal of the previous manager who effected the alienation?

I direct that the papers be placed before my Lord the Chief Justice.

Abdur Rahman J. — The only question which we have been invited to decide in this appeal is, as observed by my learned brother, that of limitation. But before I discuss the question, I may state a few more relevant facts. Sivasubramania, who was a matathipathi of a Saivite Mutt, died on 15th July 1918. He had no successor at the time of his death but the plaintiff was appointed to take his place by the sishyas (disciples) on 7th June 1922. The plaintiff was then a minor and attained majority only on 16th May 1931. He instituted two suits subsequently out of which these appeals arise. O. S. No. 136 of 1934 was instituted on 12th April 1934 while O. S. No. 180 of 1934 was instituted on 26th June 1934, the day on which the Court reopened after the summer recess of eight weeks. Both of these suits were for the recovery of possession of property alleged to have been alienated without any necessity or justification by the plaintiff's predecessor in office, Sivasubramania. One of the suits was thus instituted within three years of the date on which the plaintiff attained his majority while the second suit was brought after three years, yet on the day on which the Court reopened, the plaintiff having attained majority some time during the vacation. These suits were brought within twelve years of the plaintiff's election or nomination to the office of matathipathi, but more than twelve years after Sivasubramania's death.

The arguments in this case have centred round the applicability of Art. 134-B and Art. 144, Limitation Act, and that is the point which has been discussed very elaborately by my learned brother. But if Art. 134-B be assumed to apply to the plaintiff although he was not the manager on the date on which Sivasubramania died, it is only because retrospective effect is being given to the section. The argument is that the period of limitation began to run on Sivasubramania's death and that it continued to run until it was barred irrespective of the fact that the person who could have fulfilled the qualification stated in column 1 of Art. 134-B was not elected or nominated until four years after Sivasubramania's death. The existence or non-existence of a manager of a religious or charitable endowment during the twelve years after the death, resignation or removal of the manager who had alienated the property is, according to the learned Counsel for the respondent, immaterial as long as a suit is instituted by a person who falls within the purview of column 1 of the article. It is not quite easy to see how the provisions of this article of the Limitation Act can be said to be attracted when a manager was not in existence at the time of Sivasubramania's death unless by the introduction of a fiction the manager, although appointed after the death, resignation or removal of the person who had effected the disputed alienations, is assumed to have existed even during the period that he was not so appointed. This seems to be the only method by which the criticism that limitation would otherwise be running so to say in vacuo and not against the person described in column 1 of Art. 134-B from the date mentioned in column 3 of that article may be avoided.

But if that assumption be justified, there is no reason why the same be not made under S. 6, Limitation Act, and why that section should not be held to help the plaintiff who was a minor both on the dates on which he became entitled to institute the present suits and at the time from which the period of limitation is, according to my esteemed brother, to be reckoned under Art. 134-B, Limitation Act. The relevant portion of S. 6, Limitation Act, reads as follows:

> Where a person entitled to institute a suit .... is at the time from which the period of limitation is to be reckoned a minor .... he may institute the suit .... within the same period after the disability has ceased as otherwise would have been allowed by the time prescribed in the third column of the said schedule.

Section 8, Limitation Act, restricted the concession granted in S. 6 to a period of not more than three years from the cessation of the disability. This does not, however, stand in the plaintiff's way as one of the suits was instituted within that period and the other although a little after that period is covered by S. 4, Limitation Act. I am aware of the interpretation placed by their Lordships of the Judicial Committee on S. 6, Limitation Act, in 47 ALL 165,[37] where it was held that the extended period under that section can be availed of by a person who was in existence and "entitled to institute the suit at the time from which the period of limitation is to be reckoned." But in the absence of any evidence on the record

that any other person or persons were in possession of the property belonging to the math after Sivasubramania's death, there is no reason why the representation of the math by the plaintiff be not held to be continuous and his appointment not to relate back to the time when the previous manager ceased to exist. In 21 A 145,[13] which came up for consideration before their Lordships of the Judicial Committee the point arose for consideration whether certain judgments and decrees passed against a previous shebait were not binding on his successor, it was held that they were and this because "succeeding shebaits" were held to "form a continuing representation of the idol's property". A matathipathi's office of a Saivite temple may similarly be held to be continuous and even if it is not filled in for some time, it must be, to retain the continuity in representation, held to have been filled later only from the date when it was vacated. If this is correct, the present plaintiff, although appointed four years after Sivasubramania's death, should yet be held to have been appointed as from the date on which Sivasubramania died and should thus be held to fulfil that capacity both at the time of the institution of the present suit and at the time from which the period of limitation is to be reckoned. Since the plaintiff was admittedly a minor at the time when Subramania died, he would, in my opinion, thus get the benefit of S. 6, Limitation Act.

As for the question whether Art. 134B would apply to the facts of the present case, with very great deference to my esteemed brother, I am of opinion that we would not be justified in applying it simply because we find that the present suits were instituted by the manager of a Hindu religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for valuable consideration. My chief difficulty for not falling in with my learned brother's view is that the construction which he proposes to place on that article would make its application retrospective. Since no manager of the property vesting in the mutt was in existence on the date mentioned in col. 3 of the article, that is the death of the transferor, no person could be, it must be conceded, said to be entitled to institute the suit under this article on that date. If this article of the Limitation Act were not applicable on 16th July 1918, that is the day after Sivasubramania's death and could not be held to be applicable till 6th June 1922, why should it be held to apply on the plaintiff's nomination on the following day? What would have happened if there would have been no election or nomination, say for 13 years, that is till about the time when the plaintiff attained his majority? If Art. 134B were held to be applicable although no manager was in existence for 12 years after the transferring manager's death, we would have to hold that the suit for the recovery of possession of immovable property belonging to the charitable or religious endowment would be barred by limitation before a manager was elected or appointed to function as such. It must not be overlooked that Art. 134B applies to a suit by manager. The suggestion made to us during the course of the arguments by the learned counsel for the respondent that a suit could have been instituted by the sishyas or by the Advocate-General during the period when none was acting as a manager is to my mind beside the point. A suit by these gentlemen might have been competent but it could not be held to fall within the ambit of Art. 134B.

It is unnecessary for me to enter into the controversy whether the word "manager" is necessarily confined to a de jure manager only. I am quite prepared to concede that a de facto manager of a religious or charitable endowment, even when he does not happen to be a de jure manager would be governed by this article when he institutes a suit for the recovery of immovable property. This is because the word "manager" in col. 1 of Art. 134B is not qualified by any such prefix as de jure or de facto. The managers either de jure or de facto stand in the same position as far as their liabilities to the trust are concerned. But to infer from the absence of any such distinction that the succession of a de jure manager to his office or the time when he succeeds cannot for that reason be a material circumstance in ascertaining the starting point of limitation is not, if I may say so with great deference, correct. A de facto manager cannot be said to succeed at all. He merely assumes certain duties and is consequently liable to discharge them as best as he can in the interest of the trust whose property he has under his control. It is only a de jure manager who can be elected or appointed to succeed to a previous de jure manager. The succession in the case of the latter would be equivalent to the assumption of control by the former. But as observed by

me in another connection there is no evidence in this case of any manager either de jure or de facto functioning as such or being in possession of the mutt or its properties before the plaintiff was elected or, in fact before he attained his majority. There being thus no de facto manager and de jure manager having succeeded in June 1922 only, it seems to be difficult to apply Art. 134B to this suit.

Nor was I struck by the argument that if I give effect to the view that the present manager had a right to bring a suit after his appointment under some other article of the Limitation Act, it would virtually mean that a second manager would, after the first manager's death, be entitled to claim a fresh lease of twelve years for the institution of the suit. The reply to that contention would be that once the period of limitation has begun to run, the death or removal of that manager would not by itself prevent the period of limitation from running.

Mr. Sitarama Rao's main contention was that the suit was really brought by the institution, i. e., the mutt and if the suit was by the mutt, the period of limitation must be held to have started on the date of Sivasubramania's death. It might be observed in this connexion that the suit by the institution or the mutt would not first of all be governed by Art. 134B and secondly that the mutt could not bring a suit itself. The right of suit vests, as held by Sir Arthur Wilson in 32 Cal 129[14] in the passage quoted by my learned brother, in the shebait and not in the idol. It is true that the idol is a juristic entity and is thus capable of suing but *ex necessitate rei* it cannot bring a suit itself and some person will have to speak or act on its behalf. The person who would act on behalf of the idol would be its shebait or manager. It may be that limitation may, if he is in existence, run against him in a representative capacity so as not only to debar him from suing for possession himself if he had any individual rights as well in the property but also against the idol or the mutt which he represented. It is only in that sense that I take the decisions of their Lordships of the Privy Council in 57 ALL 159[19] and 12 Pat 251[20] to be. The idols and mutts may exist without shebaits or managers but they can only be represented by shebaits or managers and the existence of such a manager is a *sine qua non* for the applicability of Art. 134B. In the absence of any manager between 1918 and 1922, it would not be easy, in my opinion, to apply this article.

It may not be out of place here to refer to 27 Mad 143,[28] in which their Lordships of the Privy Council, when called upon to construe Art. 110, Limitation Act, held that the words "arrears of rent" in that article meant "arrears of ascertained rent which the tenant is under obligation to pay and which the landlord can claim and if necessary sue for" and that the period of limitation for the recovery of such arrears would start not from the close of the fasli year for which the arrears of rent were payable but from the date of the final decree which was necessary for the landlord to obtain under the Madras Act, 8 of 1865 to have the proper rate of rent ascertained. In deciding the above appeal, their Lordships of the Judicial Committee observed as follows :

> The object of a Limitation Act is presumably to compel people to sue upon them with due promptitude or to forfeit the right to do so at all. In such an Act the falling due of rent naturally means the falling due of an ascertained rent which the tenant is under an obligation to pay and which the landlord can claim and if necessary sue for.

This decision was arrived at as it was held that if the arrears of rent were held to be due at the end of each fasli year, limitation would be running against the landlord during the pendency of the suit brought by him for the determination of the rate of rent and the result would be that the suit would be barred although the plaintiff was not in a position to say what rent was actually due. If Art. 110 was construed by their Lordships in that manner and for that reason, how can Art. 134B be construed to apply to a period when no manager who was capable of bringing a suit or of forfeiting his right to do so was in existence. The Full Bench decision in I L R (1938) Mad 586[26] lends support to the argument that a right of action on the ground of breach of trust against a trustee would remain in abeyance until a new trustee was appointed who is competent to sue in this behalf. It is true that in that case the Full Bench was dealing with Art. 120, Limitation Act, but no distinction can be drawn, in my opinion, on that ground as Art. 120 provides generally that the period of limitation would start when the right to sue accrues while Art. 134B lays down more specifically as to when the right to sue would be said to accrue in cases covered by that article.

28. ('04) 27 Mad 143 : 31 I A 17 : 14 M L J 1 : 8 Sar 617 (P C), Rangayya Appa Rao v. Bobba Sriramulu.

In short according to my reading of Art. 134B, Limitation Act, there must be if the article is to apply a person capable of suing as manager either de facto or de jure of a religious or charitable endowment who may be able to recover possession on its behalf as soon as the previous manager dies, resigns, or is removed from his office. If there is no such manager on the date on which the previous manager was deprived of his office, Art. 134B would have no application to that case. To such a case Art. 144, Limitation Act, in the absence of any other specific article, would be applicable and since adverse possession had according to that article to run against the plaintiff for the statutory period and the suits were instituted within 12 years of his appointment and in any case within three years of his attaining majority, they must be held to be within time. As the questions involved in the case are of considerable difficulty, I agree to the order of reference to the Full Bench.

OPINION.

Leach C. J. — This Full Bench has been constituted to decide the following questions:

(1) Where a manager of a Hindu religious institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach that alienation by suit, will Art. 134-B apply when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager?

(2) If such succeeding manager happens to be a minor at the date of his election or appointment, will he be entitled to the benefit of S. 6, Limitation Act?

(3) If Art. 144 be held applicable to the case, when does adverse possession commence? Is it from the date of the election or appointment of the succeeding manager or from the date of the death, resignation or removal of the previous manager who effected the alienation?

The reference arises out of Appeal No. 26 of 1937, which was preferred from a decree of the subordinate Judge of Coimbatore. The suit was instituted by the mahant, or matadhipathi of the Perur math to recover possession of certain immovable properties belonging to the math which had been alienated by his immediate predecessor, one Sivasubramania Swamigal. The last alienation took place in 1910. Sivasubramania Swamigal died on 15th July 1918 and the suit was not instituted until 12th April 1934. The appointment to the office of mahant rests with the disciples of the math, but they did not appoint a successor to Sivasubramania Swamigal until 7th June 1922, nearly four years after his death. The defendants raised the plea that the suit was barred by limitation, their contention being that Art. 134-B, Limitation Act, applied. The plaintiff maintained that the appropriate article was Art. 144 and that time only began to run from the date of his appointment. He was a minor at the time of his appointment and did not attain his majority until 6th May 1931. It was in these circumstances that it was said that S. 6, Limitation Act, had application. The subordinate Judge decided against the plaintiff and he appealed to this Court. The appeal came before Venkataramana Rao and Abdur Rahman JJ., who were inclined to take different views on the question of limitation and both have set forward their reasons for making this reference. They have discussed all relevant authorities and an elaborate examination of them is not called for. It will be sufficient to examine the questions which arise and to refer merely to the governing factors.

Article 134-B which falls in Part VIII of the schedule to the Limitation Act states that the period of limitation for a suit by the manager of a Hindu, Mahomedan or Bhuddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration shall be twelve years and that time shall begin to run from the death, resignation or removal of the transferor. Article 144 is the residuary article in Part VIII of the schedule. It prescribes a period of twelve years for a suit for the possession of immovable property or any interest therein not otherwise specially provided for in the Act, the period of limitation starting from the time when the possession of the defendant becomes adverse to the plaintiff. Article 134-B was inserted in the Limitation Act by the amending Act of 1929. It is accepted by both sides that the object of its insertion was to put an end to judicial conflict. The conflict was whether in a suit by a manager of a math for possession of immovable property belonging to the endowment which had been transferred by his predecessor time began to run from the date of the alienation or from the date of the death of the alienor. By inserting Art. 134-B the Legislature has made the starting point the death, resignation or removal from office of the transferor. Independent of the amendment of the statute the Privy Council in 1933 in its judgment in 12 Pat 251[20] also decided that this should be the starting point. There

the Privy Council held that where a mahant has alienated math property the possession of the alienee does not become adverse during the tenure of office of the mahant and limitation only begins to run from the time when the mahant ceases to hold office. The question was whether Art. 134 or Art. 144 applied and the decision was that the proper article was Art. 144. The appeal in 12 Pat 251[20] was heard after the amendment of the Act in 1929, but the suit had been instituted before the amendment and therefore Art. 134-B had no application. A mahant is not a trustee in the English sense, as was pointed out by the Judicial Committee in 44 Mad 831.[10] He has the right to the enjoyment of the properties during his lifetime, subject, of course, to the necessities of the math, and that is why in that case and in 12 Pat 251[20] the Privy Council held that the starting point of limitation was the date when the mahant vacated the office, and no doubt similar considerations operated when the Legislature decided to insert Art. 134-B in the Limitation Act.

On the face of it, Art. 134-B applies to a case like the present one. This is a suit by the manager of a Hindu religious endowment to recover possession of immovable properties comprised in the endowments which were alienated by his predecessor for valuable consideration and the starting point of the period of 12 years is the date of the death of his predecessor. It is contended however that the Legislature only intended the article to apply in a case where the full period of limitation could run. In other words, unless the terms of the endowment provide for immediate succession on the death of the mahant responsible for the alienation the article cannot apply. In answer to a question put to him in the course of the arguments, Mr. Govinda Menon, on behalf of the appellant, said that the article would have application in this case if the disciples had elected a successor to Sivasubramania Swamigal as soon as the breath left his body, but if they delayed for a moment Article 134-B would not apply and the case would be governed by the residuary article, namely Art. 144. This is going to great lengths and to lengths which I certainly am not prepared to go. When the Legislature places upon the statute book a provision in terms which are entirely without ambiguity, as is the case here, it is the duty of the Court to give effect to the provision.

The argument for ignoring Art. 134-B is that it is a general principle of the law of limitation that limitation can only be deemed to run from the date when the cause of action accrues, and a cause of action cannot exist unless there is a person capable of suing. Granted that this is so it does not mean that the Legislature cannot make an arbitrary starting point, irrespective of whether there is a person capable of suing or not. It is to be observed that there is a vast difference between the wording of Art. 134-B and Art. 120. Under Art. 120 the period of limitation commences when the right to sue accrues, which is plainly not the case so far as Art. 134-B is concerned, where the starting point is definitely from the date on which the manager of the endowment ceases to hold office. As Venkataramana Rao J. has been at pains to point out in his referring order the Legislature has made an arbitrary starting point, and I agree with him. In my opinion, there is here no room for the application of any principle, which, if applied, would mean the overruling of the plain words of the statute. What is so often lost sight of is that the plain words of a statute must be given effect to, unless by doing so it is obvious that it would lead to an absurdity. That is not the position here. Moreover, the Privy Council has itself pointed out that equitable considerations are out of place when construing the Limitation Act and the strict grammatical meaning of the words is the only safe guide : 60 Cal 1.[2] And that case was concerned with the interpretation of Art. 182, Limitation Act.

In considering whether Art. 134-B or Art. 144 applies in this case we have two important factors. The first is that the Legislature intended to make the starting point of limitation the death, resignation or removal from office of the mahant responsible for the alienation and that irrespective of the statute the Privy Council has laid down the same rule. The second is that there can be no equitable construction of the Limitation Act and effect must be given to the plain meaning of the words used. If these factors are borne in mind it seems to me that all difficulties disappear, and Art. 134-B is the only article which can be applied. The contention that this will cut down the period of limitation, if there is not an automatic appointment of a successor to the mahant responsible for the alienation is really beside the point. The Legislature could not be expected to legislate in this connexion for a situation where

those responsible for the appointment of a successor choose to neglect their duty. If they do so theirs must be the responsibility. In the present case the disciples of Sivasubramania Swamigal could have elected his successor immediately after his death had they so desired. Because they neglected their duty in this respect, the Court, in my opinion, is certainly not called upon to ignore the very emphatic words of Art. 134-B and allocate the case to a category to which it does not belong. I agree entirely with the observations of my learned brother Venkataramana Rao on this question, and consequently the answer which I would give to the first question is in the affirmative.

The answer which I would give to the third question has been indicated in what I have already said in discussing the first question under reference. In view of the decision of the Privy Council in 12 Pat 251[20] it appears to me that even if Art. 144 does apply the date of the starting point of adverse possession is the date of the death, resignation or removal of the manager who effected the alienation, and not the date of the election or the appointment of his successor. Article 144 says that the period of limitation shall start from the date when the possession of the defendant becomes adverse to the plaintiff and in a case like the present one, the Judicial Committee has declared that adverse possession starts from the death, resignation or removal of the mahant responsible for the alienation. Therefore the answer I would give to the third question is that even if Art. 144 be applicable adverse possession started to run from the death of Sivasubramania Swamigal.

The second question does not call for much discussion. It has been said on behalf of the appellant that his appointment to succeed Sivasubramania Swamigal should be deemed to date back to the latter's death, in which case the appellant would be entitled to the benefit of S. 6, Limitation Act. If his appointment were to be deemed to date back to that period there is no doubt that the suit would be in time, but unfortunately for the appellant's argument here there is no warrant that the appointment should be deemed to be antedated. It was made on 7th June 1922 and there is nothing in the Limitation Act or in any other enactment which gives it retrospective effect. The argument that it should be given this effect is one which has only to be stated to be rejected. When the appellant was appointed the period of limitation had started to run. It had in fact been running for nearly four years and once having started nothing could stop it. My answer to the second question is that if the appellant's appointment had automatically followed Sivasubramania Swamigal's death, the appellant being a minor would have been entitled to the benefit of S. 6, but inasmuch as his appointment was made after the period of limitation had started to run the section does not help him. The costs of this reference I would make costs in the cause.

Venkataramana Rao J. — I agree.

Horwill J. — I agree.

Abdur Rahman J. — Nothing was said by learned counsel for the respondent before the Full Bench that may induce me to alter my opinion. It is not difficult to follow the interpretation placed by him on Art. 134B, Limitation Act. It is too simple in fact not to be understood and that in my judgment is about its only merit. Had it not led to a great injustice in a given set of circumstances it would not have been difficult to agree with him. But an apprehension of the consequences that would result from that interpretation led me to examine the language of the article more closely in order to ascertain whether it was the only construction, as claimed on behalf of the respondent, that could be put on the language of the article or whether the article was meant, if properly understood, to apply to a different and perhaps a limited class of cases but not to cases such as the present one.

When the language of the article is plain, the task of a Judge is easy. He has to concentrate on the words used in the statute and to give them their plain and ordinary meaning. This is what is meant by a literal or a grammatical construction. Since there is no ambiguity in the words or phrases used in the article that we are called upon to construe, it is unnecessary to consider the circumstances when it would have been permissible to depart from that method of construction. It is our duty in this case to give full effect to the words as they appear in the statute without altering their sense or meaning with the variation of circumstances or facts and decide whether the article can be made applicable to the present case. To come to Art. 134B. It declares that a suit by

> the manager of a Hindu, etc., religious or charitable endowment to recover possession of the immovable property comprised in the endowment which has been transferred by a previous manager for valuable consideration

may be instituted within "twelve years"

from "the death, resignation or removal of the transferor." Since the word "manager" has been used in juxtaposition with the words "previous manager" in the same column, it may be safely inferred that the Legislature, by employing the word manager, intended to convey "the following or succeeding manager" regardless of the fact whether the latter manager was de jure or de facto. A suit, to attract this article, has to be instituted by a manager alone and by none else. If brought on behalf of a religious or a charitable endowment, such as a math is, through anyone else, it would not fall within the scope of this article. The period of limitation provided for a suit which falls within its period is twelve years. The manager must therefore have twelve years from the event specified in col. 3. He can have no more and should have, according to me, no less. If we are obliged to give a lesser period to a manager under any set of circumstances for a suit covered by this article, we are committing an inroad which is not, in my opinion, justifiable. Are we entitled to interpret the article in such a way as would lead to the curtailment or abridgment of the period of limitation provided in col. 2? My learned brother, Venkataramana Rao J. foresaw this difficulty and felt that it could not be helped. But is that the correct method of interpretation? Would it be right for us to construe the article in such a way as to reduce the prescribed period of limitation? I submit not. It may be said however that the suit has to be brought within twelve years of the occurrence of the event mentioned in Col. 3 and this period is not reduced. This is undisputed and in fact, indisputable. By whom then is the question? and the answer can only be, by the manager. But if no manager was in existence on the date when the event mentioned in col. 3 occurred, how could he be said to have the period prescribed by this article?

Article 134-B could not be obviously applied to an alienation made by a previous manager if the following or succeeding manager was not in existence for a period of twelve years after the death, resignation or removal of the former (i. e., the last manager). Two methods of treatment were possible in the circumstances, one of which was suggested by my learned brother and is now adopted by the majority of the Full Bench and the other which I ventured to propose. According to the view taken by the majority, limitation must be held to have started whether the person answering to the description given in col. 1 was in existence or not at the time when any of the events mentioned in col. 3 occurred and the article according to them should be applied to any suit instituted by a person of that description regardless of the fact whether that person would get the full or even any period provided for by the section or not. This is the first method. The second method is to hold that this article should be held to be inapplicable, unless the manager was in existence on the date from which the prescribed period of limitation was to run. This would limit the application of this article only to that class of cases where the following or succeeding manager was brought into existence as in cases of hereditary succession or by nomination or election either prior to or on the day when "the previous manager" died, resigned or was removed. As this interpretation would entail in some cases, if the article is to be held applicable, the necessity of nominating or appointing a manager on the very day on which the previous manager might have died and when his corpse might have been, as suggested at the hearing, lying to be disposed of or even when his ashes had not even grown cold, it was characterised by my Lord the Chief Justice as astounding. But with very great deference to him, I see nothing so startling in it. We are asked to find whether Art. 134-B would apply in these circumstances. He and those of my learned brothers who agree with him are prepared to give the answer in the affirmative. I am, in all humility, of a contrary opinion. According to me, this article can be held to apply only to those cases where a manager was in existence on the date on which one of the events mentioned in col. 3 occurred. This, to my mind, is the only way in which an inroad on col. 1 or col. 2 of the article can be avoided. This is the only manner, in my opinion, in which limitation can be saved from running, so to say, in *vacuo*. There is no other method of treatment, I submit and I say so with very great deference, which is logical and brings out the ordinary meaning of every word in Art. 134-B.

If Art. 134-B is held to be inapplicable to a case such as the present one, the only other article that would apply is Art. 144. This necessitates the determination of the time when the period of limitation is to start and has led my learned brother to formulate the third question in his order of reference. The decision of this question again bristles, on account of the various decisions

of the Privy Council, with difficulties. The argument advanced by learned counsel for the respondent was that inasmuch as the math was a real plaintiff and the manager, who was a minor in this case on the date of his appointment, was only an agent or guardian on its behalf—the adverse possession should be held, under Art. 144 to start from the date when the possession of the defendant became adverse to the plaintiff, i. e., to the math and not to the manager who is suing on its behalf. This is claimed to be in accordance with the grammatical construction of the words of that article and the question to decide is whether the contention is, although quite plausible, sound. The first difficulty that one encounters in agreeing with this interpretation is that the period of adverse possession would have to be held to start from the very date on which the alienation was effected by the 'previous manager'; and if he happened to live beyond the statutory period of twelve years, alienee's title to the property would be held to be completed—although the alienation might not have been of the math itself or did not purport to have been made adversely to the math. This cannot be denied that in view of the decisions of their Lordships of the Privy Council and of Courts in India, limitation in the two cases mentioned in the preceding sentence would start on the date of the alienation: *see* 37 Cal 885,[18] 12 Pat 251,[20] 46 Mad 751,[21] A I R 1930 Cal 673[29] at p. 677 and (1938) 1 M L J 118.[30] But the same cannot be said of cases where a manager has alienated the property for the apparent necessity of the math although it is subsequently found to have been made in excess of his powers and for his private needs alone. In such cases, it has been held by their Lordships that the period of limitation would start from the date when the manager who effected the alienation died or ceased to function. It was pointed out by their Lordships in 12 Pat 251[20] that

> the operation of the proposed grant is effective and endures only for the period during which the mahant had power to create an interest in the property of the math.

Mahant Rampal Das who had in the first instance granted a permanent lease of certain lands in December 1909 to Naurangi Lal and conveyed them later to Mt. Sampat Kaur in February 1911, died in or about July 1913. A suit for the recovery of possession by a succeeding chela brought in May 1924 was not held to be barred by limitation under Art. 144 and the decision of the High Court of Patna holding that the period of limitation ran from the date of alienation was reversed as the mahant was held to be

> at liberty to dispose of the property of a math during the period of his life and that grant purporting to be for a longer period

was held to be "good to the extent of the mahant's life interest:" *see also* 44 Mad 831[10] and 46 Mad 751.[21] But the argument now put forward on behalf of the respondent would go against these decisions. If the math is the real plaintiff, there would be no justification for holding that the limitation is to remain suspended during the period that the alienating manager continued to function as such. This would bring us in conflict with the Privy Council decisions and the principle that although a juristic personality and thus capable of holding the property in the legal sense, a math is unable to know or capable of taking any action itself for protecting its rights.

There are two lines of cases which must be reconciled if this conflict has to be avoided. There are cases such as 32 Cal 129[14] recently followed in (1940) 2 M L J 903[31] at page 913, where it was held by their Lordships that the right of suit vested in the manager alone or in other words, it was only the manager (be he de facto or de jure) who was entitled to intercede on behalf of the math and could speak or act on its behalf. The other line of cases is to the effect that temples and maths have juristic personalities and their property is not vested in their managers but in the idols or institutions: *see* 33 ALL 735,[32] 52 Cal 809[17] and the observations in 59 Mad 809[33] at page 819 and ILR (1940) Mad 858.[34] If this argument is adopted, limitation must be held to start from the date of the alienation irrespective of the non-existence or incapacity of the manager. But this contention was repelled by their Lordships in 32 Cal 129.[14] The facts of that case were that

29. ('30) 17 A I R 1930 Cal 673 : 128 I C 195 : 51 C L J 547: 34 C W N 498, Debendra v. Naharmal.
30. ('38) 25 AIR 1938 Mad 415: 183 I C 88: (1938) 1 M L J 113, Alam Khan v. Karuppannaswami Nadan.
31. ('40) 27 A I R 1940 P C 116 : 189 I C 1 : ILR (1940) Kar P C 251 : 67 I A 251 : ILR (1940) Lah 493 : (1940) 2 M L J 903 (P C), Masjid Sahidgunj v. Shiromani Gurdwara Parbandhak Committee, Amritsar.
32. ('11) 33 All 735: 11 I C 47: 8 A L J 817, Jodhi Rai v. Basdeo Prasad.
33. ('36) 23 A I R 1936 P C 183 : 162 I C 465 : 59 Mad 809 : 63 I A 261 (P C), Ponnambala Desikar v. Periyanan Chetti.
34. ('40) 27 AIR 1940 Mad 532 : ILR (1940) Mad 858 : (1940) 1 M L J 442, Nagappa v. Zamindar of Sivaganga.

Jagindranath Ray brought a suit for possession as shebait of an idol. It was found by the Courts in India that the dispossession on which the cause of action was based had taken place during the plaintiff's minority but the suit was brought within three years of his attaining majority. The trial Court had decreed the claim but the suit was dismissed by the High Court as barred by limitation on the ground that the title was in the Thakur and Braja Sundara Achi, who was the guardian of her minor adopted son, the shebait, could bring a suit during his minority on behalf of the Thakur. In other words, the ratio decidendi of their decision was that the limitation had started against the Thakur and the shebait's minority would not entitle him to bring a suit within three years of the attainment of his majority. This reasoning was not accepted by their Lordships in the following words :

> . . . . . that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol.

The pronouncement of their Lordships is very clear. The fact that somebody else could bring a suit during the minority of the shebait was immaterial — the Thakur itself being *ex necessitate rei* unable to do so. It could only act through a human agency and that agency can be no other than that of a manager, whatever name be given to him and whether he be de facto or de jure. If limitation had started against the Thakur and the plaintiff was acting merely as an agent, as appears to be the contention in this Court, limitation would have run on irrespective of the plaintiff's minority and run out on the expiry of twelve years from the date of dispossession. But, it was not so held. How could S. 6, Limitation Act, be held to be applicable if the math were regarded to be independent and capable of acting without its manager? It was so held as the idol had no power to bring a suit except through the trustee who was a minor. What about Lord Buckmaster's observation then in 46 Mad 751[21] when referring to two earlier decisions in 38 Cal 526[35] and 44 Mad 831[10] which were decided under Art. 144, he observed that, "the statute would only run against him (the succeeding trustee) as from the time he assumed office." It cannot be denied that it was a case of a specific trust and for that reason Art. 134 might have been but for the transfer by the trustee not being voluntary held applicable. It is true that their Lordships held that, "there was little difference in principle between a transfer under an adverse execution and a sale by the trustee himself;" they however added, "but disregarding that article (134), Art. 144 covers the exact case."

Since the limitation was held in that case to start from 22nd March 1898, i. e., the date of the alienation, it may be said that the period under Art. 144 was, in spite of what their Lordships had observed before when referring to 38 Cal 526[35] and 44 Mad 831[10] counted from the date of alienation. The answer to this apparent conflict is to be found in the fact that the vendee in that case had purchased the property in violation of the trust and he was, in virtue of the exception to S. 10, Limitation Act, held entitled to show in answer to the claim for the recovery of possession of trust property that he had bought it for valuable consideration and held it adversely. The vendee was found to have been within the terms of the exception, and consequently, not prevented from relying on the provisions of the statute which limit the time for the institution of the suits brought for recovery of possession. In so far as the alienation was in breach of specific trust, it was held to be void ab initio, as the transfer of the math would have been according to 37 Cal 885[18] and limitation was held to start from the date of alienation. The matadhipathi had, in the present case, on the other hand, liberty to dispose of the property during his life although the alienation made by him was only to the extent of his own life interest. It would follow therefore that possession during the last manager's life could not be adverse and that upon his death, it would run against the succeeding trustee, i. e., the present plaintiff from the time that he assumed office with the extended period of limitation under S. 6 as he was a minor at the time from which the period of limitation was to be counted. It is interesting to observe that the passage quoted above from 32 Cal 129[14] including the sentence with reference to Art. 144 was cited by Sir George Rankin in 59 Mad 809[33] with approval. Then there is the observation in 59 Mad 809[33] at p. 821 that

> the right of each successive manager to authorize, create or continue a new tenancy for the period of his managership must be taken in the case of a public temple or a family idol to be the same as in the case of a math.

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35. ('11) 38 Cal 526 : 10 I C 683 : 38 I A 76 : 14 C L J 238 : 15 C W N 417 (P C), Ishwar Shyam Chand Jiu v. Ram Kanai Ghose.

Since it was held by their Lordships in the preceding page,

> that for the present purpose it is unnecessary to recognize any difference in the consequences which flow from a permanent lease or complete alienation of the debutter property in the case of a math or temple or family idol

this observation can only be justified on the principle laid down in 32 Cal 129[14] that the only person competent to act or sue on behalf of the math was the manager and limitation could not run against the math or temple unless it was also running against the succeeding manager after the manager who had originally alienated the property ceased to function—and this not on account of "the notion of personal bar as regulating the validity or invalidity of the transaction" but because "the offence lies entirely in the unnecessarily great interest which has been parted with."

The manager like a Hindu widow, has power to act for his lifetime or during the period in which he holds the office; but the effect of his act beyond that period would depend on the validity of the necessity for the alienation in the interest of the math or the temple. If this is the correct principle, how can it be urged that the limitation would start against the math from the date of the alienation regardless of the existence of the succeeding manager, whether de facto or de jure, simply because a juristic personality has been held or recognized in an inanimate institution like a mutt on account of religious custom of the Hindus? It may have a juridical status with the power of suing and liability of being sued; but it cannot be denied that it is an artificial person after all and is incapable of acting except through its manager. There are other decisions of this Court which have taken the same view: *see* 4 M L W 369,[25] 2 M L W 723,[24] 46 Mad 579,[36] 48 M L J 114[37] and 49 M L J 640.[38] The only method of reconciling the two lines of cases represented by 32 Cal 129[14] on the one hand and 52 Cal 809[17] on the other thus is that while the property and the capacity to sue or being sued may be held to vest in the juristic person like an idol or the institution of a math, the right of action or suit on behalf of the math or the idol must be confined to the manager of these inanimate objects of worship or charity.

Three decisions were relied on by Mr. Sitarama Rao in support of his contention that an adverse possession would start against the mutt even if there is no manager at the time of the death of the alienating manager. The first decision was that in 18 Bom 507.[22] The facts of that case are that Krishnaji who was a manager of a math sold the miras tenure of certain lands appertaining to the math to one Buxarbhai in 1860. Krishnaji died in that year and was succeeded by Ram Krishna as manager who sued Buxarbhai in 1864 to set the sale aside, but the suit was dismissed against him in the following year as he asserted to be a perpetual tenant under the sale and his right was confirmed. Gopal brought a suit against Ramkrishna subsequently asking for a declaration that he was the legal manager of the math. This was decreed in 1871 and Ramkrishna was ordered to be removed as he was held to have had no title to the office. The decree was confirmed by the High Court in 1875 and Ramkrishna was removed in consequence. On a suit being brought by Gopal for possession of the property sold to Buxarbhai in 1887, he was met with a plea of limitation by Buxarbhai's alienee. This plea prevailed and if I may say so with respect, rightly. Ramakrishna was in possession of the math property between 1860 and 1875 and was a manager of the math de facto if not de jure. Sir Charles Sargent C. J. who delivered the judgment observed:

> If the defendant's possession was adverse to the ownership of the math during the 12 years after Krishnaji's death, the operation of the Act cannot be affected by the circumstance that there was no legal manager of the math during that period.

In spite of the finding that the mirasdar in inam estates in Bombay Presidency is a tenant at a quit rent or a reasonable rent not subject to ejectment as long as he pays it, it was held that since Buxarbhai asserted his mirasi right in 1864 when he was sued by Ramakrishna and twelve years had passed from that day the plaintiff's right as representing the math to recover immediate possession was barred. This decision does not support the contention advanced by learned counsel for the respondent. Ramakrishna, who was the manager de facto in 1864, brought a suit against Buxarbhai and failed. He continued to remain in possession till 1875 when he was followed or succeeded by Gopal. The math was thus being continuously represented by Ramakrishna and Gopal. The decision in the second case, 51 Cal 953,[23] is not, with great deference to the

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36. ('23) 10 A I R 1923 Mad 461 : 72 I C 5 : 46 Mad 579 : 44 M L J 318, Annamalai Desikar v. Govindarao.

37. ('25) 12 A I R 1925 Mad 822 : 86 I C 231 : 48 M L J 114, Rangadasan v. Latchuma Dasan.

38. ('26) 13 A I R 1926 Mad 193 : 91 I C 377 : 49 M L J 640, Govinda Rao v. Chinnathurai Pillai.

learned Judge who decided that case, correct. While the learned Judge understood the effect of the decision in 32 Cal 129[14] correctly, he overlooked the fact that 37 Cal 885[18] was a case in which the assignment was, being one of the math and its properties, void ab initio and passed no title with the result that the assignee's possession became adverse from the date of the assignment (3rd November 1874) itself irrespective of the fact that the senior chela who had executed ekrarnama and transferred the math and its properties was living. This was how this decision was explained by their Lordships in 12 Pat 251.[20] 37 Cal 885[18] is no authority for the proposition that time will begin to run against the idol even when the shebait is not in existence. Nor is it possible, I venture to submit, to institute a suit in the name of the idol in cases where a shebait is not appointed. There is very little analogy between a public company and an idol although both of them, it must be conceded, are clothed with a juristic personality by law. Under the provisions of O. 29, Civil P. C., however, it is only a secretary, director or other principal officer, able to depose to the facts of the case, and none else who can sign and verify the statements in the pleadings as a shebait. Matathipathi or a manager can do on behalf of the idol or math and none else *(sic)*. To say that any person other than those that I have mentioned in the last sentence, by whatever name they may be called, can bring a suit on behalf of the idol or math in their names where they are not appointed or functioning as managers etc., is to go against the express decision of their Lordships in 32 Cal 129.[14]

The third case was that in 59 Mad 809.[33] The reflection in regard to this case that there was no manager between 1913 and 1917 is of no avail as Nataraja became a manager de facto in 1902 and continued to function as such until 1913 when he was removed by the High Court. If the period of limitation had once started, it could not be stopped by the subsequent removal of the manager. Moreover the permanent cowle was in that case granted in 1865 and the conduct of the various managers showed that they had been recognizing the transfer of the permanent cowle or lease as valid. In view of the existence of a manager de facto, the decision does not support the contention advanced by learned counsel for the respondent. If the alienee's possession during the lifetime of the previous manager was not adverse to the math (a proposition to which no exception is taken in this case) and if an idol or a math is incapable of bringing an action without the intervention of a human agency and if that agency is to be confined in law to a manager, de facto or de jure, by whatever name he be called, it is to my mind impossible to conceive that they (i. e., the idol or the math) can be described to be the plaintiffs within the meaning of that word as used in Arts. 142 or 144, Limitation Act. By using the word 'plaintiff' in either of these Articles, the Legislature obviously intended to convey a person who was in existence capable of taking action, although on account of a disability like minority (real and not fictional as an idol or a math is at times described), insanity or idiocy, he may not be able so to do during the period that he continues to suffer from the disability. To say that a cause of action has not arisen is one thing; to say that a cause of action, although it has arisen, is, on account of a disability suspended after it has arisen, another. Since the right to maintain a suit cannot be said to be hanging in the air and must necessarily vest in somebody as soon as it arises the word plaintiff in Arts. 142 and 144 must be, in my opinion, so construed as to cover a plaintiff who is in existence, although he may not be, on account of a disability mentioned in S. 6, Limitation Act, capable of bringing an action at once. If a person who has the right to bring a suit for the recovery of possession does not happen to be in existence, limitation under these Articles cannot be said to have started. It can only start when they come into existence.

Cases of this nature are very different from those which are covered by S. 17, Limitation Act. The language of this section makes it clear that the "right to institute a suit or make an application" must be independent of the death of the person and must have been such as should have accrued during his lifetime if he had lived but did not do so on account of his death. This section does not seem to contemplate cases where the right of action is connected with or arises in consequence of, the death. But this is not the case here. The cause of action to set aside the alienation made by a previous manager, if it is not void ab initio, arises according to Art. 134-B on his death, resignation or removal and would not have accrued earlier as this was all that was "required to correct his failure to keep within acts of proper management."

But it is argued that the suit must be held to be barred as the math was in exis-

tence on the date of the previous manager's death, as it had the capacity to sue and is actually a plaintiff in the present suit. The criticism that the right of suit can only arise when a person capable of suing is in existence, it is contended, has no application to a case like the present where the plaintiff who is capable of suing existed on that date. The answer to this contention is to be found in the two passages quoted by my learned brother Venkataramana Rao J. in his referring order from 14 Beng L R 450[13] and from 32 Cal 129.[14] If "it is only in an ideal sense that property can be said to belong to an idol," if "it still remains that the possession and management of the dedicated property belongs to the shebait" and if "every such right of suit is vested in the shebait, not in the idol" or in the math, it would seem to follow that the temple or math cannot be the plaintiffs by themselves without their shebaits or managers who must be in existence and capable of exercising their right to bring suits which vest in them—subject of course to the provisions contained in S. 6, Limitation Act. If such shebaits or managers happen to be in existence on the date on which the adverse possession is started, limitation will continue to run not only against them but as against the temple or mutt of which they are the sole accredited agents and after the expiry of the statutory period, subject to such other extensions that may be possible to add under the provisions of the Act, the suit for possession would have to be dismissed as barred by Art. 144.

It is said that in construing the word 'plaintiff' in their Lordships' judgment in 57 ALL 159,[19] Sir Shadi Lal took it as referring to the institution and not to the manager of the same. But no such question was before their Lordships for their consideration then and even taking the limitation as running from the date of Raj Bau's death, which occurred in 1916, the action which was commenced in 1926, was held to be within time. There was no necessity in that case to consider whether the word 'plaintiff' was not used by the Legislature so as to cover the case of a matadhipathi or a manager when suing on behalf of a math or other charitable or religious institution. The language in 12 Pat 251[20] is not, however, capable of that contention. The question that was formulated by their Lordships referred both to the math and the mahanth. That the math is a plaintiff (or perhaps a part of the plaintiff) cannot be doubted. Nor can it be, I venture to submit, denied that it was unable to protect itself or bring any action with that object. If the manager was the only human being who could bring a suit on behalf of the math and if it was not maintainable by anyone else, the word 'plaintiff' cannot be used, in my humble opinion, for merely an inanimate juristic person which is unable to take any action itself. It is quite true that when a human being who is capable of maintaining an action is in existence, the period of limitation would not run against him alone but also against the institution as well. This is because in such cases the capacity to sue vests conjointly in two persons, one juristic and the other natural; the one being the complement of the other and thus filling the deficiency that either individually has in the other's absence. It would, therefore, follow that when the living person who could bring an action is not in existence, adverse possession cannot run against the institution as one whole plaintiff, of which the inanimate and animate beings are two component parts, is not in existence but only, so to say, half the plaintiff and that an inanimate one.

The decision in 12 Pat 251,[20] it might be added, has no bearing to a case like the present where there was no manager in existence to challenge the action taken by the previous manager. If the math is unable to sue without the intervention of the human agency of its own manager, the limitation cannot be, in my opinion, held to run against the math either. Stating in 61 Cal 262[39] what constitutes adverse possession, their Lordships adopted the language of Lord Robertson in 27 Cal 943[40] at p. 950, which was to the following effect :

> The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor,

and added :

> The classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion, there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment so that the person, against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening.

The above quotation was cited by their

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39. ('34) 21 AIR 1934 P C 23 : 147 I C 545 : 61 Cal 262 : 61 I A 78 (P C), Secretary of State v. Debendralal Khan.
40. (1900) 27 Cal 943 : 27 I A 136 : 4 C W N 597 : 7 Sar 714 (P C), Radhamoni Debi v. Collector of Khulna.

Lordships in 68 M L J 600[41] and would show that to be effective, to use their words,

> the person against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening.

It was not only impossible for the math to be aware of what was happening, however, greatly it may have exercised its vigilance, but what is worse, there was no living person, capable of bringing an action, in existence at the time when adverse possession is said to have started, who could have been aware of what was happening. Adverse possession need not necessarily be brought to the actual knowledge of the person against whom it is to operate, but the rule is subject to the qualification, as pointed out in the above case, that it is incumbent on those who plead and rely on adverse possession to show that the person against whom it was claimed ought to have been, by exercising due vigilance, aware that the property was being held adversely and if they failed to show this, their plea of adverse possession must fail apart from the question of whether their possession was adequate in continuity and extent. If the manager had not come into being till then, and it was the manager alone, being the only person entitled to sue on behalf of the math whose knowledge or rather whose capability of having knowledge was essential, it is fairly obvious that limitation or adverse possession could not start against the math either to his knowledge or what was capable of being known by him, on the date of the previous manager's death and before he was appointed. Viewed thus, adverse possession must be held to have commenced from the date of the plaintiff's election or appointment and not earlier. I agree that the costs of the reference should be made costs in the appeal.

Krishnaswami Ayyangar J. — Of the three questions referred, it is the first alone which presents a difficult question of construction. Article 134B with which we are primarily concerned was enacted for the first time in 1929, and during the eleven years since elapsed, no occasion appears to have arisen for an authoritative pronouncement regarding the precise scope of the article, much less on its applicability to the peculiar facts which are here present. The argument at the bar proceeded therefore mostly on general principles. It is to be observed at once, that general principles rarely, if ever, occasion anxiety to Courts, but it is their application to concrete facts which often presents problems of considerable difficulty. One can readily grant in the abstract the soundness of the elementary rule that when the words of a statute are clear and unambiguous, the Court must give effect to their plain meaning, uninfluenced by considerations of possible hardship, inconvenience or even injustice in individual cases. For where the language is explicit, its consequences are for the Legislature and not for the Courts to consider. It may also be conceded that what has been termed the rule of equitable construction based on "the equity of the statute" is an antiquated doctrine not favoured in modern times, and appears to have fallen out of use even in England at the present day (Craies on Statute Law, 97). There is, it is not to be forgotten,

> another elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it be also within the real intention of the Legislature, and the words, if sufficiently flexible, must be construed in the sense, which if less correct grammatically is more in harmony with that intention. (Maxwell 17).

The rule on the subject has been long ago laid down by such eminent authorities as Lords Blackburn and Halsbury, than whom I can desire no better or safer guides. In (1876-77) 2 A C 743,[42] Lord Blackburn said:

> In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view.

In (1898) A C 571[43] at page 575, Lord Halsbury said :

> To construe the statute now in question it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy.

The rules of construction set out above warrant a consideration of the state of the law as it was understood to be when the Amending Act of 1929 was passed. It is only by so doing that one can obtain a clue to the correct understanding of the scope and effect of Art. 134B, by a knowledge of the causes which led to the enactment. If we can be certain of the particular defect in

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41. ('35) 22 AIR 1935 P C 36 : 153 I C 929 : 14 Pat 327 : 62 I A 40 : 68 M L J 600 (P C), Srischandra Nandy v. Baijanath Jugal Kishore.

42. (1876-77) 2 A C 743 : 47 L J Q B 193 : 37 L T 543 : 26 W R 217, River Wear Commissioners v. Adamson.

43. (1898) 1898 A C 571 : 67 L J Ch 628 : 79 L T 195 : 47 W R 152 : 15 R P C 476 : 14 T L R 527, Eastman Photographic Material Co. v. Comptroller-General of Patents, Designs and Trade-marks.

the law, which the Legislature set out to remedy, whether it consisted of an evil to be removed, or a doubt to be resolved, we shall be better equipped to approach the construction of the language used than otherwise.

Up till the decision of the Privy Council in 44 Mad 831[10] the true legal relation in which the head of a math and the dharmakartha of a temple stood towards the properties in his charge had not been correctly understood in this country: 27 Bom 363,[44] 20 ALL 482,[45] 23 Cal 536[46] and 40 Mad 745.[47] The dicta in some of the earlier decisions even of the Privy Council cannot be said to have been wholly free from ambiguity. The current of judicial opinion ran largely on the view that S. 10 and Art. 134 applied indifferently to all cases of endowed property improperly alienated, whether that property belonged to a math or to a temple. 44 Mad 831[10] finally rejected this view and declared in a manner no more open to misapprehension, that neither of the two provisions were applicable to the holding of such a species of property. The head of a math and the shebait of a temple are not trustees in the legal acceptation of the word, and the property entrusted to their charge was not legally vested in or conveyed to them in trust. The result was the discovery of a *casus omissus* in the Limitation Act, regarding a well-known and a rather frequent type of cases arising out of the malversation of temple or math properties by delinquent managers. The Legislature proceeded to supply the omission, instead of leaving such cases to be governed as theretofore by the residuary article, Art. 144. In framing the new articles specifically providing periods of limitation for suits to set aside alienations of endowed property, and recovery of possession, the Legislature merely followed the elucidation of principle contained in the judgment of the Privy Council in 44 Mad 831.[10] That judgment laid it down in clear terms that a permanent lease granted by the manager of a math was good during his lifetime though on his death his successor could recover back the property free of the alienation. Adverse possession began to run from the death of the alienating manager, on the happening of which event the succeeding manager had a cause of action to sue to recover the property. These principles which are of course common to all similar institutions were explained in the following terms at page 855:

> According to the well-settled law of India (apart from the question of necessity which does not here arise) a mahant is incompetent to create any interest in respect of the mutt property to enure beyond his life. With regard to mahant 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can therefore only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death.

It is plain that it was this passage which furnished the material for the drafting of Art. 134B whose language closely follows the view expressed there. There was no occasion for introducing a change in the law so declared and no necessity existed for legislative intervention except to give effect to the principles laid down. In a later part of my judgment, I have adduced arguments in support of the view that Art. 144 should not be understood as sanctioning the commencement of limitation at a time when there existed no manager. If that is a sound view, there is no reason for thinking that the Legislature intended to enact a different principle when it framed Art. 134B. Otherwise the article will result in producing the startling consequence pointed out by my learned brother Abdur Rahman J. that in a case where no successor happened to be appointed for a period of twelve years, the institution would stand to lose all its rights owing solely to the reason that no manager had been brought into existence to vindicate them on its behalf. It is, I consider with all respect, no answer to say that the blame rests with the electors who had neglected a duty incumbent on them to appoint a successor. The law enjoins this duty on the manager and not on the disciples of a math or the worshippers of a temple. The latter cannot sue for possession for themselves, though they may sue for the possession to be restored to a manager, if in existence or to one to be newly appointed: 27 M L J 270[48]

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44. ('03) 27 Bom 363 : 4 Bom L R 743, Dattagiri v. Dattatraya.
45. ('98) 20 All 482 : 1898 A W N 123 (F B), Behari Lal v. Md. Muttaki.
46. ('96) 23 Cal 536, Nilmony Singh v. Jagabandhu Roy.
47. ('18) 5 AIR 1918 Mad 984 : 40 I C 531 : 40 Mad 745 : 32 M L J 24, Baluswami Iyer v. Venkitaswami Naicken.
48. ('15) 2 A I R (1915) Mad 687: 25 I C 559: 27 M L J 270, Noor Mahomed Sait v. Karim Bivi.

and 17 M L W 147.[49] Their position in this respect is not higher than that of relators in regard to charitable property improperly alienated: 41 Mad 124[50] at p. 128. It is difficult to imagine that the Legislature contemplated the possibility of their taking action to protect the institution, and on this footing fixed the starting point for limitation, irrespective of whether there was or was not a manager who could sue. However that may be, the Article under consideration is designed to apply to suits for possession by the manager and considerations connected with the remoter rights of disciples and worshippers have no place in the construction of its language. Those rights are essentially different in character, and the remedies annexed to them are equally different.

These considerations incline my mind to the construction which has found favour with Abdur Rahman J. which has the merit of avoiding what, I am satisfied, would be an unforeseen consequence of the wording found in Art. 134B. To apply it to cases where there is an interregnum, would mean the abridgment of the period limited, and where it is long enough, the extinction of the right altogether. There may be no help for it, if the language is sufficiently explicit, but in my opinion it is not. Prima facie, there is much to be said for the view that when the Legislature fixes a period of limitation it means that the litigant should have it in full and not merely in part, much less, none, of it. The reason is plain, and really underlies every rule of limitation, in the absence of express words to the contrary.

The Limitation Act, as is the case with all other statutes of limitation, fixes a period of limitation for causes of action in existence, not for those to arise in the future. The statute in fact assumes the existence of a cause of action, 21 Cal 8[51] at p. 18, and only aims at interposing a bar after a certain period, to a suit to enforce it. It has been repeatedly held that unless there is a completed cause of action, limitation cannot run; and there cannot be a completed cause of action, unless there is a person who can sue, and a person who can be sued: (1913) 2 K B 549[52] at p. 552; 39 C L J 40;[53] 18 I C 373[54] at p. 375. It is on this principle that S. 7 of the Act is based, though it is not exhaustive in this respect. It is again in this view only, that the decisions of this Court in 2 M L W 723,[24] 4 M L W 369[25] and ILR (1938) Mad 586[26] could be supported. All these cases, it is true, were decided with reference to Art. 120, which fixes a period of six years from the date when the right to sue accrues. My Lord, the Chief Justice, delivering the judgment of the Full Bench in the last of these cases, observed :

> With regard to the second question it will be observed that Article 120 declares that limitation shall start to run when the right to sue accrues. There can be no cause of action until there is a party capable of suing, and until there is a cause of action, there can be no question of the law of limitation coming into operation : *see* (1821) 5 B & Ald 204,[4] 32 Cal 129,[14] 43 I A 113[3] and 50 Cal 49.[6] It follows that if a sole trustee of a public trust commits a breach of trust, the loss cannot be made good, by voluntary action on the trustee's part, until there is a new trustee. The right to sue in such a case would have to be in abeyance until a new trustee was appointed, in which case the period of six years' limitation would not commence until a new trustee had been appointed.

Here then is a qualification subject to which, Art. 120 has been construed, though there are no express words to that effect to be found in this article. Venkataramana Rao J. is of opinion that this is not to be regarded as a general principle applicable to all articles without exception, but must be limited to cases where, without specifying the starting point by reference to particular events or facts, the Legislature has contented itself with fixing it by reference generally to the accrual of the cause of action. It cannot of course be disputed that the Legislature can by the use of apt words make limitation run, by fixing an arbitrary point of time irrespective of whether there is a completed cause of action or not in the sense explained. But the Legislature should not be presumed to have acted in an arbitrary manner, and as I read Art. 134B, it seems to me that in specifying the events mentioned in col. 3, it was only attempting to give effect to the law as declared by the Privy Council. The choice of those events were made by way of describing the true cause of action as settled by the Privy Council, and there is not to my mind the slightest ground for importing the idea of arbitrariness in the

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49. ('23) 10 A I R 1923 Mad 276: 71 I C 463: 44 M L J 116: 17 M L W 147, Rangaswami Naidu v. Krishnaswami Iyer.

50. ('18) 5 A I R 1918 Mad 464: 42 I C 366: 41 Mad 124: 33 M L J 357, Chidambaranatha Thambiran v. Nallasivan Mudaliar.

51. ('94) 21 Cal 8: 20 I A 183: 6 Sar 334 (P C), Harinath Chatterjee v. Mothurmohan Goswami.

52. (1913) 2 K B 549: 82 L J K B 949: 109 L T 77: 29 T L R 486, Gelmin v. Morrigia.

53. ('24) 11 A I R 1924 Cal 600: 79 I C 520: 39 C L J 40, Dwijendra Narain v. Joges Chandra.

54. ('13) 18 I C 373, Palaniyandi Malvarayan v. Vadamalai Udayan.

fixation of the *terminus a quo* here. One has only to run one's eyes through the several articles to realize what an amount of care the Legislature has taken to fix the starting point with reference to the accrual of the cause of action.

If the charge of arbitrariness so far as this article is concerned is unsustainable, as I think it is, is there any reason why this article should be regarded as not subject to the qualification, to which I have already referred? I have examined the English and the Indian cases on the point, and I can find no authority which limits the operation of the qualification to those cases only where, the statute has adopted the date of the accrual of the cause of action stated in general terms, as the date from which limitation would commence to run. I regret that I am unable with great respect to share the view that such a salutary principle is necessarily to be excluded, for no other reason than that the Legislature has proceeded a step further and described the cause of action with some definiteness and particularity. Where an omnibus article intended to apply to a variety of suits, too numerous to specify, is to be framed, the Legislature cannot and nobody can, but be content to insert a general statement of the cause of action and leave it at that. That is precisely what has happened in the case of Art. 120. I consider that the proposition stated in the following words at p. 205 in Lighwood's "Time Limit of Action" is of general application, applicable as much to Art. 134B as to Art. 120, and read in the light afforded by it, time cannot be held to run until the succeeding manager is appointed. The passage is this :

> If at the time when a cause of action would arise there is no person capable of suing upon it, the statute does not commence to run until there is a person to sue, the cause of action does not fully accrue, and the operation of the statute is postponed accordingly.

The authorities cited by the learned author appear fully to support the statement of the law made by him. The only question is whether the language of Art. 134B is sufficiently clear to exclude its application. In my view it is not. There is also much force in the argument that the article worded as it is could not in any event be applied to a case where the manager contemplated in col. 1 of the article had not come into existence at the point of time fixed in the third. This aspect of the question has been so fully examined by Abdur Rahman J. that it is unnecessary for me to say anything more than that I generally agree in his reasoning. If this article is to be put aside as not applicable, we are necessarily thrown back on Art. 144 to which resort must be had in all cases left unprovided for, by the mere specific provisions of the Act.

The consideration of the true effect of Art. 144 is comparatively a simpler question, and is capable of an easy answer, if it is remembered that the question is not when the possession of the defendant became adverse in a general sense, but when it became *adverse to the plaintiff*. Inasmuch as the possession of the defendant has not only to be adverse, but adverse as against the plaintiff, it is self evident that until there is a plaintiff in existence, the statute cannot run. We have not therefore to consider in connexion with this article, the applicability of the rule in *Murray's case*,[4] (36 C L J 478[55] at p. 483, approved by the Privy Council in 52 Cal 809[17] at p. 815) for the qualification laid down in that case is implicit in the words of the article italicized above. There is still the controversy as to who in the case of maths and temples is to be regarded as the factual and not the nominal plaintiff in suits falling under the article. Venkataramana Rao J. is of opinion that it is the math or temple conceived as an artificial legal entity which is and must be regarded as the real plaintiff, so that in applying Art. 144, the question that falls to be considered is not whether the possession of the defendant becomes adverse to the manager, but whether and when it becomes adverse to the math, that is to the artificial legal persona, supposed to represent the math and own its properties. With the utmost respect, I must say there is no warrant for this view either on principle or on the authority of the decided cases.

The peculiar character and incidents which attach to Hindu religious institutions in this country have no parallel in any other system of jurisprudence. The doctrine that an idol is not merely symbolic of a trust, but is a living sentient being, 36 C L J 478[55] at p. 483; 52 Cal 809,[17] capable of holding and owning property, is based on an article of faith sanctioned by the Hindu religion, and recognised by the British Courts from a very early time. The idol, to use the language of the law, is an artificial legal concept, a judicial entity in itself. In 13 M I A 270[12] it was laid down by the Privy Council that

> the rents constituted . . . . . in legal contemplation its (idol's) property. The shebait had not the legal

55. ('23) 10 A I R 1923 Cal 60 : 72 I C 1026 : 36 C L J 478, Ramabrahma Chatterji v. Kedar Nath.

property but only the title of a manager of a religious endowment.

In 14 Beng L R 450[13] at p. 459, their Lordships explained the position by observing :

It is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must in the nature of things be entrusted to some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain it.

In 32 Cal 129[14] the question again fell to be considered, and legal position was more fully analyzed. Their Lordships said :

There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is in an ideal sense that property is so held. And probably this is the true legal view when dedication is of the completest kind known to law. But there may be dedications of a less complete character. . . . . But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. *Every such right of suit is vested in the shebait, not in the idol.*

(The italics are mine.) In 44 Mad 831[10] the Judicial Committee reiterated the same proposition in the following words :

Under the Hindu law, the image of a deity of the Hindu pantheon is, as has been aptly called a 'juristic entity,' vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same 'juristic' capacity, and gifts are made to them eo nomine . . . . . When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency, called by whatever name, he is only the manager and custodian of the idol or the institution . . . . In no case was the property conveyed to or vested in him; nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration.

Lastly in 52 Cal 809,[17] Lord Shaw observed as follows :

A Hindu idol is, according to long established authority, founded upon the religious system of the Hindus, and the recognition thereof by Courts of law, a 'juristic entity.' It has a juridical status with the power of suing or being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote authorities; for, this doctrine, thus simply stated, is finally established.

After these pronouncements it is purposeless to multiply authorities. The result is that an idol—the same is equally true of a math—is a legal abstraction, a juristic entity having only a notional existence but capable in theory of owning and holding property. This is but a fiction but its consequence in practice is to deprive the manager of legal title in the property, which he may only hold and possess on behalf of the institution, not on his own. When he sues or is sued in a Court of law, the form to be adopted is that appropriate to the fiction that it is the idol or the math, and not the manager that is the owner. Hence the necessity for using the name of the deity or the institution as the formal party on the record, 33 ALL 735[32] and I L R (1940) Mad 858,[34] in proceedings in Court. But the form is not to be mistaken for or confused with the substance. The substance of it is that the juridical possession is in the manager, and he alone can vindicate the rights appertaining to it. When a stranger usurps possession, it is he that is dispossessed not the institution, and the right of action is his and not the idol's. Otherwise, it will be impossible to understand the decision in 32 Cal 129[14] where the Judicial Committee gave to a minor manager the benefit of S. 6, Limitation Act, in a suit by him as the shebait of an idol to recover possession of land belonging to it. The ground of the decision is contained in the following sentence at p. 140 :

The dispossession complained of has been found to have taken place after the date of the plaintiffs' adoption, and therefore the cause of action in respect of it accrued to him, and to no one else, and it accrued according to the findings during his minority.

Language can scarcely be plainer. The party held to have been dispossessed was not the idol but its manager according to the decision, and hence it was that the cause of action was found to belong to him and to none other. It is impossible therefore in this type of cases, to hold that the idol can never be dispossessed; the only person who can be dispossessed is the person who has the possession in law, and that person is the manager. The subsequent decisions of the Board have in no wise altered the view of law as conceived in this decision. In 37 Cal 885[18] the senior chela had during his lifetime by an ekrarnama executed in favour of the junior more than 12 years prior to suit, parted with the possession of a part of the math itself, in fact of the whole of a subordinate math, together with the properties annexed to it, and his successor's suit to recover it was held barred. It is to be observed that the Privy Council did not go back on its

earlier decision in 32 Cal 129,[14] in any respect. It did not make, and was not called upon to make, any pronouncement, on the question whether the cause of action which was held barred was one which was vested in the idol as distinct from the manager. The case only decided that the suit was barred, as from the date of the ekrarnama; the possession of the junior chela "was adverse to the right of the idol and of the senior chela as representing that idol." This decision and an earlier one in 23 Mad 271[56] have since been authoritatively explained by their Lordships in 12 Pat 251,[20] as having proceeded on the footing that in them, unlike in the case before their Lordships as in the case before us, the impugned alienation was void ab initio as it consisted of an assignment or disposition of the math and its properties, which

was void and would in law pass no title with the result that the possession of the assignee was perforce adverse from the moment of the attempted assignment.

Where the alienation is not wholly void, but would stand good during the tenure of office of the alienating manager, adverse possession does not commence till that tenure comes to an end, by death, removal or resignation. In laying down the law in this manner, the Privy Council was only repeating what had already been ruled on in 44 Mad 831.[10] The same principle has also been applied since in 46 Mad 751,[21] 57 ALL 159[19] and 59 Mad 809,[33] in which their Lordships further made it clear that all classes of endowments and all manner of alienations fall under it.

Can it be said that as the result of the Privy Council decisions since 44 Mad 831,[10] which is a landmark as it were on the point under review, any doubt has been cast on the integrity of the law as enunciated in 32 Cal 129[14]? I think not. When the manager is ultimately barred, the institution is also barred, and there can be no doubt of this being the correct principle. For instance if a stranger manages by trespass to dispossess the manager and continue in possession, for the statutory period, the rights of the manager as well as those of the institution will be barred. The same result will follow where a title by adverse possession is perfected by possession commenced under an alienation void from the beginning, or where the succeeding manager has allowed the possession of an alienee under an alienation valid during the tenure of office of his predecessor but not beyond, to continue for the full period of twelve years. The difference between void and voidable alienations in the sense explained in 12 Pat 251[20] may no longer be of any importance in cases falling under Art. 134B. But in cases outside the article it still holds good. The difference may perhaps be justified on the theory that in the former the alienating manager is under no personal bar, and that he is at liberty to take steps to get back the property ignoring the alienation 2 Pat 391[57] at p. 400, 59 Mad 809,[33] while in the latter he cannot do so. This difference has to be recognized, having been imported into the law by the decision of the highest tribunal binding on all the Courts in India, in 23 Mad 271[56] and 37 Cal 885,[18] and has come to stay as laid down in 12 Pat 251.[20]

The general position resulting from the decisions noticed above may be formulated by saying that ordinarily a math or an idol is represented by its manager in whom alone all rights of action are vested, and who alone can enforce them. Rules of limitation which operate in bar of suits are to be understood as having reference to his action or inaction, the institution dropping out of account for this purpose altogether. Just in the same way as his possession is the possession of the institution, so also when he is dispossessed, the institution will be deemed to be dispossessed and not otherwise. It follows that when there is no manager, the institution cannot be held to be in possession as the right to possession inheres only in him and he alone can exercise it. In order that possession may be held to be adverse against the institution it must be shown that it is adverse to the manager. In other words, when there is no adverse possession against the manager, there can be none against the institution either. By its very name, adverse possession connotes the idea of a hostile competitive holding of property in such an overt manner "that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening": 61 Cal 262.[39] The vigilance, in the case of endowed property, is the vigilance expected of the manager on whom the duty to protect it is placed by law. The expression "adverse to the plaintiff" in col. 2 of Art. 144 of the Act must therefore be understood as meaning that the possession should be

56. (1900) 23 Mad 271: 27 I A 69: 10 M L J 29: 7 Sar 671 (P C), Gnanasambanda Pandarasannadhi v. Velu Pandaram.

57. ('23) 10 A I R 1923 Pat 475 : 74 I C 403 : 4 P L T 675 : 2 Pat 391, Muhammad Fahimul Huq v. Jagatbullav Ghosh.

adverse to the real plaintiff in whom the right of action is vested disregarding the nominal plaintiff which is the idol or the math concerned.

If this is the correct view of the article, then the further question when the possession of the defendant becomes adverse in regard to endowed property is not difficult to answer. The controversy which once existed on this subject as to whether adverse possession commences from the date of the alienation or from the date when the tenure of office of the manager who made the alienation terminates, has been definitely and finally set at rest by the several Privy Council decisions to which reference has already been made. It has been finally declared that the former furnishes the correct starting point in cases when the alienation is void ab initio as where it comprises in whole or in part the math and its properties. In the ordinary type of cases, where the manager acts in excess of his powers, by creating an interest to enure beyond his tenure of office, the alienation is good till its termination, but from that time the possession of the alienee will become adverse to the succeeding manager and the institution, of course, in the absence of any fresh arrangement between the parties.

But never till now has it fallen to the Court to apply the article to a case where there was an interval of time between the termination of one manager's tenure, and the commencement of his successor's. The Privy Council did not contemplate such a situation in any of the cases so far decided by it. There is on the contrary good reason for thinking that Mr. Amir Ali who delivered the judgment of their Lordships in 44 Mad 831[10] did not envisage the possibility of a hiatus, when he extracted the following passage from a judgment of his own while he was on the Bench of the Calcutta High Court in 19 Cal 203[58]:

> Upon the death of the last incumbent, generally on the day of what is called the sium or teja ceremony (performed on the third day after his decease), the fakirs and murids of the durgah, assisted by the heads of neighbouring durgahs, install a competent person on the guddi; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent.

What is stated in the above passage is equally true of Hindu institutions. There is little, if any, scope for an interregnum in the case of Hindu temples, mostly under the management of a plurality of managers, or vested in hereditary dharmakarthas. In the case of maths, the usual and recognized method of appointment is by nomination during the lifetime of the ruling matadhipathi by installing a junior who will in due course succeed to the headship promptly on his death. Occasionally an appointment might be made by will where again there is no possibility of an interregnum. It is only when the choice has to be made by the disciples, which is a very rare event, that there is scope for an interregnum occurring. From the passage quoted, it would seem that even the last mentioned mode of succession was not regarded as likely to give rise to the problem. Be that as it may, the language of the article understood in the light of the peculiar principles applicable to endowed property, creates no difficulty whatever. There can, therefore, be no doubt that adverse possession cannot commence against the math when there is no manager, though when it once commences to run, it would run on in spite of the subsequent occurrence of a hiatus, which does not by force of S. 9 operate to stop it. The general rule of law is to bar a person who has a right to enter if he does not exercise his right in a certain time, not to bar those who cannot exercise those rights : 52 Cal 417[59] at p. 422. I, therefore, concur in the answer given by Abdur Rahman J. to the third question.

The second question raises the point whether a succeeding manager if a minor at the date of his election or management, can take advantage of S. 6 when he brings the suit. If Art. 144 is the proper article which governs the case, then the time from which the period of limitation is to be reckoned, is the date of the appointment which brought the manager into existence which is the date of the commencement of adverse possession. The benefit of the section will be attracted to the case. But if the true article applicable to the case is Art. 134B, the minor manager cannot invoke the section to his aid, for, on this hypothesis, time had already begun to run with the death, resignation or removal of the preceding manager, and the section excludes him from its benefit. There is no warrant for raising a fiction to date back his appointment to the date of the termination of the previous manager's

58. ('92) 19 Cal 203, Piran v. Abdul Karim.

59. ('25) 12 A I R 1925 P C 97 : 88 I C 110 : 52 Cal 417:52 I A 160 (PC), Katyayani Debi v. Udai Kumar Das.

tenure merely on the strength of the dictum of the Privy Council in 14 Beng L R 450[13] that successive shebaits form a chain of continuing representation of the idol's property. I agree with the order made by my Lord as regards the costs of the reference.

C.R.K./G.N. *Reference answered.*

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* (28) A. I. R. 1941 Madras 475

LEACH C. J. AND HAPPELL J.

Doraisami Naicken — Appellant

v.

Peru Su. Aru Periakaruppan Chettiar and others — Respondents.

Letters Patent Appeal No. 10 of 1940, Decided on 20th December 1940, against decree and judgment of Patanjali Sastri J., *Reported in A I R 1940 Mad 461.*

*** (a) Limitation Act (1908), S. 20 (2)—Mortgagee entering into possession under invalid contract of sale—He must be deemed to be in possession within meaning of S. 20 (2) as mortgagee : (1940) 1 M L J 134=A I R 1940 Mad 461, REVERSED; (1937) 2 M L J 170=A I R 1937 Mad 642=172 I C 576, OVERRULED.**

A mortgagee who enters into possession of the mortgaged properties under an invalid contract of sale must be deemed to be in possession within the meaning of S. 20 (2). The fact that his sale proved to be invalid cannot vitiate his title as mortgagee and the rents and profits which he received must be deemed to have been received by him as the mortgagee : (1940) 1 M L J 134=A I R 1940 Mad 461, *REVERSED*; (1937) 2 M L J 170=A I R 1937 Mad 642=172 I C 576, *OVERRULED*; A I R 1922 Cal 114 and A I R 1926 P C 68, *Rel. on*; A I R 1934 Mad 656, *Disting.* [P 476 C 2]

(b) Limitation Act (1908), S. 20 — Mortgage suit — Application for final decree — S. 20 operates to extend time.

Section 20 operates to extend the time for the filing of an application for a final decree in a mortgage suit : A I R 1927 All 159, *Foll.*; A I R 1919 Mad 709, *Rel. on* ; A I R 1919 Mad 792, *Expl.* [P 477 C 1]

K. Rajah Iyer — for Appellant.

S. Ramchandra Iyer — for Respondents.

Judgment. — Two questions relating to the law of limitation have been argued in this appeal. On 8th April 1926, the appellant obtained in the Court of the subordinate Judge of Coimbatore a preliminary mortgage decree for Rs. 4772 with interest and costs, amounting altogether to Rs. 5856-6-6, against one Muthu Goundan and his two sons, a period of six months being allowed for redemption. The respondent was impleaded as defendant 5 in the suit. He had obtained a money decree against the mortgagors and has attached the equity of redemption of the mortgaged properties. The attachment was continuing at the time of the passing of the preliminary decree on 8th April 1926. In the month of July 1926 the mortgagors conveyed the mortgaged properties to the appellant in satisfaction of the mortgage debt. Thereupon the appellant went into possession of the properties and remained in possession until 1932 when he was dispossessed by the respondent, who had caused them to be sold in execution of his decree and had become the purchaser at the court-sale. The properties were sold subject to the appellant's mortgage and on 27th October 1933 the appellant filed an application in his suit for a final decree for sale. The respondent pleaded that the application was barred by the law of limitation, but the subordinate Judge and the District Judge on appeal held that it had been filed within time. The respondent then appealed to this Court and the appeal was heard by Patanjali Sastri J. who allowed it. The present appeal is from the judgment of Patanjali Sastri J.

The first of the two questions raised is whether S. 20 (2) applies here. If it does apply the appellant's application for a final decree is in time. Patanjali Sastri J. held that the section did not apply and relied on the decisions of this Court in (1937) 2 M L J 170[1] and 40 M L W 595.[2] The appellant says that the first decision is erroneous and the second decision has no application. He contends that the Calcutta High Court rightly decided the question in 35 C L J 58.[3] The second question is whether the purchase of the properties by the respondent at the court-auction held in the execution proceedings instituted by him revived the appellant's right to have a final mortgage decree passed in his favour, irrespective of s. 20.

Sub-section (2) of S. 20 states that where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of the land shall be deemed to be a payment for the purpose of sub-s. (1) which deals with the effect of payment of interest as such or a part payment of principal. The first case in which the effect of sub-s. (2) was considered was 35 C L J 58.[3] The facts in that case were shortly these. A preliminary mortgage decree was passed on 6th April 1910 and the mortgagor was allowed six months in which to redeem. In 1912 the

1. ('37) 24 AIR 1937 Mad 642: 172 I C 576: (1937) 2 M L J 170, Mahomed Yusuf v. Narayana Pillai.
2. ('34) 21 A I R 1934 Mad 656 : 153 I C 462 : 40 M L W 595, Faibsatha Banu v. Mahomed Rashidhuddin Quasireshi.
3. ('22) 9 A I R 1922 Cal 114 : 64 I C 903 : 35 C L J 58, Bamacharan Chakraburty v. Nimai Mandal.

mortgagor agreed to transfer the equity of redemption to the mortgagees in satisfaction of what was due to them under the mortgage decree, and in pursuance of the agreement the mortgagees went into possession, but they never received a valid conveyance. On 1st April 1917, the mortgagor transferred the property to defendant 5, who dispossessed the mortgagees. On 2nd October 1917, the mortgagees applied for a final decree for sale, but the objection was taken that the application was time-barred. The Court which was composed of Asutosh Mukherjee and Panton JJ., held that it was not time-barred. The Court said that S. 20 might well be construed to apply whenever mortgaged property is in the possession of the mortgagee. Where a mortgagee has obtained possession under an invalid agreement for sale he may be called upon to account for the rents and profits as if he were a mortgagee in possession. The Court also observed that a litigant cannot be permitted to take up inconsistent position to the detriment of his opponent. If he does not regard the sale as being valid he must accept his opponent as the mortgagee, in which case section 20 applies.

In (1937) 2 M L J 170[1] the facts were also very similar. In 1903 immovable property was mortgaged to one Narayanaswami Iyer and in 1905 a second mortgage was created in favour of one Swaminatha Pillai. In 1906 Narayanaswami Iyer instituted a suit to enforce his mortgage without impleading the second mortgagee and bought the property in execution proceedings in 1908. In 1915 Narayanaswami Iyer sold the property to the plaintiff's father, and the plaintiff and the members of his family remained in possession upto the year 1928. In 1910 Swaminatha Pillai assigned his second mortgage to defendant 4 who in 1920 brought a suit on his mortgage, impleading Narayanaswami Iyer as the first mortgagee. The Court directed a sale and at the court-auction held in 1928 defendant 4 bought the property. He obtained possession from the plaintiff, who filed the suit out of which the appeal arose to recover the amount lent on the mortgage of 1903. It was held that the suit was time-barred. Venkataramana Rao J. said that as the plaintiff and his family had been in possession as purchasers, not as mortgagees, they must be deemed to have received the rents and profits in the capacity of owners and not as standing in the place of the first mortgagee. The learned Judge considered that there was a distinction between that case and the Calcutta case which has just been quoted, but we are unable to see any distinction in the principle involved. The facts in 40 M L W 595[2] bear no analogy to the facts in 35 CLJ 58[3] or in (1937) 2 MLJ 170.[1] In 40 M L W 595[2] the Court held that unless interest is received as such S. 20, Limitation Act, cannot extend the period of limitation in favour of the plaintiff, but the Court was not considering the position of a mortgagee who has gone into possession as owner under an invalid title and we do not regard the case as having any real bearing here.

In the present case the plaintiff had a valid mortgage but went into possession of the mortgaged properties under an invalid contract of sale. The fact that his sale proved to be invalid could not vitiate his title as mortgagee and the rents and profits which he received must in the circumstances be deemed to have been received by him as the mortgagee. He may have thought that he was receiving them as the full owner of the property, but as he did not in fact hold that position he could only have received them in the capacity actually held by him, namely that of mortgagee. Support for this opinion is to be found in the decision of the Privy Council in 48 ALL 443.[4] There a karta of a joint Hindu family contracted to sell family property in order to discharge a debt due under a simple mortgage. The karta did not convey the property and the purchasers were compelled to institute a suit for specific performance as the result of which they obtained a conveyance and went into possession a year later. Out of the price payable to the vendor the vendees discharged the mortgage debt. Subsequently, the karta's sons challenged the validity of the transaction and it was held that it did not bind them, but the Privy Council said that the purchasers should for the period in which they were in possession of the property be treated as usufructuary mortgagees. They had discharged the mortgage. They purported to be in possession as purchasers, but as their title was defective they were to be regarded as usufructuary mortgagees. It follows that we consider that in 35 C L J 58[3] the correct opinion was expressed and therefore the appellant in this case was in possession of the property within the meaning of S. 20, Limitation Act.

This Court held in 42 Mad 52,[5] that an

4. ('26) 13 A I R 1926 P C 68 : 95 I C 898 : 53 I A 142 : 48 All 443 (P C), Ramcharan v. Bhagwan.
5. ('19) 6 AIR 1919 Mad 709 : 48 IC 298 : 42 Mad 52 : 35 MLJ 552, Subbalakshmi v. Ramalinga.

application which amounts to an acknowledgment within the terms of S. 19, Limitation Act, gives a fresh starting point for computing limitation in an application for a final decree in a mortgage suit. There is no difference in principle between S. 19 and S. 20 and the Allahabad High Court in 49 ALL 147,[6] expressly held that S. 20 operates to extend the time for the filing of an application for a final decree. It has been suggested that the decision of this Court in 42 Mad 61[7] is in conflict but we do not agree. The Court there was not considering the question which arises here. We hold that in the circumstances of this case the appellant must be deemed to have been in possession of the properties in suit as the mortgagee and therefore S. 20 (2), Limitation Act, applies which means that his application for a final decree on 27th October 1937 was in time. In these circumstances it is not necessary to consider the appellant's second contention. The appeal succeeds and will be allowed with costs in this Court and before Patanjali Sastri J.

C.R.K./G.N. *Appeal allowed.*

6. ('27) 14 A I R 1927 All 159 : 98 IC 818 : 49 All 147 : 25 ALJ 154, Baldeo Sahai v. Jafar Hussain.
7. ('19) 6 A I R 1919 Mad 792 : 48 I C 196 : 42 Mad 61 : 35 M L J 579, Singaraja v. Pethu Raja.

* (28) A. I. R. 1941 Madras 477

BURN AND MOCKETT JJ.

K. Nagalinga Chetty — Appellant

v.

O. K. Srinivasa Iyengar and another — Respondents.

Appeal No. 284 of 1939, Decided on 10th December 1940, against order of City Civil Court, Madras, D/- 20th April 1939.

* Civil P. C. (1908), S. 48 — Revision petition presented to High Court against decree of Small Cause Court — Period of twelve years should be computed from date of decree and not from decision of High Court.

There is no analogy between Art. 182, Limitation Act, and S. 48, Civil P. C., because Art. 182 expressly states that all applications that fall under S. 48, Civil P. C., are excluded from its operation. [P 478 C 1]

Where a revision petition against the decree of Small Cause Court is presented to High Court, the period of 12 years should be computed from the date of the decree of Small Cause Court and not from the decision of High Court in revision: A I R 1940 Mad 127 (F B), *Applied.* [P 478 C 1]

V. Ramaswami Iyer — for Appellant.

T. K. Rangaswami — for Respondents.

Burn J. — This is an appeal from an order of the learned principal Judge of the City Civil Court in E. P. No. 759 of 1938 in M. S. C. No. 7395 of 1925. The question is whether the execution is barred by S. 48, Civil P. C. The decree in the small cause suit was passed on 2nd February 1926. The execution petition was filed on 27th October 1938. It was a fresh application for execution. Prima facie, S. 48 prevents the Court from passing any orders for execution on such application. The decree-holder's plea was that he was entitled to execute because subsequent to the decree passed by the Court of Small Causes he had filed a new trial application in 1926 and that when that failed he had filed a revision petition in the High Court (C. R. P. No. 127 of 1927). That revision petition was dismissed with costs on 7th March 1928 and the decree-holder contended that the period of 12 years indicated in S. 48 should be calculated from 7th March 1928. In that case the application would of course be well within twelve years. The learned principal Judge of the City Civil Court had decided in favour of the decree-holder. Considering what he calls an analogous provision in Art. 182, Limitation Act, he has found that for the purpose of that article the date of the decision of a revision petition against a decree of a Small Cause Court is to be taken into account and not the date of the decree of the Small Cause Court. He has referred to the decision of the Privy Council in 60 Cal 1.[1] In that case their Lordships pointed out that there was no definition of the word "appeal" in the Code of Civil Procedure and that for the purpose of Art. 182 an application by a party to an appellate Court asking it to set aside or revise the decision of a subordinate Court would be an appeal within the ordinary meaning of the word. The learned Judge of the Court below therefore considered that the reasons for which an appeal was held to include a revision petition in connexion with Art. 182 would apply with equal force to enable a revision petition to give a fresh starting point under S. 48, Civil Procedure Code.

But curiously enough after coming to this conclusion the learned Judge goes on to say, "so that in computing the period of 12 years, the time taken in the revision petition will have to be deducted." This looks as though he were applying the principle of S. 15, Limitation Act. But that was not a contention that was ever raised before him nor was it a contention which he ap-

1. ('32) 19 A I R 1932 P C 165 : 137 I C 529 : 60 Cal 1 : 59 I A 283 (P C), Nagendra Nath De v. Sureschandra De.

peared to be considering. The only point in dispute before him was whether the period of 12 years ought to begin on 2nd February 1926 or on 7th March 1928. The time taken for the prosecution of the civil revision petition was quite irrelevant to this question. Learned counsel for the appellant (judgment-debtor) has pointed out that the terms of S. 48 are very different from the terms of Art. 182 and that Art. 182, Limitation Act, only applies to cases which do not fall within S. 48. Where an application has been made to the High Court for revision of a decree of a Small Cause Court the period of three years prescribed in Art. 182, Limitation Act, begins to run from the date of the High Court's order on the revision petition, whether the decree of the Small Cause Court is confirmed, modified or reversed : *vide* I L R (1937) Mad 616.[2] That decision however does not deal with S. 48, Civil P. C. Now S. 48 says that

> where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed.

Mr. Ramaswami Iyer's contention for the appellant is that the decree which the decree-holder is here seeking to execute is the decree of the Small Cause Court, the date of the decree is 2nd February 1926 and the fact that a revision petition was presented in the High Court which was dismissed does not alter the date of the decree of the Small Cause Court. It has recently been held by a Full Bench of this Court, *vide* I L R (1940) Mad 349,[3] that if a decree is amended under S. 152, Civil P. C., in order to bring it into accordance with the judgment, the period of twelve years under S. 48, Civil P. C., still runs from the date of the decree and not from the date of the amendment. Stress is laid upon the wording of S. 48 and it is emphasised that the date to be taken into account is the date of the decree which is being executed. This contention we think must be accepted. There is no analogy between Art. 182, Limitation Act, and S. 48, Civil P. C., because Art. 182 expressly states that all applications that fall under S. 48, Civil P. C., are excluded from its operation. The decision of the principal Judge of the City Civil Court cannot therefore be upheld. In so far as the execution of the Small Cause Court's decree is concerned, this application, E. P. No. 759 of 1938, was barred by section 48, Civil P. C. It has not, however, been apparently noticed until now that the decree-holder was claiming not only the amount of the decree of the Small Cause Court with interest and costs but also the amount of costs awarded to him by this Court in C. R. P. No. 127 of 1927 with interest on that amount. The decree of the High Court awarding him costs having been passed on 7th March 1928, the application presented on 27th October 1938 is in time so far as that amount is concerned. The execution petition will therefore be returned to the City Civil Court to be dealt with in accordance with law in the light of this judgment. The appellant will recover his costs of this appeal from the respondents.

Mockett J. — I agree. It seems to me that finality is given to the argument which the respondents have put forward in this case by the decision of a Full Bench of this Court in I L R (1940) Mad 349.[3] The learned Chief Justice in giving the judgment of the Court states quite clearly that Art. 182, Limitation Act, leaves the provision in S. 48, Civil P. C., untouched and that there can be no execution of a decree governed by S. 48, when twelve years have passed from the date of the decree, amendment or no amendment. In that case the Court was concerned with an amendment of a decree and it was pointed out by Krishnaswami Ayyangar J. that the effect of the law as laid down by the Full Bench might in exceptional cases render the amendment of a decree futile and barren. But as the learned Judge points out, that is an anomaly and any remedy for it was in the hands of the Legislature. I think that applies to this case. It may well be that owing to the delays in the hearing of civil revision petitions very many valuable years may be lost to a decree-holder in which he might execute his decree but it seems to me that it would be straining the very clear wording of S. 48, Civil P. C., and to hold contrary to the express decision of the Full Bench to which I have referred if we uphold the view which has been taken by the City Civil Judge. In this case it is interesting to note that the decision of the Full Bench in I L R (1937) Mad 616,[2] which held that Art. 182 (2), Limitation Act, applied to civil revision petitions as well as to orders in appeal was not even referred to by any of the learned counsel who argued the case

2. ('37) 24 AIR 1937 Mad 385 : 168 I C 561 : ILR (1937) Mad 616 : (1937) 1 M L J 453 (F B), Chidambara Nadar v. Rama Nadar.
3. ('40) 27 AIR 1940 Mad 127 : 187 I C 176 : ILR (1940) Mad 349: (1940) 1 M L J 285 (FB), Ramachandra Rao v. Parasuramayya.

in I L R (1940) Mad 349.[3] I agree with the order proposed by my learned brother.

C.R.K./D.S. *Order accordingly.*

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(28) A. I. R. 1941 Madras 479

WADSWORTH AND PATANJALI SASTRI JJ.

Kodali Venkayamma — Petitioner

v.

Mamidipaka Ramakotayya — Respondent.

Civil Revn. Petn. No. 1076 of 1939, Decided on 15th October 1940, to revise decree of District Munsif, Bapatla, D/- 24th February 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 8—From mere fact that counter interest was allowed on unappropriated payment upto date of its appropriation it cannot be inferred that appropriation is towards principal and not towards interest.

In order to get the benefit of cl. (1), S. 8 of the Act, the debtor has to show that there was on 1st October 1937 interest outstanding which has to be cancelled. He can do this by showing that although payments have been made, they have been actually appropriated towards principal or have been kept unappropriated. But the burden lies upon the debtor to prove that interest is outstanding. From the mere fact that counter interest was calculated on the unappropriated payment upto the date of its appropriation, it cannot be inferred that the parties considered the matter and decided to appropriate this sum towards principal and not towards interest. [P 479 C 2; P 480 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 8 (1) and (3) — Clause (3) cannot be applied disregarding effect of cl. (1).

Clause (3) of S. 8 cannot be applied without regard to the effect of cl. (1). [P 480 C 1]

Y. G. Krishnamurthi — for Petitioner.

K. Krishnamurthi — for Respondent.

Wadsworth J.—This petition arises out of an application under S. 19 of Madras Act, 4 of 1938. The petitioner was the debtor. The transactions between the parties started with a promissory note for Rs. 200 in 1925. In 1928 there was a payment which cleared off all outstanding interest and a small portion of the principal and a fresh note was executed for Rs. 197-7-3. On 23rd August 1931, there having been no further payment, a third promissory note was executed for Rs. 259-9-6. Towards this note there was a payment of Rs. 150 on 9th October 1932 which was not expressly appropriated at that time towards principal or interest. On 17th August 1934 the suit promissory note was executed for Rs. 162-10-0. This figure was arrived at by allowing counter interest on the payment of Rs. 150 and subtracting this payment and the interest thereon from the total amount due on the third note with interest up to the date of the renewal. The decree passed on this promissory note has been scaled down by the District Munsif in a manner which has been criticized on various grounds. Firstly, it is contended that the act of the parties in calculating counter interest on this payment of Rs. 150 at the time of the last renewal must be taken to indicate that this payment was treated as a payment towards principal. The argument is that the effect of allowing counter interest is that interest on the debt ceased to the extent of this payment with effect from the date of the payment and that therefore the payment must be treated as having been appropriated towards principal.

Now, in fact there was no appropriation whatever on 9th October 1932. The only appropriation was made on 17th August 1934 when the debt was renewed. Is it a legitimate inference from the mere fact that counter interest was calculated on the unappropriated payment upto the date of its appropriation that the parties considered the matter and decided to appropriate this sum towards principal and not towards interest? It must be remembered that in order to get the benefit of cl. 1 of S. 8 of the Act, the debtor has to show that there was on 1st October 1937 interest outstanding which has to be cancelled. He can do this by showing that although payments have been made, they have been actually appropriated towards principal or have been kept unappropriated. But the burden lies upon the debtor to prove that interest is outstanding. We doubt very much whether the mere calculation of counter interest in circumstances such as these is any sure indication that the parties intended to go against the usual practice of crediting the payment first towards interest and secondly towards principal. This certainly is not a case of an unappropriated payment after 17th August 1934 and certainly after this date the whole of the balance of the debt was to bear interest, so that if we have to infer appropriation towards principal, we have also to infer an undertaking by the debtor to pay interest on a large sum made up mostly of interest. The probability seems to be on the facts of this case that when the parties were negotiating for a renewal, a concession was given to the debtor in respect of this unappropriated payment whereby he was given credit for the interest which it would carry up to the time when it was appropriated. But we do not consider that this circumstance justifies the inference that the parties decided to

appropriate this payment towards principal with retrospective effect to the date of payment.

The other contention is that even appropriating the payment towards interest, it should be appropriated only towards interest outstanding on 9th October 1932. This again seems to be misconceived, for the appropriation having been actually made on 17th August 1934 it should be made with reference to the state of facts as on that date. Lastly it is contended that the lower Court is wrong in applying cl. 3 of S. 8, without regard to the effect of cl. 1. This contention must be upheld. The principal of the note as on 17th August 1934 was Rs. 162-10-0. The decree was passed on 8th February 1937 without any further payment having been made and in scaling down this decree the principal sum cannot be more than Rs. 162-10-0 and the interest outstanding upto 1st October 1937 must be cancelled. In the result therefore the petition must be allowed and the lower Court's order modified by substituting Rs. 162-10-0 for rupees 185-8-0. In other respects the order is confirmed. Each party will bear his own costs.

C.R.K./D.S. *Petition allowed.*

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(28) A. I. R. 1941 Madras 480

VENKATARAMANA RAO
AND HORWILL JJ.

Suddapalli Satyanarayana—Appellant

v.

Ghapalamadugu Rangayya and others —Respondents.

Appeal No. 76 of 1937, Decided on 28th October 1940, against order of Sub-Judge, Bapatla, D/- 6th January 1937.

(a) Civil P. C. (1908), S. 144 — Right to recover mesne profits by way of restitution is assignable and assignee can apply under S. 144.

The right to recover mesne profits which the assignor is entitled to by way of restitution is assignable and the assignee is competent to apply for recovery of mesne profits by an application for restitution under S. 144. [P 480 C 2]

(b) Civil P. C. (1908), S. 47—Appeal—Parties and representatives — Legal representative of judgment-debtor cannot reopen question as to binding effect of transaction when that question has become final in previous suit between parties.

In an appeal arising out of execution proceedings it is not open to the appellant, the legal representative of the judgment-debtor to reopen the question that the transaction is not binding on him when that question has become final by reason of a decision in a previous suit, against which there was no appeal. [P 480 C 2]

K. Rajah Ayyar and K. Cottayya—for Appellant.

M. S. Ramachandra Rao, D. R. Krishna Rao, R. Hariprasada Rao and B. S. Ramachandra Rao—for Respondents.

Venkataramana Rao J. — In this civil miscellaneous appeal two points were urged by Mr. Rajah Aiyar on behalf of the appellant, (1) that the application by respondent 1 as transferee-decree-holder is incompetent on the ground that there was no decree in favour of alleged assignors which could be transferred and (2) that the transfer is not binding on the appellant on the ground that it has not been proved to be for a valid necessity. In regard to the first contention there can be no doubt that the assignors of respondent 1 were entitled to recover mesne profits in pursuance of the appellate decree in O. S. No. 72 of 1910 on the file of the Sub-Court, Bapatla. It is not disputed by Mr. Rajah Ayyar that they were competent to apply for recovery of mesne profits by way of restitution under S. 144, Civil P. C. If they were competent to do so, we do not see any reason why their assignee is incompetent to do so. The right to recover mesne profits which the assignors were entitled to under the said decree is assignable. We are inclined to treat the application presented by respondent 1 as an application for restitution after recognizing the transfer in his favour. Whether O. 20, R. 16 is strictly applicable or not, it would be open to the Court to recognise the transfer under S. 146, Civil P. C., and allow the transferee to apply for restitution. If we are inclined to take this view, Mr. Rajah Ayyar has not been able to adduce anything against it. We, therefore, overrule the contention of Mr. Rajah Ayyar in this behalf. In regard to the question of consideration there was a finding in the partition suit, O. S. No. 63 of 1932, that it was binding on the members of the family including the appellant. The transfer was found to be for a valid necessity. There was no appeal against that decree in respect thereof and the matter has become final. The appellant was impleaded in the execution proceedings only as legal representatives of his father and so far as his father is concerned the transfer was binding on him. His right to impeach the binding nature of the transaction, as already stated, having become final, it is not open to him to re-open it in this appeal. In the result the appeal fails and is dismissed with costs.

C.R.K./N.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Madras 481

FULL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Mir Ghulam Hussain Sahib —

Appellant

v.

Ayesha Bibi and others — *Respondents.*

Letters Patent Appeal No. 14 of 1940, Decided on 18th February 1941, against judgment and decree of Horwill J., in S. A. No. 303 of 1937, D/- 1st March 1940.

(a) Letters Patent (Madras), Cl. 15 — Judge granting certificate cannot limit grounds of appeal.

The Judge granting a certificate under Cl. 15 declaring the case a fit one for appeal has no power to limit the grounds of appeal. It is for the higher appellate Court to decide as to the questions which it will allow to be raised. [P 482 C 1, 2]

*** (b) Guardians and Wards Act (1890), S. 30 —Transfer by guardian appointed by Court without Court's sanction is voidable and not void — It is valid unless set aside at minor's instance within limitation : A. S. No. 526 of 1931, OVERRULED.**

A transfer by the guardian appointed by the Court without the Court's sanction is voidable and not void and is valid unless set aside at the instance of the minor or minors concerned, within the period of limitation: A. S. No. 526 of 1931, *OVERRULED*; 22 Mad 289; 1933 M W N 791 and A I R 1938 Mad 822, *Approved*. [P 482 C 2]

(c) Practice—Appeal—New plea—Guardian of *A* and *B* minors appointed by Court—Transfer by guardian without Court's sanction to *C* — *A* and *B* transferring same property to *D*—Suit by *D* for possession — *C's* plea of limitation on the ground that *B* attained majority even three years before suit refuted by plaintiff *D*, and *B* found to be minor—*C* held entitled to raise plea in appeal that *B* being minor at date of transfer to *D*, *D* was not entitled to *B's* share in property transferred to him.

The guardian of the minors *A* and *B* appointed by the Court transferred their property without the Court's sanction to *C*. *A* on attaining majority transferred his and *B's* interest in the same property to *D* who brought a suit for possession against *C*. *C's* plea of limitation on the ground that *B* attained majority even before three years of the suit was refuted by the plaintiff *D* and *B* was found to be minor. In the appeal by the defendant:

Held, that inasmuch as *B* was found to be minor, it was competent for *C* to take up the plea in appeal that *D* was not entitled to *B's* share in the property transferred to him though the plea was not specifically raised in the written statement. [P 483 C 1, 2]

D. Ramaswami Ayyangar — for Appellant.

S. Panchapakesa Sastri for T. V. Ramanatha Ayyar — for Respondents.

Leach C. J. — Respondent 7 is the mother of respondents 8, 9 and 10 in this appeal and of defendant 6 in the suit out of which the appeal arises. Defendant 6 died pending the litigation and is now represented by respondents 11, 12 and 13. The father, one Shumsudeen died before 1922. In that year, respondent 7 was appointed the guardian of the properties of her sons and daughters all of whom were minors. On 24th September 1924, respondent 7, acting on her own behalf and as guardian of respondents 9 and 10 and defendant 6, sold to the appellant a house which had been left by Shumsudeen. Respondent 8 was at this time a major and she joined in the conveyance. Respondent 7 did not obtain the sanction of the Court to the sale, as she was bound to do by reason of S. 29, Guardians and Wards Act, 1890. Her failure to obtain the necessary consent of the Court did not however avoid the transaction so far as the minors were concerned. The transaction was not void, but merely voidable. Section 30 says that the disposal of the immovable property by a guardian in contravention of S. 28 or S. 29 is voidable at the instance of any person affected thereby, and goes no further. Article 44, Limitation Act, gives a ward three years from the date when he attains majority to sue to set aside a transfer of property made by his guardian. Therefore the minors were placed by statute in a position to sue to set aside the transaction within three years of attaining majority, but failure to exercise this right would make the appellant's title unassailable.

On 31st January 1932, respondents 9 and 10 and defendant 6 sold their shares in the property to one Mohamed Ghulam Hussain Sahib, who, on 24th January 1933, filed the suit out of which this appeal arises to recover from the appellant the shares of his vendors in the property. Mohamed Ghulam Hussain Sahib died during the pendency of the suit and his legal representatives, who are respondents 1 to 6, were made plaintiffs in his place. The suit was defended by the appellant, who contended that the sale was valid and that the suit was barred by limitation in that it had been filed three years after respondents 9 and 10 and defendant 6 had attained majority. The District Munsif of Trichinopoly who tried the suit held that (1) the vendors of Mohamed Ghulam Hussain Sahib were not bound by the sale to the appellant on 24th September because the Court's sanction had not been obtained for the transfer; (2) respondent 9 alone had attained majority more than three years before the suit; and (3) respondents 9 and 10 were majors at the time of the sale to Mohamed Ghulam Hussain Sahib, but that defendant 6 was a minor. Relying on a de-

cision of this Court (Ramesam and Cornish JJ.), in the unreported case in A. S. No. 526 of 1931,[1] the District Munsif held that the plaintiffs were entitled to a decree for the shares of respondents 9 and 10 and defendant 6.

The appellant appealed to the Subordinate Judge of Trichinopoly, who concurred in the judgment of the District Munsif and accordingly dismissed the appeal. Before the subordinate Judge, the appellant applied to amend his grounds of appeal by setting out the contention that in any event the trial Court erred in giving the plaintiffs a decree for the share of defendant 6 as she was a minor at the time of the sale and consequently could not transfer her interest to the vendee, Mohamed Ghulam Hussain Sahib. The Subordinate Judge refused to allow this additional ground to be raised. The appellant then appealed to this Court. The appeal was heard by Horwill J. who also was bound by the decision of this Court in A. S. No. 526 of 1931.[1] The learned Judge indicated that he was not in agreement with that judgment but being bound by it he was compelled to follow it. The learned Judge held that the Subordinate Judge was justified in not allowing the appellant to raise the contention with regard to defendant 6's inability to confer any title on the vendee, and in giving the certificate under clause 15, Letters Patent, which has permitted of the present appeal, he limited it to the question whether the case was governed by A. S. No. 526 of 1931.[1] The appellant, while conceding that that case did bind the Courts below, says that it is bad law. He also challenges the validity of the certificate granted by Horwill J. in that it limited his grounds of appeal. He says that as a certificate was granted he is at liberty to say that the subordinate Judge and Horwill J. erred in refusing to allow him to raise the question of the effect of defendant 6's minority at the time of the sale to Mohamed Ghulam Hussain Sahib.

It will be convenient to deal first of all with the contention that the learned Judge was wrong in attempting to limit his certificate. I consider that the appellant's objection is well founded. Clause 15, Letters Patent, permits of an appeal from a Single Judge of this Court sitting on the appellate side, where the Judge declares that "the case is a fit one for appeal." It is no function of the learned Judge to say what points are fit for appeal. It is for him to say whether "the case" is a fit one for appeal. If he considers that it is, he can give the certificate, but he must leave the matter there. It is for the higher appellate Court to say what are the questions it will allow to be raised. It follows that in my opinion it is open to the Court to hear and decide the appellant's objection with regard to the course taken below in respect of the contention which the appellant raised regarding defendant 6's capacity to contract. In my judgment, the appellant's objection that A. S. No. 526 of 1931[1] was wrongly decided is also well founded. In that case, as in the one now before us, a person had been appointed under the Guardians and Wards Act, to be the guardian of the property of Mahomedan minors. The guardian applied for permission to Court to sell certain properties and permission was given subject to a condition which was not fulfilled. The question was whether in those circumstances the sale was a valid one. Ramesam J. who delivered the judgment of the Bench after observing,

> whereas in the case of a sale by a de jure guardian or a sale by a Court guardian who has obtained the permission of the Court and who has complied with the conditions precedent to the sale, if any, the sale is presumed to be prima facie valid and the quondam minor has to sue to set aside the sale and therefore Art. 44 will become applicable,

went on to say :

> But if the case is of a sale by a de facto guardian or by a Court guardian without obtaining sanction or without complying with the conditions precedent imposed by the Court granting sanction, then the minor is not bound to set aside the sale.

These two statements are in conflict and the second statement ignores altogether the provisions of S. 30, Guardians and Wards Act. While the statement that an unlawful sale by a de facto guardian does not bind the minors can be taken to be correct so far as a guardian of a Mahomedan minor is concerned, it is certainly not the case where a guardian appointed by the Court under the Guardians and Wards Act has conveyed property without the sanction of the Court. As I have already observed, the transaction is voidable and not void and operates as a valid transfer unless set aside at the instance of the minor or minors concerned within the period allowed by the law of limitation. The decision of Ramesam and Cornish JJ. not only runs directly contrary to unambiguous words of the statute, it ignores three decisions of this Court which were binding upon the learned Judges, namely

1. A. S. No. 526 of 1931, Rahima Bi v. Abdul Vakil Sahib.

22 Mad 289,[2] 1933 M W N 791[3] and (1938) 2 M L J 428.[4] I fail to understand the reference made to a sale which is "prima facie valid," because the statute leaves no doubt that a transfer made by a lawful guardian without sanction of the Court is valid until it is set aside. The decision in A. S. No. 526 of 1931[1] cannot be allowed to stand in so far as it relates to transfers made by guardians appointed by the Court. Where the transfer is made by a de facto guardian the position may be very different. Therefore, I would allow this objection and hold that the suit is barred by limitation so far as the interest of respondent 9 is concerned. It is not barred so far as the interest of respondent 10 is concerned because the suit was filed within three years of the date on which he attained majority and Mohamed Ghulam Hussain Sahib obtained a valid transfer of his interest in the property.

It remains to decide the appellant's contention that he should have been allowed to have raised his objection with regard to the passing of defendant 6's interest. I consider that inasmuch as the evidence on which the plaintiffs relied showed conclusively that defendant 6 was a minor when she purported to sell her interest to Mohamed Ghulam Hussain Sahib on 31st January 1932, the appellant should have been allowed to amend his memorandum of appeal and the Court should have dealt with this additional objection. It is true that the appellant did not raise this contention in his written statement and the evidence on which he was relying was adduced in order to establish the contention that defendant 6 was a major, but the plaintiffs succeeded in negativing this evidence and establishing that defendant 6 was a minor In these circumstances, the appellant was entitled to say to the Court that even on the plaintiffs' own evidence, they are not entitled to a decree for defendant 6's interest. But instead of allowing the contention to be raised, the subordinate Judge gave a decree to the plaintiffs in respect of property which they themselves had shown that they had no title. It would be manifestly wrong to give the plaintiffs a decree for property in respect of which they clearly have no title, and consequently I would allow this further objection.

The result is that the appeal succeeds so far as it concerns the interest of respondent 9 and defendant 6. Therefore the decree will be amended by limiting it to the interest of respondent 10. The appellant is entitled to his costs before the subordinate Judge, Horwill J., and in this Court; he will also get his costs in the trial Court proportionate to the value of the interests of respondent 9 and defendant 6. The plaintiffs-respondents will get costs in the trial Court based on the value of respondent 10's interest in the property. They will have no costs beyond this. The case will be remanded to the trial Court to pass a final decree for partition based on this judgment.

Mockett J. — I entirely agree. As we are overruling a judgment of a Bench of this Court, I desire to note a certain aspect of the judgment of the Bench which I find it difficult to follow. Section 29, Guardians and Wards Act, provides for the alienation of minor's property by his guardian and sets out the circumstances under which it may or may not be alienated. It may not, without the previous permission of the Court, be mortgaged, charged or transferred and there is a restriction on leases. Section 31 gives the Court power to attach to the acts mentioned in S. 29 a number of conditions, if the Court thinks fit. It is obvious from a reading of S. 30 that a disposal of immovable property in contravention of S. 29 read if necessary with S. 31 which the Act enables "any other person affected" to attack is valid unless held to be otherwise. Ramesam J. has stated thus:

> Whereas in the case of a sale by a de jure guardian or a sale by a Court guardian who has obtained the permission of the Court and who has complied with the conditions precedent to the sale, if any, the sale is presumed to be prima facie valid and the quondam minor has to sue to set aside the sale and therefore Art. 44 will become applicable.

In other words, the learned Judge envisages a suit, e. g., by a minor attacking the transfer by a lawful guardian who has in every way complied with all the conditions which the Court has set out. Exactly what sort of suit that is, I find it difficult to understand unless it relates to a transfer obtained by fraud under a cloak of lawful authority. The suit which the Act does envisage, e. g., in the case of a sale by a Court guardian without obtaining sanction or without complying with conditions precedent which has to be set aside under S. 30 and to which Art. 44 applies, the learned

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2. ('99) 22 Mad 289 : 9 M L J 64, Sinia Pillai v. Munisami Aivar.
3. ('33) 1933 M W N 791, Periakaruppan Chetty v. Kandasami Chetty.
4. ('38) 25 A I R 1938 Mad 822 : 182 I C 862 : (1938) 2 M L J 428, Sivanmalai Goundan v. Arunachala Goundan.

Judge expressly says, need not be instituted for a period of twelve years and then not for an order setting aside the sale but under Art. 144, Limitation Act, for possession. I have merely set out this distinction in the judgment to lend emphasis to my respectful dissent from it.

Krishnaswami Ayyangar J. — I agree with the judgment of my Lord the Chief Justice and have nothing further to add.

C.R.K./G.N. *Appeal allowed.*

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* (28) A. I. R. 1941 Madras 484

FULL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Donda Bhagavantulayya Dhora and others — Appellants

v.

Adapa Venkandhora and others — Respondents.

Letters Patent Appeal No. 8 of 1940, Decided on 4th March 1941, against judgment and decree of Wadsworth J., in S. A. No. 93 of 1936.

(a) Deed — Construction — Mortgage deed— Mortgagor to pay principal and interest "by" fixed date—Word "by" held meant on or before fixed date.

In a mortgage deed the mortgagor undertook to pay the principal and interest payable under the deed by a fixed date :

Held that the word "by" in the deed meant on or before the fixed date. [P 485 C 1]

(b) Transfer of Property Act (1882), S. 84 — Tender in redemption of mortgage—It is doubtful whether maxim *de minimis non curat lex* applies *(Obiter)*.

In view of S. 84, T. P. Act, and S. 38 (2), Contract Act, it is open to doubt whether the maxim *de minimis non curat lex* applies to a tender in redemption of a mortgage. [P 485 C 1, 2]

(c) Transfer of Property Act (1882), S. 84 — — Unequivocal refusal to accept tender — Law does not require tender to be made.

Where there has been an unequivocal refusal to accept a tender in redemption of a mortgage the law does not require a tender to be made : A I R 1923 P C 26, *Disting.*; (1844-46) 4 Hare 420, *Rel. on.* [P 485 C 2]

*** (d) Transfer of Property Act (1882), S. 84— Specific objection to tender amounts to waiver of other objections.**

A specific objection to a tender in redemption of a mortgage amounts to an implied waiver of any other objection there may be. Consequently, the refusal of a tender not because the amount tendered is short but because the mortgagee considered that he was entitled to wait until the date fixed for payment in the mortgage deed which meant more interest for him amounts to a waiver of any objection to the amount being short : (1831) 37 R R 623, *Rel. on.* [P 485 C 2; P 486 C 1]

V. Govindarajachari — for Appellants.

G. Chandrasekhara Sastri — for Respondents.

Leach C. J. — This appeal involves two questions. The first question is whether the mortgagors of certain immovable properties were entitled to redeem the mortgage before 10th September 1928. The second question is whether a tender of Rs. 760 is to be regarded as invalid because it fell short of the amount due by Rs. 4. The mortgage was created by defendants 1, 2 and 3 in favour of Donda Godavarayya, the appellants' father, on 10th September 1926. The mortgagors covenanted to repay all the principal and interest payable under the deed "by" 10th September 1928. In the month of June 1927 defendant 4, who is now respondent 1, tendered to the mortgagee the sum of Rs. 760. Respondent 1 had purchased the equity of redemption and therefore stood in the shoes of the mortgagors. In tendering the sum of Rs. 760 respondent 1 did so in the full belief that this was the correct amount. There had been a miscalculation, but this was not discovered at the time. The mortgagee refused to accept the tender, not because the amount offered was Rs. 4 short of what was then due under the mortgage, but because he maintained that the terms of the mortgage deed precluded respondent 1 from making any tender until 10th September 1928. The mortgagee at no time questioned the correctness of the amount which was offered to him and a letter written by him to respondent 1 on 4th July 1927 and his own testimony in the case clearly indicates an unequivocal refusal to accept anything less than an amount representing the principal and interest calculated up to 10th September 1928. It is not suggested that respondent 1 in making the tender was unwilling to pay the full amount then due.

In 1933 the appellant's father instituted a suit in the Court of the District Munsif of Chodavaram to enforce payment of a sum of Rs. 1700 which he claimed to be owing in respect of the mortgage. The defendants pleaded that by reason of the tender in the month of June 1927 interest had ceased to run from the date of the tender and denied that there was anything more than Rs. 769 due which amount was deposited in Court. The District Munsif accepted the plea that there had been a valid tender and directed that the Rs. 769 should be paid to the plaintiff. Accordingly, he dismissed with costs the claim for the balance of the Rs. 1700. The appellants appealed to the subordinate Judge of Vizagapatam, who held that the tender was invalid and passed a decree for the full amount claimed, less a small reduc-

tion in the amount of interest. Respondent 1 appealed to this Court and the appeal was allowed by Wadsworth J. who restored the decree of the District Munsif. The present appeal is from the judgment of Wadsworth J. under Cl. 15, Letters Patent. The learned Judge held that the words "we shall pay all the principal and interest payable under this document by 10th September 1928" to be found in the deed meant payable 'on or before' that date, and we have no hesitation in concurring in this opinion. Before the learned Judge and in this Court several cases have been quoted, but none is really in point. The meaning of the word "by" is not referred to in any of them. If the word "by" is to be given here its ordinary meaning the document stipulates that the mortgagors shall pay on or before that date. The option was in them. In our opinion, it is not feasible to put any other interpretation on the word.

There has been considerable argument in this case on the question whether the maxim *de minimis non curat lex* applies to a tender. In 30 M L J 607[1] Sadasiva Iyer and Moore JJ. did not discuss the maxim, but impliedly rejected it. There a tender by a mortgagor to the mortgagee was short by 9 pies of the correct amount, and it was held that this was a bad tender. In 34 M L J 439[2] Seshagiri Iyer J. referred to the decision in 30 M L J 607[1] and said that if he were deciding that case he would have applied the maxim, but this observation constituted an obiter dictum as the application of the maxim to a tender was not called for in that case. Venkataramana Rao J. in (1939) 1 M L J 324[3] expressed his agreement with the observations of Seshagiri Iyer J. and this again was obiter. For reasons which will presently be indicated, it is not necessary to decide whether the maxim can be applied to a tender of an amount in redemption of a mortgage, but in passing it may be observed that no case has been quoted to us, English or Indian, in which the maxim has been applied to a tender and it is certainly open to doubt whether it can properly be applied. Section 84, T. P. Act, which deals with a tender in redemption of a mortgage speaks of "the amount", remaining due on the mortgage, and S. 38 (2), Contract Act, says that an offer of performance should be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do "the whole" of what he is bound by his promise to do. It may also be observed that the sum of Rs. 4 is not an inappreciable sum.

The reason why it is not necessary to decide whether the maxim *de minimis non curat lex* applies in this case is because it is manifest that there are two other principles which apply and on these principles the judgment under appeal may be supported. The first principle is that where there has been an unequivocal refusal to accept a tender the law does not require a tender to be made. In 46 Mad 108[4] which was an appeal from this Court, the Privy Council expressly approved of the dictum of Vice-Chancellor Wigram in (1844-46) 4 Hare 420,[5] where he said:

> The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money.

46 Mad 108[4] arose out of a mortgage suit, and the refusal to accept a tender was based on an invalid provision in the mortgage deed. In these circumstances and because it did not necessarily follow that if a tender had been made it would not have been accepted, the Judicial Committee held that there was not an unequivocal refusal. But the facts in that case are very different from the facts in this case. Here there was a tender and the appellant's father intimated in writing that he would not accept it. The refusal was embodied in a letter dated 4th July 1927, and it left no doubt that any tender less than the full amount calculated up to 10th September 1928 would not be accepted. The second principle is that where there is a specific objection to a tender it is an implied waiver of any other objection there may be. The application of this principle is conveniently stated in Benjamin on Sale, Edn. 7, p. 812 where the leading cases are collected. It will be sufficient if one of the cases is referred to, namely that in (1831) 2 Cr & J 15 =37 R R 623[6] where Bayley, B. said :

1. ('17) 4 A I R 1917 Mad 922 : 34 I C 825 : 30 M L J 607, Subbai Goundan v. Palani Goundan.
2. ('18) 5 A I R 1918 Mad 88 : 45 I C 638 : 34 M L J 439, Subramania Iyer v. Narayanaswami.
3. ('39) 26 A I R 1939 Mad 503 : (1939) 1 M L J 324, Narayanaswami Nayak v. Ramaswami Narayanappa.
4. ('23) 10 A I R 1923 P C 26 : 71 I C 1035 : 46 Mad 108 : 50 I A 41 (P C), Venkatarayanim Garu v. Venkata Subadrayamma.
5. (1844-46) 4 Hare 420 : 14 L J Ch 194 : 9 Jur 520, Hunter v. Daniel.
6. (1831) 2 Cr & J 15 : 2 Tyr 89 : 1 L J (N S) Ex 5 : 37 R R 623, Polglass v. Oliver.

To make a tender good, it should be made in the coin of the realm and the money ought to be produced; but the party to whom the tender is made, may make good what would otherwise be insufficient, by relying on a different objection. If he claims a larger amount, and gives that as a reason for not accepting the money, he cannot afterwards object that the money was not produced nor can he object that it was offered in paper. If he objects to accept the sum tendered because it is in paper, which he is not bound to receive, he gives the party tendering an opportunity to make his tender in coin; but if he puts his refusal upon a different ground, he waives the objection as to the quality of the tender.

In the present case the tender was refused, not because the amount tendered was short by Rs. 4 but because the appellant considered that he was entitled to wait until 10th September 1928, which meant more interest for him. His refusal of the tender on this ground waived any objection, that he may have had to the amount being short. After he had written his letter of 4th July 1927 it was not open to him to raise the question of the amount of the tender or ask for the application of the *de minimis non curat lex* rule. For these reasons the appeal will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 486

WADSWORTH AND PATANJALI SASTRI JJ.

Thrikkateeri Ullanoor Manakkal Vasudeva Nambudiri — Petitioner

v.

Matamma Thediyil Kayyumma — Respondent.

Civil Revn. Petn. No. 854 of 1939, Decided on 16th September 1940, from order of Dist. Munsif, Walluvanad, D/- 24th October 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 15 — Assignee of part of properties demised on kanom is entitled to benefit of S. 15.

An assignee of part of the properties demised on kanom is entitled to the benefit of S. 15, Agriculturists' Relief Act, in respect of the arrears of michavaram due to the jenmi, inasmuch as not only is he under a liability to pay rent, founded upon privity of estate with the jenmi, but the latter is entitled, by virtue of S. 41, Malabar Tenancy Act, to recover the entire rent reserved under the lease from the properties assigned and consequently the assignee thus being a person by whom rent is payable to a jenmi is entitled to claim the benefit of S. 15 : A I R 1916 Mad 768 and (1923) 1 K B 469, *Rel. on;* A I R 1941 Mad 196, *Ref.* [P 486 C 2; P 487 C 1]

The assignee's agreement with his assignor to pay the sum reserved with him to the jenmi for arrears of michavaram has no bearing upon his statutory right to have such arrears wiped out under S. 15. [P 487 C 1]

P. Govinda Menon — for Petitioner.

D. A. Krishna Variar — for Respondent.

Patanjali Sastri J.—The main question arising for determination in this revision petition is whether an assignee of part of the properties demised on kanom is entitled to the benefit of S. 15, Madras Agriculturists' Relief Act, in respect of the arrears of michavaram due to the jenmi. The lower Court has held that he is, and the petitioner who is the jenmi contests the validity of that conclusion. The facts are briefly these. The petitioner demised five items of land on kanom to one Haji by Ex. A dated 11th December 1907, for a sum of Rs. 136-11-5. Under this deed, the michavaram payable by the kanomdar was fixed at 50 paras and 6 narayams of paddy and one bunch of bananas worth eight annas. There was a partition in Haji's family, in 1925, and three out of the five items comprised in the kanom were allotted to his son Koya subject to the payment of 50 paras and 4 annas which is practically the entire michavaram due to the jenmi. The respondent became entitled by assignment under Ex. B, dated 13th March 1937 to the interests of Koya in the three items aforesaid, and although a sum of Rupees 125 out of the consideration for the assignment was reserved with him for payment to the petitioner as arrears of michavaram due till then, he applied for relief under S. 15 of the Act making the prescribed deposit.

We have held in C. R. P. No. 611 of 1939[1] that the assignee of the entire interest of a lessee in the property demised is entitled to claim the benefit of S. 15, but it is argued that as the respondent is an assignee of some only of the items demised in kanom and so not bound, even by privity of estate, to pay rent as such to the landlord, he cannot claim such benefit. It is however clear that under the general law which has been applied to leases in Malabar (*see* 38 Mad 86[2]) an assignee of a part of the demised property is liable by privity of estate to pay a proportionate part of the rent reserved under the lease, so long as he remains assignee : *see* Leake on Contracts (Edn. 8, page 960) and (1923) 1 K B 469.[3] Though the respondent is liable on this basis to pay only proportionate michavaram to the jenmi, S. 41, Malabar Tenancy Act, provides that

arrears of michavaram or rent due to the landlord together with interest, if any, payable on the same

1. *Reported in* ('41) 28 AIR 1941 Mad 196 : (1940) 2 M L J 788, Moopil Variar v. Veettil Veloor.
2. ('16) 3 AIR 1916 Mad 768 : 17 I C 933: 38 Mad 86 : 23 M L J 695, Kunhisow v. Molloli Chathu.
3. (1923) 1 K B 469 : 92 L J K B 326 : 128 L T 768 : 67 S J 199 : 39 T L R 825, United Dairies Ltd. v. Public Trustee.

shall be a charge on the interest of the person from whom they are due in the holding in respect of which they are due as at the time of the creation of such interest.

Thus not only is the respondent under a liability to pay rent, founded upon privity of estate with the jenmi, but the latter is entitled, by virtue of the provision referred to above, to recover the entire rent reserved under the lease from the properties assigned under Ex. B. The respondent is thus a person by whom rent is payable to a jenmi, and, there being no dispute that he is an agriculturist as defined in the Act, is entitled to claim the benefit of S. 15. It was also contended for the petitioner that inasmuch as a sum of Rs. 125 out of the consideration for the assignment was expressly reserved with the respondent for payment to the petitioner, the respondent could not claim to have such arrears declared discharged. This contention must be rejected as the respondent's agreement with his assignor to pay the sum reserved with him to the petitioner can have no bearing upon his statutory right to have such arrears wiped out under S. 15 of the Act. It may be that the respondent, in a question with his assignor, will be bound to return to the latter the sum which he undertook to pay but did not in fact have to pay. That question does not arise here and we express no opinion upon it. The revision petition fails and is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 487

WADSWORTH J.

C. S. Jagannatha Iyengar — Appellant

v.

Senniveera Chettiar and another — Respondents.

Appeal No. 130 of 1939, Decided on 18th November 1940, against appellate order of District Court, Coimbatore, D/- 9th August 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 10 (2) (i) — Mortgage stipulating that properties shall be enjoyed by mortgagee for certain period in lieu of interest, that on expiry of that period mortgagor shall pay amount due and on his failure to do so mortgagee shall enjoy usufruct and shall also be entitled to interest in addition to usufruct—Mortgage held not saved by S. 10 (2) (i).

Section 10 (2) (i) is not confined to mortgages which are usufructuary mortgages within the terms of S. 58 (d), T. P. Act. The clause provides a special exemption for any mortgage under which the mortgagee has possession and no rate of interest is stipulated. It does not apply to a mortgage in which, although the mortgagee is in possession, a rate of interest is stipulated and it makes no difference whether the rate of interest stipulated in the mortgage is one which might be regarded as a penalty or not. [P 488 C 1]

A mortgage stipulated that the properties shall be enjoyed by the mortgagee for two years in lieu of interest, that on the expiry of two years, the mortgagor shall pay the amount due and if he failed to do so, the mortgagee shall retain the right to enjoy the usufruct of the properties and shall also be entitled to interest at three per cent. per annum in addition to the usufruct :

Held that this was a mortgage under which a rate of interest was stipulated. It was therefore not saved by S. 10 (2) (i) of the Act, and it was liable to be scaled down. [P 488 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 8 (2) — Enjoyment by mortgagee of usufruct of properties in lieu of interest cannot be deemed to be payment falling under S. 8 (2).

Where there is an arrangement in a mortgage whereby the mortgage is to some extent free of interest, the mortgagee getting his compensation by the enjoyment of the produce, such enjoyment of the produce cannot be deemed to be a payment to the creditor by the debtor falling under S. 8 (2) of the Act. [P 488 C 2]

(c) Madras Agriculturists' Relief Act (4 of 1938), S. 21 — Application by agriculturist adjudicated insolvent—Official receiver should be impleaded as party.

Section 21 in its plain terms contemplates an application by the person who would have been an agriculturist but for his adjudication. But it is proper that to such an application, the Official Receiver in whom the estate vests should be impleaded as a party. [P 488 C 2]

A. C. Sampath Ayyangar — for Appellant.

D. Ramaswami Ayyangar, T. P. Kannabiran and M. V. Gopalaratnam — for Respondents.

Judgment. — The appellant in this case is an insolvent who applied to the insolvency Court under Ss. 8 and 9, Madras Act, 4 of 1938, to scale down the amount due on a mortgage. The mortgage in question is Ex. 1 dated 15th July 1931 for a principal sum of Rs. 10,650, made up of four items of consideration. One is a prior mortgage on which Rs. 7000 was due for principal and Rs. 1858-8-0 was due for interest. Exhibit 1 stipulates that the properties shall be enjoyed by the mortgagee for two years in lieu of interest, that on the expiry of two years, the mortgagor shall pay the amount due and if he fails to do so, the mortgagee shall retain the right to enjoy the usufruct of the properties and shall also be entitled to interest at three per cent. per annum in addition to the usufruct. The Courts below have held that this provision for interest is to be regarded as a penalty and that for the purposes of S. 10 (2) (i) of the Act it may be ignored and the mortgage treated as a possessory mortgage without any rate of interest stipulated and therefore immune from

the scaling down provisions of the Act. It seems to me that these decisions overlook the plain terms of S. 10 (2) (i) of the Act. That clause recites :

> Nothing contained in Ss. 8 and 9 shall affect any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee.

I am asked to add to this clause the words 'in respect of such possession,' and to treat this contract as a contract in which there is no rate of interest stipulated so far as the right to possession is concerned and to regard the provision for interest in default as a sort of additional contract which is liable to be scaled down, leaving the main contract immune from the provisions of the Act. It seems to me improper to put into this clause words which are not there and equally improper to treat this single contract as if it were two separate contracts. No doubt, the mortgage with which we have to deal is not, strictly speaking, a usufructuary mortgage, for, it contains a covenant to pay and it contains a stipulation for cash interest in addition to the right to the usufruct in case of a breach of this covenant. But S. 10 (2) (i) is not confined to mortgages which are usufructuary mortgages within the terms of S. 58 (d), T. P. Act. The clause provides a special exemption for any mortgage under which the mortgagee has possession and no rate of interest is stipulated. It does not apply to a mortgage in which, although the mortgagee is in possession, a rate of interest is stipulated and it seems to me to make no difference whether the rate of interest stipulated in the mortgage is one which might be regarded as a penalty or not. I wish to make it clear that I express no opinion on the question whether on the terms of this particular mortgage the default rate should or should not be regarded as penal. To my mind, this is a mortgage under which a rate of interest is stipulated. It is therefore not saved by S. 10 (2) (i) of the Act and it is liable to be scaled down.

It remains to consider how the scaling down process is to be carried out. It is contended for the petitioner that the Court should calculate the cash value of the produce enjoyed by the mortgagee and treat this cash value as a payment made by way of interest to the mortgagee and apply the rule in S. 8 (2) of the Act. This contention overlooks the fact that there has been no payment to the mortgagee at all. All that has happened is that the mortgagee has had the right to enjoy whatever produce the land might yield. His enjoyment of this produce is not a payment by the mortgagor for principal or interest to the mortgagee. It is a special arrangement whereby the mortgage is to some extent free of interest, the mortgagee getting his compensation by the enjoyment of the produce. To my mind, such enjoyment of the produce cannot be deemed to be a payment to the creditor by the debtor falling under S. 8 (2) of the Act. When so much is decided, the scaling down process becomes simple. The amount of Rs. 1858-8-0 representing interest on the prior mortgage is to be deducted from the principal under the explanation to S. 8, so that the principal amount due will be Rs. 8791-8-0. This sum will carry interest at three per cent. from 1st October 1937.

A question has been raised as to the procedure under S. 21 of the Act, where the application is made by or on behalf of a person who would have been an agriculturist but for his adjudication in insolvency. The question is not one of any importance in this appeal, for though the insolvent himself has filed the application, the official receiver has been impleaded both here and in the Court of first instance. Section 21 in its plain terms seems to me to contemplate an application by the person who would have been an agriculturist but for his adjudication. But it seems to me proper that to such an application, the official receiver in whom the estate vests should be impleaded as a party. In the result therefore the appeal is allowed and the debt will be scaled down in the manner indicated above. The parties will pay and receive costs throughout proportionate to their failure or success in all the Courts, the appellant having contended that the debt was entirely discharged except for a sum of Rs. 3183 and succeeding only to the extent of Rs. 1858-8-0 with interest up to 1st October 1937.

C.R.K./D.S. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 488

LAKSHMANA RAO J.

In re Sivakalathi Gramany—Petitioner.

Criminal Revn. Case No. 90 and Petn. No. 87 of 1940, Decided on 1st February 1940, to revise order of Special Honorary Presidency Magistrate, Egmore, Madras, D/- 26th August 1939.

Criminal P. C. (1898), S. 106 — Conviction under S. 75, Madras City Police Act — Order under S. 106, Criminal P. C., is uncalled for.

Where the conviction is under S. 75, Madras City Police Act, the order under S. 106, Criminal P. C., is not called for. [P 489 C 1]

A. S. Sivakaminathan — for Petitioner.

Order. — The conviction is under S. 75, City Police Act, and the order under S. 106, Criminal P. C., is not called for. The order under S. 106, Criminal P. C., is therefore set aside and otherwise this petition is dismissed.

C.R.K./D.S. *Order set aside.*

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(28) A. I. R. 1941 Madras 489

BURN AND MOCKETT JJ.

In re Muddamsetti Subba Rao and another — Prisoners.

Referred Trial No. 166 and Criminal Appeals Nos. 660, 661 and 659 of 1940, Decided on 3rd December 1940, referred by Court of Session, Kistna Division, for confirmation of death sentences passed on 6th September 1940.

(a) Penal Code (1860), Ss. 147 and 148—Rioting committed by unlawful assembly some of members being armed with deadly weapons — Other members not armed with deadly weapons can be convicted under S. 147 and not under S. 148.

If some members of an unlawful assembly are armed with deadly weapons in prosecution of the common object of the unlawful assembly and if rioting is committed, the other members of the unlawful assembly who are not armed with deadly weapons cannot be convicted under S. 148 read with S. 149. They can be convicted only under S. 147 : A I R 1926 Mad 741, *Doubted.* [P 490 C 1; P 491 C 1]

(b) Penal Code (1860), S. 398 — Only robbers armed with deadly weapons can be convicted under S. 398 *(Obiter).*

It is only the robbers who are actually armed with deadly weapons who can be charged and convicted under S. 398 : 22 Cal 276, *Rel. on; Case law referred.* [P 490 C 2]

(c) Penal Code (1860), S. 307—Person inflicting hurt upon another with intention of putting his life in danger—Conviction should be under Section 307.

If a person inflicts hurt upon another with the intention of putting his life in danger, that is the same thing as saying that the offender is trying to kill the man whom he attacks. Such person should be convicted under S. 307. [P 491 C 1]

K. S. Jayarama Iyer and P. Suryanarayana — for Accused.

Public Prosecutor — for the Crown.

Burn J. — These eight appellants were tried jointly by the learned Sessions Judge of Kistna on charges arising out of offences committed at about 9 P. M. on 19th February last in Masulipatam town at a place called Javarpet Junction. There was a disturbance at that place and time, in the course of which one N. Venkataswami was fatally wounded, another man named Viraswami (P. W. 7) was very seriously injured, a police constable named Antony (P. W. 4) was slightly injured and one Chandramouli (P. W. 8) was severely wounded in the foot. The first three accused were alleged to have been armed with spears and the other five with sticks. On these facts the learned Sessions Judge framed charges against all the accused under S. 148 read with S. 149, I.P.C.; he separately charged accused 2 and 3 with the murder of Venkataswami. Accused 1 was separately charged with voluntarily causing grievous hurt with a deadly weapon to Viraswami, and accused 3 was charged with voluntarily causing hurt to deter a public servant from his duty, S. 332, I. P. C. Accused 5, 6, 7 and 8 were charged with causing simple hurt to Chandramouli (P.W.8) and accused 2 and 3 were charged with causing simple hurt with a dangerous weapon to Viraswami (P. W. 7). The learned Sessions Judge, disagreeing with the assessors (who perversely said that none of the accused was guilty of anything), held that all the accused were guilty of all the offences with which they had been charged. He sentenced accused 2 and 3 to death for the murder of Venkataswami, accused 1 to five years' rigorous imprisonment for the offence under S. 326, all the accused to two years' rigorous imprisonment for rioting armed with deadly weapons, accused 3 to two years' rigorous imprisonment for an offence under S. 332, accused 2 and 3 to two years' rigorous imprisonment for an offence under S. 324 and accused 5, 6, 7 and 8 to rigorous imprisonment for six months for the offence of simple hurt. Hence these appeals.

Mr. Jayarama Iyer who has appeared for the appellants has conceded that there is no possibility of doubting the occurrence or the commission of the various offences with which the accused were charged. Accused 1, 3, 4 and 8 admitted their presence at the scene of offence and at the time stated by the prosecution witnesses. Accused 2 and 7 pleaded alibi, and accused 5 and 6 merely denied that they knew anything about the occurrence, and said they had been impleaded on account of enmity. Accused 2 and 7 adduced evidence in support of their pleas of alibi. Accused 7 examined three witnesses, D. Ws. 3, 4 and 7, to prove that he was at Godugupet, another part of Masulipatam. The learned counsel for the appellants has stated frankly that he is not able to ask us to rely upon the evidence given by these three defence witnesses. Accused 2 examined D. Ws. 5 and 6 and the evidence of these two witnesses is on the face of it rather more respectable than that given by

D. Ws. 3, 4 and 7. But the great defect in this plea of alibi put up by accused 2 is that when he was examined in the Sub-Magistrate's Court he did not mention it. Accused 2 was arrested very soon after the occurrence and there was no suggestion put to the police that, as soon as he was arrested, he expressed any astonishment or alleged himself to have been elsewhere. We think it is inconceivable that, if this plea had been a true plea, he could have failed to mention it when questioned by the Magistrate.

It is not possible to doubt the truth of the story told by the prosecution witnesses in its main lines; nor is it possible to doubt the presence and the participation in the rioting of all these accused persons. Mr. Jayarama Iyer's arguments have been chiefly directed towards showing that it would be unsafe to convict accused 2 and 3 for the murder of Venkataswami. He has examined the evidence given by all the witnesses of the occurrence with great care and has attempted to persuade us that, although in the main they are witnesses of truth, yet, in the circumstances, they could not have been expected to observe with accuracy which of the rioters inflicted the fatal blow on Venkataswami. This is practically the only point seriously urged in these appeals. [After considering evidence his Lordship concluded.] We must therefore agree with the learned Sessions Judge that accused 2 and 3 were proved to be guilty of the murder of Venkataswami and we confirm their conviction for murder and the sentence of death which the learned Sessions Judge has imposed on them. The learned Sessions Judge has not explained why he framed a charge under Ss. 148 and 149 against all these eight accused; nor has he explained in his judgment, why he thinks S. 149 has any application. The evidence is clear that the first three accused were armed with spears and the other five with sticks. There is no evidence of any witness to show that the sticks in this case were dangerous weapons. The charge framed should therefore have been under S. 147 against accused 4, 5, 6, 7 and 8 and under S. 148 against accused 1, 2 and 3 only, and the accused should have been convicted accordingly. It is just possible that the learned Sessions Judge was guided by the decision in this case in 50 M L J 559.[1] It is there stated that if some members of an unlawful assembly are armed with deadly weapons in prosecution of the common object of the unlawful assembly and if rioting is committed, the other members of the unlawful assembly who are not armed with deadly weapons may be convicted under S. 148 read with S. 149. With respect, we think that this decision is of doubtful authority. Section 148 appears to differ from S. 147 precisely in the same way that S. 144 differs from S. 143. Under S. 143 any member of an unlawful assembly is liable to punishment up to six months. Under S. 144 whoever being armed with a deadly weapon is a member of an unlawful assembly is liable to imprisonment for two years.

In exactly the same way, under S. 147, whoever is guilty of rioting is liable to imprisonment up to two years; and under S. 148 whoever being armed with deadly weapon is guilty of rioting is liable to imprisonment for three years. The same distinction appears in the sections of the Penal Code dealing with robbery. Section 392 provides a punishment for robbery and S. 397 provides an enhanced punishment, in the shape of a minimum sentence, for any robber who at the time of committing robbery or dacoity uses a deadly weapon, and similarly S. 398 provides some punishment for the robber or dacoit who is armed with a deadly weapon. We think that it is clear, as held by the Calcutta High Court in 22 Cal 276,[2] that it is only the robbers who are actually armed with deadly weapons who can be charged and convicted under S. 398. In the case of the robbery sections there is ample authority for the view that we are taking—28 ALL 404,[3] 47 ALL 59[4] and 51 Cal 265[5]—and in our own Court, 22 M L J 186.[6] We think with respect that in 50 M L J 559[1] it is incorrect to say that S. 148 describes a separate offence. The only offence that S. 148 describes or refers to is the offence of rioting and provision is made for enhanced punishment if the rioter at the time of rioting is armed with a deadly weapon. Section 149, we think, is intended to lay upon all the members of an unlawful assembly responsibility for any offences, other than the offence of rioting, committed by any member of the unlawful

1. ('26) 18 A I R 1926 Mad 741 : 96 I C 158 : 50 M L J 559 : 27 Cr L J 894, In re Mudurupayalagadu alias Subbigadu.

2. ('95) 22 Cal 276, Sabir v. Queen-Empress.
3. ('06) 28 All 404 : 1906 A W N 61, Emperor v. Nageswar.
4. ('25) 12 A I R 1925 All 305: 85 I C 714: 47 All 59: 26 Cr L J 570, Emperor v. Dulli.
5. ('24) 11 A I R 1924 Cal 643: 81 I C 800: 51 Cal 265: 25 Cr L J 1024, Emperor v. Ali Mirza.
6. ('11) 22 M L J 186 : 13 I C 282 : 13 Cr L J 42, Arunachala Thevan v. Emperor.

assembly in prosecution of the common object. Section 149 can hardly have been intended to make rioters constructively guilty of the offence of rioting. If the matter had been of any importance in this case, we should have felt it necessary to refer to a Full Bench the question whether the case in 50 M L J 559[1] has been correctly decided. But, in this case, it is not necessary since the punishment for an offence under S. 147 is two years rigorous imprisonment. In modification of the judgment of the learned Sessions Judge we alter the conviction under the first charge to a conviction under S. 148 for accused 1, 2 and 3 and S. 147 for accused 4, 5, 6, 7 and 8.

Viraswami, as we have already said, was very severely hurt. His chest was pierced so that his lung was protruding in one place. It is clear that he had a narrow escape with his life. Why the learned Sessions Judge did not charge accused 1 with attempt to murder on the third charge we do not know. It would have been much more appropriate than a charge under S. 326. If Viraswami had no bones broken, the only kind of grievous hurt with which he can be charged in respect of Viraswami was that which is involved in putting Viraswami's life in danger. If a person inflicts hurt upon another with the intention of putting his life in danger, that is the same thing as saying that the offender is trying to kill the man whom he attacks. Accused 1 may therefore consider himself fortunate in that he was not charged and convicted of an offence under S. 307. The remaining convictions are justified by the evidence and the sentences call for no interference. The learned Public Prosecutor has brought to our notice that in this case the accused appear to have assembled with a store of weapons close-by including three spears. It would have been appropriate to charge all the other accused except accused 2 and 3 with liability for the murder of Venkataswami under S. 149, Penal Code. Considering the antecedents of the factions in Masulipatam it would have been difficult for any of the accused to show that he did not expect murder to be done. There is however no petition by the Provincial Government and therefore it is not necessary to say more on this subject. The result therefore is that the appeals of all the accused are dismissed, the only modification being in the matter of the conviction on the first charge.

C.R.K./D.S. *Appeals dismissed.*

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(28) A. I. R. 1941 Madras 491

KING AND PATANJALI SASTRI JJ.

Gadamsetti Peddi Subbarayadu and another — Appellants

v.

Lingam Yella Somayya and others — Respondents.

Appeal No. 7 of 1939, Decided on 29th November 1940, against decree of Sub-Judge, Kurnool, D/- 11th October 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 21—Same debt payable by two persons—One becoming insolvent — S. 21 does not apply to claim of debtor who is not insolvent.

Where a debt is payable by two persons, one of whom is adjudged insolvent, S. 21 does not apply when the claim of the debtor who is not an insolvent is being considered. Consequently, when the mortgage debt is payable by the mortgagor and a puisne mortgagee and the mortgagor becomes insolvent, the puisne mortgagee is not precluded by S. 21 from claiming the benefits of the Act : A I R 1940 Mad 808, *Rel. on.* [P 491 C 2]

K. S. Jayaram — for Appellants.

V. Govindarajachari — for Respondents.

King J. — This appeal must succeed on all points. It is not disputed that appellants are agriculturists and debtors within the meaning of the Madras Act, 4 of 1938 : *see* (1940) 2 M L J 513.[1] It is argued however for respondent 1 that inasmuch as plaintiff's mortgage debt which the appellants are liable to pay as puisne mortgagees is also payable by defendant 1 as the mortgagor and defendant 1 has become insolvent, by S. 21 of the Act, the debt cannot be scaled down. We are unable to accept this argument. We think that good reasons are given in the judgment of Wadsworth J., in (1940) 2 M L J 291,[2] for holding that though this is a debt payable by two persons, the section does not apply when the claim of the debtor who is not an insolvent is being considered. The appeal will therefore be allowed and plaintiff's decree scaled down in accordance with the provisions of the Act. The parties will give and take proportionate costs in the Court below and respondent 1 must pay appellants' costs of this appeal. Time for redemption three months.

C.R.K./G.N. *Appeal allowed.*

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1. ('41) 28 A I R 1941 Mad 113 : (1940) 2 M L J 513, Periaswami Chettiar v. Ramaswami Goundan.
2. ('40) 27 A I R 1940 Mad 808 : (1940) 2 M L J 291, Sooryanarayana v. Ramamma.

* (28) A. I. R. 1941 Madras 492

SPECIAL BENCH

LEACH C. J., SOMAYYA AND PATANJALI SASTRI JJ.

S. S. S. Chokkalingam Chettiar & Sons — *Petitioners*

v.

Commissioner of Income-tax, Madras— *Respondent.*

O. P. No. 204 of 1940, Decided on 18th March 1941; reference made by Commissioner of Income-tax, Madras, D/- 23rd September 1940.

* Income-tax — Assessment should be based on strict legal position and not on substance of matter — Assessee holding two mortgages of Rs. 40,000 and Rs. 10,850 against same property —In year of account amount due under first mortgage amounting to Rs. 72,000 with interest —Assessee suing on first mortgage, restricting claim to Rs. 50,000 and giving up balance of interest and also claim on second mortgage with interest—Assessee held entitled to deduction of Rs. 10,850 in year of account as bad debt at time of taxation.

An assessment to income-tax must be made according to the strict legal position and should not be based upon the substance of the matter : A I R 1940 P C 183, *Foll.* [P 492 C 2]

The assessee had two mortgages in his favour against the same person and over the same property one for Rs. 40,000 and the other for Rs. 10,850. During the year of account the assessee sued on the first mortgage which by then had accumulated with interest to about Rs. 72,000. In the suit he restricted his claim to Rs. 50,000 and gave up his claim for the balance of interest and also the claim on the second mortgage for Rs. 10,850 and interest thereon as the market value of the hypotheca on that day was only Rs. 50,000 and the mortgagors had no other properties. The assessee claimed in the assessment of his income deduction of the sum of Rs. 10,850 as a bad debt. It was contended by the income-tax authorities that the two mortgages were one and the same transaction and as the principal amount of Rs. 50,000 due under the two transactions was sued for the assessee was entitled to a deduction of Rs. 850 only, the balance of the principal under the said two mortgages:

Held that the assessee was entitled to have the debt of Rs. 10,850 taken into consideration and deducted from his income during the year of account as the same had then become a bad debt.

[P 493 C 1]

K. Krishnaswami Ayyangar and T. P. Gopalakrishna Iyer—for Petitioners.

K. V. Sesha Aiyangar—for Respondent.

Leach C. J.—The assessee was a partner in a money-lending firm carrying on business in Rangoon. The firm was dissolved and as his share of the assets the assessee was allotted two debts due by a customer of the firm. These debts were secured on mortgages of immovable properties. In the first case the customer was given an advance of Rs. 40,000 and in respect of this sum a first mortgage of the properties was created. Later he was given a further advance of Rs. 10,850, which was secured by a second mortgage of the same properties. As the result of the arrangement entered into on the dissolution of the partnership the assessee became the lender of the two sums and entitled to realize the security which had been given. He filed a suit against the debtor, but as he considered that the properties were not worth more than Rs. 50,000, he limited his claim to this amount. With interest the amount due on the first mortgage was Rs. 71,220. He waived rupees 21,220 of the interest due and asked for a decree on the first mortgage for Rs. 50,000. He regarded the second loan, that is the loan of Rs. 10,850, as being irrecoverable and accordingly he did not ask for a decree in respect of this amount.

For the assessment year 1938-39 the assessee has been assessed on an income of Rs. 22,394. Included in this sum is Rs. 19,260 which the income-tax officer regarded as being the amount of the net profits of the assessee's business in Burma for the year of account. The assessee says that the income-tax officer here erred as he should have reduced the amount by Rs. 10,850, the loss which he had suffered in respect of the second mortgage. This claim was disallowed and the reasons set out in the case submitted to this Court by the Commissioner are that in the assessee's books the two mortgage debts are debited against the debtor in a single folio and that as he only expected to recover Rs. 50,000 from the debtor there was no loss in respect of the second loan of Rs. 10,850 except to the extent of Rs. 850, which had been allowed. What has apparently operated in the mind of the Commissioner is that the suit was filed to recover a sum of Rs. 50,000 which was roughly the amount of the two principal sums of Rs. 40,000 and Rs. 10,850. It would seem that the Commissioner has had regard to what he considers to be the substance of the matter, not the strict legal position. This the Commissioner is not entitled to do and the Privy Council has protested against assessments being made on such a basis. In the recent case in I L R (1941) Mad 89,[1] the Board considered it necessary once more to protest against the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position, and reference was made in the judgment to the

1. ('40) 27 A I R 1940 P C 183 : 190 I C 218 : 67 I A 394 : I L R (1941) Mad 89 : I L R (1940) Kar P C 371 (P C), The Bank of Chettinad Ltd. v. Commissioner of Income-tax, Madras.

disapproval of this doctrine expressed in (1936) A C 1.[2]

Now what is the strict legal position here? The assessee was entitled to bring a suit against his debtor for the purpose of recovering the amounts due on both the mortgages. If he had sued on both the mortgages he would have been entitled to appropriate in the first place the proceeds of the sale of the immovable properties to the principal and interest due on the first mortgage. Only if they were sufficient to discharge both the principal and interest due on the first mortgage could there be any appropriation towards the second mortgage. It has not been suggested that the assessee erred in regarding Rs. 50,000 as being the outside value of the mortgaged properties. It has been stated at the Bar that at the sale which took place in pursuance of the decree which was eventually obtained the properties did not realize more than Rs. 27,000. But be this as it may, it must for the purposes of this case be taken that at all material times the total security was not worth more than Rs. 50,000 and the debtor had no other property. Therefore there could be nothing left for the discharge of the second mortgage, which means that the assessee has in truth and in fact lost Rs. 10,850 on the second transaction without taking into consideration his loss of interest on this sum. The loss had been ascertained in the year of account and the assessee was entitled to have it taken into consideration in calculating his income for the purpose of taxation. For these reasons we answer the question referred in the affirmative. As the assessee has succeeded he will be awarded costs which we fix at Rs. 250. The deposit of Rs. 100 will be refunded.

C.R.K./G.N. *Answered in affirmative.*

2. (1936) 1936 A C 1 : 104 L J K B 383 : 153 L T 223 : 19 Tax Cas 490 : 79 S J 362 : 51 T L R 467, Inland Revenue Commissioners v. Duke of Westminster.

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(28) A. I. R. 1941 Madras 493

MOCKETT AND WADSWORTH JJ.

S. Ramasubba Iyer and another — Plaintiffs — Petitioners

v.

Ayyalu Naidu and another — Defendants — Respondents.

Civil Revn. Petn. No. 1820 of 1940, Decided on 10th January 1941, to revise order of Sub-Judge, Mayavaram, D/- 16th September 1940.

Court-fees Act (1870), Art. 17A (1) and S. 7 (iv-a) as amended in Madras — Suit by certain worshippers of temple representing other worshippers for declaration that decree obtained against temple in collusion with trustee is not binding on temple—Suit is in substance suit for cancellation and is governed by S. 7 (iv-a).

In order to decide a matter of court-fee, the Court is entitled to examine the substance of the suit, and obviously in order to examine the substance of the suit, the position of the parties thereto must necessarily be defined. [P 494 C 1]

A grocer obtained a decree against a temple in collusion with its trustee. Certain worshippers representing other worshippers brought a suit for declaration that the decree was not binding on the temple :

Held that the suit was in substance a suit for cancellation of the decree and was therefore governed by S. 7 (iv-a) and not by Art. 17A (1) : *Case law discussed.* [P 494 C 1; P 495 C 1]

V. N. Venkatavaradhachariar—for Petitioners.

Government Pleader, K. S. Desikan and S. Sankara Iyer — for Respondents.

Mockett J. — This is a petition seeking to revise an order of the learned subordinate Judge of Mayavaram and it involves a question under the Court-fees Act. The point may be shortly stated. The petitioners contend that they should pay a court-fee under Art. 17A (1) of the Act and the learned Judge has held that the fee should be paid under S. 7, cl. (iv-a). The history of this matter, so far as it is relevant, is as follows : It appears that one Ayyalu Naidu, a grocer, brought a suit against the temple of Sri Mayuranathaswami Abisheka Kattalai represented by its hereditary trustee Sri La Sri Ambalavana Pandarasannadhi and against Sri La Sri Ambalavana Pandarasannadhi himself. The suit was founded upon a promissory note, and the promissory note had been executed by the trustee in respect of goods supplied by the plaintiff. The end of the suit was that the plaintiff obtained a decree against the temple properties alone and did not press the suit against the trustee against whom the suit was dismissed. The petitioners before us are three worshippers of the temple and they have filed the suit now under consideration in which they impugn the decree passed against the temple shortly on the ground that the trustee was not looking after the temple's interests but allowed the temple to be sacrificed in return for himself being exonerated, and we have to consider exactly what it is that the plaintiffs have prayed for in this suit. After setting out the facts which I have shortly narrated and alleging collusion between Ayyalu Naidu and the trustee, they finally

conclude their plaint with the following prayer :

The plaintiffs therefore pray that this Honourable Court may be pleased to pass a decree (a) declaring that the decree in O. S. No. 22 of 1937 on the file of this Court is not binding on defendant 2 herein; (b) directing defendant 1 to pay the plaintiffs the costs of this suit and (c) granting the plaintiffs such further or other reliefs, etc.

The Subordinate Judge has held that however worded, this is in substance and in effect a prayer for the cancellation of the decree and that therefore S. 7, cl. (iv-a) was applicable. It has been argued before us that that view is wrong because this is a prayer for a decree "declaring that the decree in O. S. No. 22 of 1937 is not binding on defendant 2" and that therefore Art. 17A (1) is the appropriate article. I have felt some difficulty in approaching this case owing to the position of the petitioners, the plaintiffs in this suit. I find it difficult to understand what their position is. They do not claim any personal benefit. It is not a case of a suit by a worshipper who claims that he has been excluded from his rights as a worshipper. It is not a suit under S. 92, Civil P. C., in which a worshipper seeks various remedies that are provided against trustees. It would appear that the position of the plaintiffs can only be regularized by leave of the Court under O. 1, R. 8. Before us the petitioners were inclined to concede that they are three of numerous persons and the numerous persons are the worshippers having the same interest in this suit and that they are suing representing all other persons like themselves. Later, this aspect may become material in the Court below, but I mention it because there is no doubt whatever and there is ample authority for the position, that in order to decide a matter of court-fee, the Court is entitled to examine the substance of the suit, and obviously, in order to examine the substance of the suit, the position of the parties thereto, and particularly in this case of the plaintiffs, must necessarily be defined.

What is it that the plaintiffs here are seeking to do? They are asking that the decree passed in previous suit should be declared to be not binding. They have made in this suit both the temple and the trustee himself parties. In my view, the position of the plaintiffs is clear. They have come forward to represent the temple itself. If they seek to sue as individuals only, it would seem that an impossible position arises, because there would be nothing to prevent other worshippers coming forward and asking for declarations in other terms. If authority is required for the proposition that the substance of the suit must be regarded, it is to be found in two cases in this High Court— 38 Mad 922[1] and I L R (1940) Mad 259[2] at page 277. The learned counsel for the petitioners has not contended that the substance of the suit is not an extremely relevant consideration. There is another group of cases which assists him in this matter, of which 29 Mad 553[3] is an example. The effect of this case is that a trustee, who seeks not to be bound by a decree, cannot raise that contention in execution but must bring a suit to set the decree aside. There is no direct authority on the position before us, but our attention has been drawn to one or two cases. I propose to confine my remarks to the decisions of this High Court, because no decision of any other High Court has rendered me any assistance. 45 M L W 380[4] was a suit by reversioners for a declaration that a decree obtained against the widow of the last male holder was collusive and not binding, and in that case a question arose as to whether the decree was governed by S. 7 (iv-c), Court-fees Act, or S. 7 (iv-a) as amended in Madras. It may be convenient at this stage to set out the articles and sections with which we are concerned. Article 17A (1) reads as follows : "To obtain a declaratory decree where no consequential relief is prayed." Section 7 (iv-a) reads :

In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value .....

Venkataramana Rao J., in 45 M L W 380[4] took the view that in cases where the decree does not cast an obligation on persons as parties, though there is a decree on the estate in which they have an interest under the general law, they do not require cancellation but only a declaration that the decree is not binding on their interests. In my view, a reversionary suit such as is dealt with by the learned Judge is in a totally different category to suits such as the present where persons come forward, as in this case, and virtually say that, as representing the particular entity — and a temple is an

1. ('15) 2 AIR 1915 Mad 948 : 28 I C 79 : 38 Mad 922 : 28 M L J 118 (F B), Arunachalam Chetti v. Rangaswami Pillai.
2. ('40) 27 AIR 1940 Mad 113 : 186 I C 494 : ILR (1940) Mad 259 : (1940) 1 M L J 32 (FB), Ramaswami Ayyangar v. Rangachariar.
3. ('06) 29 Mad 553 : 16 M L J 415, M. Varaka Desikar v. Balagopalakrishna Chetti.
4. ('37) 24 A I R 1937 Mad 449 : 171 I C 889 : 45 M L W 380, Vallabhacharyulu v. Rangacharyulu.

example of an entity that must be represented—they claim to have a decree against it cancelled. That is a very different position from a reversioner who only asks that a decree against the widow should be declared to be invalid. In 61 M L J 39,[5] the plaintiff again had a beneficial interest in the surplus. No case has been cited to us in which the plaintiff who seeks to have a decree declared invalid has had no personal interest whatever in the result. The learned Government Pleader has put his argument in this manner. He says that the substance of the suit has got to be considered and that this is not a case where the temple was not at all represented in the beginning. He has referred us to several cases of which 41 Mad 124[6] which was also cited by the appellants, is an interesting example because that shows that persons in the position of disciples of a mutt — and it is not unlike the position of worshippers of a temple—come under the category of parties who can sue within the provisions of O. 1, R. 8.

Generally, the view I take of this case is that it does not leave much room for any very erudite argument. I think that the test pressed by the learned Government Pleader solves any difficulty. What are the facts? Here, a grocer obtained a decree against a temple and it is alleged — and I emphasize that I am only setting out the pleading — in collusion with the trustee. Unless there is intervention through Court, it is obvious that there is nothing to stop that decree being executed. Intervention comes from worshippers and they come forward, in my opinion, not to ask that the decree shall not be binding on the temple, but, as representing the temple, that it should be cancelled, and I find it very difficult to understand how they can be before the Court in any other capacity. That is shortly the basis of the decision of the lower Court and I think that decision is correct. The position of the petitioners under O. 1, Rule 8, as I have already indicated, may require a decision later on by the lower Court, and nothing I have said is intended to affect their position except so far as it is relevant to this judgment. In my view, this petition should be dismissed with costs, one set to be divided between respondent 1 and the Government Pleader. The original plaint will be returned to the petitioners, who will have two months' time for payment of the court-fee.

Wadsworth J.—I agree. I wish to add only a very few words. It seems to me to be well settled that when A gets a decree against B and B or his representative wishes to get rid of that decree, B must pay court-fee as for the cancellation of the decree, whether he drafts his prayer openly as one for cancellation or whether he disguises it in the form of a prayer for a declaration. If the decree obtained by A against D adversely affects the interests of C, C may apply for a declaration that the decree against B is not binding upon himself, and in such a suit there is no question of cancellation and the suit can be valued as for a declaration. Here we are concerned with a suit by the plaintiffs, presumably representing the general body of worshippers, for a declaration that the decree obtained by defendant 1 against defendant 2, the temple, is not binding upon the temple. The plaintiffs do not ask for the protection of any interest of their own. By the simple device of putting both the temple and its present trustee into the array of defendants they hope to disguise the fact that they are in substance praying on behalf of the temple for the cancellation of a decree obtained against that temple. To my mind, as was observed in 41 Mad 124,[6] the plaintiffs, though their position gives them an interest sufficient to justify the filing of a suit independently of the trustee, really sue only in the right of the temple and its trustee; and they should not be permitted to escape from the natural consequences of their suit by arraying the temple and its trustee amongst the defendants, instead of their being co-plaintiffs as in theory they ought to have been. I agree therefore with the decision of my learned brother.

C.R.K./D.S. *Petition dismissed.*

5. ('31) 18 A I R 1931 Mad 24 : 130 I C 449 : 61 M L J 39, Venkatlal v. Kosaldasu Bewaji.
6. ('18) 5 A I R 1918 Mad 464 : 42 I C 866 : 41 Mad 124 : 33 M L J 357, Chidambaranatha Thambiran v. Nallasiva Mudaliar.

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(28) A. I. R. 1941 Madras 495

WADSWORTH AND PATANJALI SASTRI JJ.

A. Sabhapathi Mudaliar — Petitioner

v.

Rajarathna Mudaliar and others — Respondents.

Civil Revn. Petn. No. 1909 of 1940, Decided on 16th October 1940, to revise order of Dist. Court, East Tanjore, D/- 12th September 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 8, Explanation — Mortgage by father of his own property and separate share of his son — Fresh mortgage by son alone binding only his own property and discharging his father's mortgage is not renewal of son's liability.

In order to constitute either a renewal or an inclusion within a fresh document for the purpose of the explanation to S. 8, the debtor must be substantially the same. Where a mortgage is executed by father of his own property and the son has permitted his separate share to be mortgaged by the father, the subsequent fresh mortgage executed by the son alone binding only his own property and discharging his father's mortgage is not merely a renewal of the son's own liability. [P 496 C 2]

A. V. Viswanatha Sastri —for Petitioner.

S. Muthiah Mudaliar — for Respondents.

Wadsworth J.—This civil miscellaneous appeal is preferred against a decision under S. 19 of Madras Act, 4 of 1938. We have been asked to treat the appeal as a civil revision petition and it has been heard on that footing. The appellant will pay the deficient court-fee. The petitioner (appellant) sought to scale down the decree on a mortgage (Ex. A) dated 27th June 1933. This mortgage was the result of a long series of prior transactions. Firstly, there were three successive promissory notes executed by the petitioner's father Arunachalam, who is still living, in favour of the father of respondents 1 and 2. Then in 1919 the debt was split into two promissory notes (Exs. C and C-1) executed by the same Arunachalam, one in favour of respondent 1 and the other in favour of respondent 2, the respondents' family being undivided. In July 1920 there was a partition in the debtor's family between the petitioner and his father Arunachalam. And in 1921 the father Arunachalam executed a mortgage (Ex. E) in discharge of both the promissory notes (Exs. C and C-1), the mortgagees being the two promisees (respondents 1 and 2). This mortgage covered 64.79 acres, apparently including the property which had fallen to the share of the son (petitioner) in the partition. It is said that owing to the fact that the document of partition was unregistered, the son attested the mortgage executed by his father. Then in 1933 we have the suit mortgage deed (Ex. A) executed by the son alone in favour of the same mortgagees and binding only 28.79 acres said to be the share of the son. This mortgage discharges Ex. E and the father Arunachalam is thus exonerated from liability. In the suit on Ex. A it was held that the present petitioner was estopped from denying his liability under the previous mortgage (Ex. E) and consequently that Ex. A was binding on the petitioner's sons as having been in discharge of an antecedent debt. It is now contended that because the petitioner has been held to have been under a liability in respect of Ex. E, his own mortgage (Ex. A) which discharged Ex. E must be treated as a renewal for the purpose of the explanation to S. 8 of Madras Act, 4 of 1938. It seems to us that this is carrying the theory of renewal of liability too far.

It would appear that the son's property was bound by the mortgage Ex. E, but it was not bound as the property of the son. The son permitted his property to be mortgaged by his father and it was, at any rate, in form a mortgage by the father of the father's property. Although it was held that the son was estopped from disputing the liability of his property under this mortgage by reason of his attestation of the mortgage, it seems to us to be going too far to say that the fresh mortgage executed by the son alone binding only his own property and discharging his father's mortgage is merely a renewal of the son's own liability. In form Ex. A is an entirely new contract superseding the previous mortgage by a different person. The father and son were divided, and it is only by reason of an estoppel that the son is in any way connected with the previous transaction. We have held that in order to constitute either a renewal or an inclusion within a fresh document for the purpose of the explanation to S. 8, the debtor must be substantially the same. We do not consider that this criterion is satisfied in the present case and we are of opinion that there is a complete novatio which cannot be treated either as a renewal or an inclusion in a fresh document by the same debtor. It follows that the decision of the lower Court is correct. The further question whether the earlier promissory notes can be said to be in favour of the same creditor becomes purely academic. But we may say that in our opinion the matter is covered by our previous decision reported in 52 M L W 595.[1] In the result therefore the appeal treated as a civil revision petition is dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

1. ('41) 28 A I R 1941 Mad 321 : 52 M L W 595 : (1940) 2 M L J 664, Varadarajan Pillai v. Krishnamurthi Pillai.

(28) A. I. R. 1941 Madras 497

WADSWORTH AND PATANJALI SASTRI JJ.

Pachigolla Satyanarayanamurthi — *Appellant*

v.

Satti Gangisetti — *Respondent.*

Appeals Nos. 118 and 119 and Civil Revn. Petn. No. 511 of 1939, Decided on 17th October 1940, against orders of the Sub-Judge, Amalapuram, D/- 10th October 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 19—Sole judgment-debtor agriculturist — Scaling down of decree can be extended to any portion of property covered by decree which has come into hands of non-agriculturist after suit.

When the sole judgment-debtor on the record is an agriculturist, the scaling down of the decree need not be restricted so as not to affect any portion of the property covered by the decree which has come into the hands of a non-agriculturist after the suit : A I R 1941 Mad 204, *Ref.*; C. R. P. 1734 of 1939, *Expl.* [P 497 C 2]

(b) Madras Agriculturists' Relief Act (4 of 1938) — Act is intra vires.

The Madras Agriculturists' Relief Act is within the express powers of the Madras Legislature and the fact that in particular cases it operates to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity : A I R 1939 Mad 361 (F B), *Foll.* [P 498 C 1]

P. Satyanarayana Rao and M. Balakrishnamurthi — for Appellant.

V. Viyanna — for Respondent.

Wadsworth J. — The first two cases are alternative one to the other, being an appeal and a revision against an order scaling down a decree under S. 19 of Madras Act 4 of 1938. C. M. A. No. 119 of 1939 arises out of the same decree and is preferred against an order declining to implead the purchaser as a party to the final decree. The facts are simple. In 1936 there was a preliminary decree on a mortgage of 1930. On 3rd February 1937 a portion of the hypotheca was sold and the sale proceeds were paid to the mortgagee who released that part of the hypotheca. On 19th March 1937, there was a final decree for sale of the balance of hypotheca. On 9th October 1937 there was a further private sale by the mortgagor comprising the greater portion of his remaining interest and the purchaser paid Rs. 25,000 out of the sale price to the mortgagee, the balance of the sale price being retained for future payment. In this state of affairs, when the mortgagor retained his interest in only a few items of the hypotheca, he filed an application to scale down the decree under S. 19 of Act 4 which had recently come into force. By way of counterblast to this application, the decree-holder filed an application to implead the purchaser as a party to the final decree and he opposed the scaling down application on the ground that it should not enure to the benefit of the purchaser who was not an agriculturist. The lower Court repelled his contentions and scaled down the decree at the instance of the mortgagor and declined to implead the purchaser pendente lite.

The argument before us on behalf of the decree-holder, who is the appellant here, is briefly this : When Act 4 of 1938 came into force, there was already a liability imposed on the purchaser by reason of his purchase to satisfy this decree by the sale of those items which had been transferred to him. Though the mortgagor was still liable for the decree, it is argued that he was entitled to have the decree scaled down only to the extent of his subsisting interest in the hypotheca as it stood when the Act came into force and we are asked to amend this decree so as to provide for the sale of those items transferred to the purchaser for the full amount of the decree as originally passed and for the sale of those items retained by the mortgagor only for the amount of the decree as scaled down. We have held in C. R. P. No. 1574 of 1938[1] that when there is a decree against two persons one of whom is an agriculturist and the other is not, the decree may be scaled down as against the agriculturist judgment-debtor and left intact as against the nonagriculturist judgment-debtor, suitable modifications being made in the form of the decree. But what we are now asked to do is to alter this decree so as, in effect, to give one decree against the only judgment-debtor and another decree against a person who was not a party to the suit and against whom no decree has been passed. We are unable to see how S. 19 of Act 4 of 1938 empowers us to proceed in this manner. It is true that we have held in C. R. P. 1734 of 1939 that an assignee from a judgment-debtor may, if he is an agriculturist, claim the benefits of S. 19. But this decision is no warranty for holding that when the sole judgment-debtor on the record is an agriculturist, the scaling down of the decree should be restricted so as not to affect any portion of the property covered by the decree which has come into the hands of a non-agriculturist after the suit. We are of opinion that the decision of the lower Court on the main question is correct and see no point in impleading the purchaser

1. *Reported in* ('41) 28 AIR 1941 Mad 204 : (1940) 2 M L J 872, Ramier v. Srinivasiah.

who has no separate rights to agitate in the execution of his decree.

The appellant has also raised the question whether Act 4 of 1938 is ultra vires so far as it affects negotiable instruments. This is a matter which only arises in the process of scaling down the decree and in respect of that contention we are governed by the decision of the Full Bench in I L R (1939) Mad 151.[2] The appeals and the revision petition are therefore dismissed with costs (one set in each of the two civil miscellaneous appeals). We give the necessary certificate under S. 205, Government of India Act, that the case involves a substantial question of law as to the interpretation of the Government of India Act.

C.R.K./D.S. *Appeals dismissed.*

2. ('39) 26 AIR 1939 Mad 361 : 180 I C 994 : I L R (1939) Mad 151 : (1939) 1 M L J 272 (F B), Nagaratnam v. Seshayya.

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(28) A. I. R. 1941 Madras 498

LEACH C. J. AND HAPPELL J.

K. A. Srinivasa Ayyangar — Appellant

v.

S. Ramanujachariar and others — Respondents.

Letters Patent Appeal No. 41 of 1938, Decided on 13th December 1940, against judgment and decree of King J., in S. A. No. 721 of 1932, D/- 11th February 1938.

(a) Limitation — Person possessing right to conduct festival does not lose it because he does not institute suit in respect of first infringement of right.

A person who possesses a right to conduct festival does not lose it because he does not institute a suit in respect of the first infringement of the right. If it is a recurring infringement he can take action whenever he desires so long as he remains the holder of the right. [P 500 C 1]

The right to conduct festival in certain temple was possessed by a class of worshippers *T*. In 1911 another class of worshippers *V* asserted that they had been given right to conduct the festival and obtained an order from the Magistrate under S. 144, Criminal P. C. They obtained a similar order in the year 1914. After 1914 the festival was not held up to 1927. In 1929-30 the festival was held and *V* again obtained an order under S. 144, Criminal P. C. Thereupon *T* filed a suit in 1930 for a declaration that order under S. 144 was illegal and that *V* were not entitled to conduct the festival to the exclusion of *T*:

Held* that the suit was not barred : A I R 1935 Mad 967, *Disting.*; A I R 1941 Mad 81 (FB), *Rel. on. [P 500 C 1]

(b) Criminal P. C. (1898), S. 144—Order under S. 144 is effective at the most for two months.

An order passed under S. 144 can, at the most, be effective for two months. [P 499 C 2]

T. V. Muthukrishna Iyer, V. N. Venkatavaradachari, T. R. Srinivasa Ayyangar and S. Ramanujam — **for Appellant.**

K. S. Desikan and R. Kesava Ayyangar — **for Respondents.**

Leach C. J. — This appeal arises out of another dispute between the Thengalais and Vadagalais. In the village of Thirukkannamangai in the Tanjore District is a Thengalai temple known as the Sri Bakthavathsala Perumal Temple. The dispute is with reference to the twenty days' festival, which commences in the month of December and ends in January and is known as Pagal Pathu and Ra Pathu. It is common ground that upto 1909 the right to conduct the festival, including the right to recite the vedam, mantrapushpam and prabandam, was possessed by the Thengalais. In 1900 a number of Vadagalais filed a suit (O. S. No. 506 of 1900) in the Court of the District Munsif of Tiruvarur for a declaration that a certain shrine in the temple had been dedicated to the spiritual leader of the Vadagalais and they obtained a decree, which was confirmed by this Court on 25th November 1909. The Vadagalais maintain that the decree finally decided that the right to conduct the festival is in them, but this the Thengalais strenuously deny. The effect of the decree is in dispute in the present suit, but for the purposes of deciding this Letters Patent Appeal it is not necessary to consider this matter as the appeal only relates to a question of limitation. If the appellant succeeds in establishing his contention, that the suit is not time barred the case will have to be remanded to King J. from whose judgment the appeal has been preferred, for decision on the question whether the decree in O. S. No. 506 of 1900 operates as res judicata. On the passing of this Court's decree on 17th November 1909 the Vadagalais asserted that they had been given the right to conduct the festival and on 19th January 1911 they obtained from a Magistrate an order under S. 144, Criminal P. C., preventing the Thengalais from interfering with them in the conduct of the festival which was then being held, and they obtained a similar order on 19th December 1914. There were other orders of a similar nature between these two dates, but it is not necessary to specify them.

After 1914 the festival was not held again until the year 1927. The trustee refused to allow it to be held. It has been suggested that the reason was that there were no funds available for the purpose, but I do

not think that it is going too far to assign the real reason to a desire on the part of the trustee to avoid clashes between these antagonistic sects. The record does not show whether the festival which commenced in December 1927 was conducted exclusively by the Vadagalais, but there is some indication that the Thengalais did participate for part of the time. There was no festival in the following year, but in 1929-30 the festival was again held and the Vadagalais appear to have had complete control. On 3rd January 1930, that is while the 1929-30 festival was being held, the appellant, who is a Thengalai, filed the present suit in the Court of the District Munsif of Nannilam for a declaration that an order under S. 144, Criminal P. C., which the Vadagalais had obtained that day from the Sub-Magistrate of Kodavassal, was illegal and that the Vadagalais were not entitled to exercise any rights in connexion with the temple to the exclusion of the Thengalais. The defendants pleaded limitation and res judicata, relying for the second plea on the decree passed in O. S. No. 506 of 1900. The District Munsif held that the suit was not barred and granted the declaration asked for by the appellant. On appeal, the District Judge of East Tanjore held that the suit was not barred so far as it related to the first ten days of the festival, but that it was barred by the doctrine of res judicata so far as it concerned the second ten days. Both sides appealed and their appeals were heard by King J. who held that Art. 120, Limitation Act, applied and that the suit was barred in its entirety by reason of the fact that it had not been instituted within six years of 19th December 1914, the date of the order passed by the Magistrate under S. 144, Criminal P. C., in that year. In these circumstances the learned Judge did not deal with the question whether the doctrine of res judicata had application.

The learned Judge considered that although the actual period of efficacy of the order of 19th December 1914 was only 19 days it had resulted in the interference with the rights of the Thengalais for at least 13 years and that the case fell within the decision of this Court in 59 Mad 75.[1] I find myself unable to concur in either of the reasons given by the learned Judge for holding that the suit was barred by the law of limitation. The order of 19th December 1914 had not interfered with the rights of the Thengalais for 13 years. An order passed under S. 144, Criminal P. C., can, at the most, be effective for two months, and in this particular case it was effective for only 19 days. The trustee was the person responsible for the cancellation of the festival in the intervening years from 1914 to 1927 and neither party was able to set up a claim against the other during this period. The facts in 59 Mad 75[1] are altogether different from the facts in the present case. There certain Nadars sued to establish a right which they and their castemen claimed to pass in procession over certain public streets in the village in which they lived. Their right was denied by other villagers. In 1900 an order was passed by a Magistrate under S. 147, Criminal P. C., directing that no organised procession of Shanars or Christians should pass along the route until a civil Court had declared that there was a right to do so. The suit out of which the appeal arose was not filed until 1918. It was held that Art. 120, Limitation Act, applied and that as the suit was not filed within six years of the order of 1900 it was out of time. On appeal it was contended that no rule of limitation would apply to such a case and that the right to use public streets, including the right to go in procession, was a natural right inherent in every member of the public, and could not be prescribed against or lost as other rights might be prescribed against or lost. Notwithstanding this contention it was held that the suit was governed by Art. 120.

This decision may some day have to be reconsidered, but reconsideration is not called for now, because there is an important point of difference between that case and the present one. The order in that suit was of a permanent nature, being under S. 147, Criminal P. C., while the order in the present suit was only of a temporary nature being under S. 144 and 59 Mad 75[1] is distinguishable on this ground. It is manifest that the Vadagalais have not obtained a prescriptive right to conduct the festival. It has been suggested that the exercise of the right for a period of six years would give them a prescriptive right, but even if this argument were well founded—it is not necessary to decide the question—the Vadagalais would still not have acquired a prescriptive right. They conducted the festival in 1910, 1911, 1912, 1913 and 1914, but then there was an interruption until 1927 and this suit was filed in 1930. Therefore the Vadagalais have not conducted the festival for even six years in succession.

1. ('35) 22 A I R 1935 Mad 967 : 161 I C 658 : 59 Mad 75 : 69 MLJ 739, Ponnu Nadar v. Kumaru.

I have already mentioned that it is common ground that the Thengalais possessed the right to conduct the festival up to 1909 and their right to conduct it must still remain unless they have given it up, which is not the case, or they have lost it by reason of prescription, which is also not the case. Now a person who possesses a right such as we have here does not lose it because he does not institute a suit in respect of the first infringement of the right. If it is a recurring infringement he can take action whenever he desires so long as he remains the holder of the right. I consider that the decision of the Full Bench in 1940 M W N 1232[2] has application here. The question in that case was whether a lawful holder of an office who had not performed the duties of the office for 40 years was precluded from filing a suit to enforce his rights because his status had been challenged. The plaintiff was the mantrapushpakar of a temple and the archakas of the temple were antagonistic to him. They had not however dispossessed him of the office, although they had made the position such that he was not willing to perform his duties. The Court held that he could abide his time for taking action. The interference which the archakas were guilty of had not affected his position as the lawful holder of the office. The archakas had not displaced him. The interference by the Vadagalais here with the right of the Thengalais to hold the festival has not been sufficiently long to confer title on the Vadagalais and this being the case the appellant was entitled to institute a suit when the Magistrate passed the order on 1st January 1930.

The result is that the appeal will be allowed and the case remitted to King J. to decide the question of res judicata and any other question which may arise out of the appeal. The appellant is entitled to his costs in this Court. The costs of the hearing before King J. will abide his final decision. These unedifying disputes between the Thengalais and Vadagalais occupy much judicial time to the detriment of more deserving litigants. Most of the disputes relate to ritual and are merely sentimental in character. So much time is taken up in deciding disputes between these two sects to the prejudice of cases which possess merit that I consider that the legislative authority might take into consideration the question whether disputes with regard to temple ritual could be left to the decision of the Hindu Religious Endowments Board without the right of recourse to the Courts.

Happell J.—I agree with my Lord the Chief Justice.

C.R.K./D.S. *Appeal allowed.*

2. ('41) 28 A I R 1941 Mad 81: (1940) 2 M L J 990: 1940 M W N 1232 (F B), Annaswami Iyengar v. Adivarahachari.

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(28) A. I. R. 1941 Madras 500

WADSWORTH AND PATANJALI SASTRI JJ.

Polisetti Venkataratnam — Petitioners

v.

Dhulipudi Surya Rao and others — Respondents.

Civil Revn. Petns. Nos. 933 to 935 of 1938, Decided on 4th October 1940, to revise order of Headquarters Deputy Collector, Coconada, D/- 19th May 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 15 — S. 15 deals with arrears of rent not only under Madras Estates Land Act but also under Malabar Tenancy Act.

Section 15 deals with arrears of rent not only under the Madras Estates Land Act which prescribes a special machinery for execution but also under the Malabar Tenancy Act with reference to which the ordinary procedure applies and the ordinary civil Courts have jurisdiction. [P 501 C 2]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 23 — S. 23 embraces all decrees and consequently applies to decrees for arrears of rent under Madras Estates Land Act — Fact that extent to which decree will have to be scaled down may not be capable of being determined at time of setting aside sale is no reason for refusing to apply S. 23.

Section 23 embraces all decrees and therefore applies to sales in execution of decrees for arrears of rent under the Madras Estates Land Act. No doubt the procedure for scaling down rent is different from the procedure for scaling down an ordinary debt in that it is conditional on a deposit by the person liable to pay. But the fact that the extent to which the decree will have to be scaled down may not be capable of being determined at the time when the sale is to be set aside, is not a reason for refusing to apply S. 23 if in terms that section applies. [P 501 C 1, 2; P 502 C 1]

(c) Madras Agriculturists' Relief Act (4 of 1938), S. 23 — Sale in execution of rent decree —Mere holding of sale does not wipe off arrears of rent until proceeds thereof are paid to landholder.

The mere holding of a sale in execution of a rent decree does not wipe off the arrears of rent. The arrears remain outstanding until the proceeds of the sale are paid to the landholder. Consequently, where a sale has been held and the purchase price is in deposit with the Collector it cannot be said that there is no "rent" outstanding. [P 502 C 1]

(d) Madras Agriculturists' Relief Act (4 of 1938), S. 15 — Deposit under S. 15 need not accompany application — Benefit of S. 15 depends on whether applicant has or has not made deposit within statutory period.

It cannot be said that a judgment-debtor is not entitled to the benefit of S. 15 because on the date of his application he did not pay the rent due for fasli 1347. The question whether he is entitled to the benefit of S. 15 when the Court proceeds to ascertain the amount due from him after setting aside the sale depends on whether he has or has not made the required deposit before the statutory date. [P 502 C 1, 2]

(e) Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 and 9 — Decree for costs can be scaled down with regard to interest.

A decree for costs is liable to be scaled down under Ss. 8 and 9 as regards interest : A I R 1941 Mad 52, *Foll.* [P 502 C 2]

D. Narasuraju — for Petitioners.

V. Suryanarayana and A. Satyanarayana — for Respondents.

Wadsworth J. — These civil revision petitions raise the question whether S. 23 of the Madras Act 4 of 1938 applies to sales in execution of decrees for arrears of rent under the Madras Estates Land Act. The decree in each of these cases was passed in either 1934 or 1935. The sales were all held on the same date, 10th December 1937. On 20th January 1938 the tenants applied for challans with a view to payment of the decreed amounts, but, instead of paying, on the following day they filed applications purporting to be under O. 21, Rule 90, Civil P. C., and S. 192, Estates Land Act, praying that the sales may be set aside on the ground of irregularity, etc. Act 4 of 1938 came into force in March 1938 and on 9th April 1938, when the sale proceeds were lying in Court and no sale certificate had been issued, the judgment-debtors withdrew their application under O. 21, R. 90, Civil P. C., and instead filed applications under Ss. 15 and 23 of Act 4 of 1938.

The main argument in these petitions is that S. 23 has no application to sales in execution of decrees for rent under the Madras Estates Land Act. In terms, the section appears to apply to sales in execution of any decree whereby immovable property in which an agriculturist has an interest has been sold on or after 1st October 1937 and the application may be made by any judgment-debtor claiming to be an agriculturist entitled to the benefits of the Act and if the application is made within 90 days of the commencement of the Act, the Court is obliged, if satisfied that the applicant is an agriculturist entitled to the benefits of the Act, to set aside the sale after giving notice to the persons interested and hearing them. The argument that this section which appears to embrace all decrees, excludes decrees under the Madras Estates Land Act, is largely rested on the fact that though the section has a *non obstante* provision regarding what is contained in the Civil Procedure Code, there is no similar provision regarding what is contained in the Madras Estates Land Act. It is also suggested that the words "notwithstanding that the sale has been confirmed" seem to contemplate a sale under the Civil Procedure Code and not a sale under the Madras Estates Land Act, with regard to which S. 124 does not require any confirmation order, but provides merely for the grant of a certificate of sale if no application has been made to set aside the sale under S. 131. It is also pointed out that s. 23 contains no provision regarding the setting aside of sales under the summary provisions contained in Ss. 112 to 118, Estates Land Act, and it is contended that it is not likely that the Legislature would have given relief in the case of one class of sale under the Act if they were not giving relief under the other class. A further contention was based on the terms of S. 22 which deals with sales of moveable property, but makes no provision for dealing with such sales if the judgment-debtor is entitled to the privileges under S. 15 of the Act.

Now, there are, to our mind, many arguments which can be advanced against these contentions which Mr. Narasuraju has put forward. In the first place, S. 15 deals with arrears of rent not only under the Madras Estates Land Act which prescribes a special machinery for execution, but also under the Malabar Tenancy Act with reference to which the ordinary procedure applies and the ordinary civil Courts have jurisdiction. It cannot be contended that the non-mention of the Madras Estates Land Act in S. 23 is any indication that S. 23 would have no application to sales for arrears of rent in the ordinary civil Courts under the procedure laid down by the Civil Procedure Code. Moreover, even a decree for rent under the Madras Estates Land Act may result in a sale by the ordinary civil Courts under the Civil Procedure Code if that decree is transferred to the civil Courts for execution. To accept the argument which has been advanced before us on the strength of the absence of any *non obstante* clause with reference to the Estates Land Act, would lead to the anomalous position that some sales in execution of decrees under the Estates Land Act would come within the purview of S. 23 of Act 4 of 1938 and others would not; while sales in execution of decrees for rent under the Malabar Tenancy Act would be

liable to be set aside under S. 23 though most sales in execution of decrees for rent under the Estates Land Act would escape. The argument based on S. 22 can have little force having regard to the position of sales under the Malabar Tenancy Act. No doubt, the procedure for scaling down rent has this difference from the procedure for scaling down an ordinary debt, in that it is conditional on a deposit by the person liable to pay. But the fact that the extent to which the decree will have to be scaled down may not be capable of being determined at the time when the sale is to be set aside, is not, in our opinion, a reason for refusing to apply S. 23 if in terms that section applies.

Our attention has been drawn to the difference between the wording of S. 23 and that of S. 19. Section 19 speaks of a decree for the repayment of a debt and by the definition of "debt" this would not include a decree for the payment of rent. Section 23 however has the very wide term "any decree" and it would require very strong indications of the intention of the Legislature to justify our interpreting the words "any decree" to mean "any decree excluding a decree under the Madras Estates Land Act." It has also been contended that S. 23 is only available to a judgment-debtor who is found to be entitled to the benefits of the Act and it is argued that in the case of a person liable to pay rent, the question whether he is entitled to the benefits of the Act will depend on (1) whether there is rent outstanding on the date of the commencement of the Act and, (2) whether he has paid in respect of the holding the rent due for fasli 1347 on or before 30th September 1938. It is suggested that because in these cases sales had been held and the purchase price was in deposit with the Collector, there was no "rent" outstanding on the date of the commencement of the Act. We are unable to accept this contention. The mere holding of the sale will not, in our opinion, wipe off the arrears of rent. Those arrears will remain outstanding until the proceeds of the sale are paid to the landholder. Nor can it be contended that the judgment-debtors were not entitled to the benefit of S. 15 because on the date of their applications, they may not have paid the rent due for fasli 1347. This payment has by the terms of Proviso 2 to S. 15 to be made before 30th September 1938, and orders were passed on the present applications on 19th May 1938. The question whether they will be entitled to the benefit of S. 15 when the Court proceeds to ascertain the amount due from them after setting aside the sale, will depend on whether they have or have not made the required deposit before the statutory date. On that point we have no information.

It seems to us clear that quite apart from the question whether the petitioners were entitled to the benefits of the Act in respect of S. 15, they were clearly entitled to the benefits of the Act in respect of the decree for interest on costs. No doubt, the definition of "rent" includes rent covered by a decree, but the terms of S. 16 make it quite clear that costs awarded in a decree for rent are something quite apart from the rent. We have already held in (1940) 2 M L J 707[1] that a decree for costs is liable to be scaled down under Ss. 8 and 9 as regards interest. It follows that even apart from the claim of the petitioners to be entitled to the benefits of the Act under S. 15 as regards rent, they were entitled to the benefits of the Act under Ss. 8 and 9 as regards interest on costs. The Court below therefore had no option but to set aside the sales on application. In the result, therefore, these three petitions are dismissed with costs of the judgment-debtor respondent (one set). Pleaders fee fixed at Rs. 69—Rs. 23 in each case.

C.R.K./G.N. *Petitions dismissed.*

1. ('41) 28 AIR 1941 Mad 52 : (1940) 2 M L J 707, Palani Goundan v. Muthusami Goundan.

(28) A. I. R. 1941 Madras 502

VENKATARAMANA RAO AND HORWILL JJ.

Kanakasabapathi Chetti — Appellant

v.

Unnamalai Ammal and another — Respondents.

Appeal No. 217 of 1938, Decided on 7th January 1941, against order of Dist. Court, North Arcot at Vellore, D/- 8th March 1938.

(a) Succession Act (1925), Ss. 234 and 235 — *A* bequeathing his property by will to his widow and sons of his first wife's brother *B* and *C* — Widow entitled to life estate under will and after her *B* and *C* to enjoy property devised — *C* predeceasing testator — *C's* interest must be deemed to be intestate — *B* establishing will in Court — *B* found to be neither residuary legatee nor executor by necessary implication — Court held not justified in dismissing *B's* suit — Court ought to grant letters of administration to person competent under Act to administer estate — Widow held entitled to letters.

A bequeathed his property to his widow and sons of his first wife's brother *B* and *C*. The widow was entitled to a life estate under the will and after her *B* and *C* were to enjoy the property devised. *C* however predeceased the testator. *B* in his suit for the

probate of the will established the will but the Court found that he was neither a residuary legatee nor an executor by necessary implication and therefore dismissed the suit:

Held that in regard to the interest of *C* the testator must be deemed to have died intestate inasmuch as *C* had died before the will. [P 503 C 2]

Held further that since *B* had established the will the Court was not justified in dismissing *B*'s suit. The will having been established, it was the duty of the probate Court to direct letters of administration with will annexed, inasmuch as no executor had been appointed, to such persons as were under the Act competent to administer the estate, thus avoiding further expense and litigation and that the letters of administration with will annexed ought to be issued to the widow. [P 503 C 2]

(b) Costs — Probate — Plaintiff seeking to establish will under which he was given legacy — Will not attacked but plaintiff merely put to proof of it — Costs should be awarded to both parties out of estate.

The usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and where the will has not been attacked but the plaintiff is merely put to proof of it, is to award costs to both parties from and out of the estate. [P 504 C 1]

T. K. Sundararaman — for Appellant.

Ch. Raghava Rao — for Respondents.

Venkataramana Rao J. — This appeal arises out of an application for probate of a will left by one Varadappa Chetti. The application was contested by his widow Unnamalai Ammal and it was therefore registered as a suit under the Succession Act. The plaintiff in the suit and his brother Subramania Chetti since deceased were the sons of the brother of the first wife of the said Varadappa Chetti and they were being brought up by Varadappa Chetti as their parents were dead. The will propounded is dated 4th April 1930, and under it there were bequests in favour of the plaintiff and his brother and also in favour of Unnamalai Ammal. Unnamalai has put the plaintiff to proof of the will and the validity of the dispositions and also contended that the plaintiff was not entitled to probate on the ground that he was not appointed executor expressly under the will nor an executor by necessary implication and that in any event as Subramania Chetti died before the testator she was entitled to all his interest under the will as on intestacy. The learned District Judge framed several issues including the issue whether the will relied on was true and validly executed. He found that the will was genuine and validly executed by the testator. Then he went into the respective rights of the parties under the will and declared that Unnamalai was entitled to a life estate under the will and that it was only after her life that the plaintiff and his brother Subramania Chetty were to enjoy the property devised under the will. He also held that in regard to the interest of Subramania Chetti there was an intestacy and with regard to this it seems to us that inasmuch as Subramania Chetti died before the will the testator must be deemed to have died intestate.

But the question is not whether or not there was an intestacy with regard to the interest of Subramania Chetty but the question is, the will having been proved who is entitled to either probate or letters of administration with the will annexed for the administration of the estate left by the testator. We are satisfied that on the construction of the will the plaintiff would neither be a residuary legatee nor an executor by necessary implication. The only question therefore is, who is entitled to grant of letters of administration with the will annexed. Under Ss. 234 and 235, Succession Act, the person who would prima facie be entitled to letters of administration would be the widow Unnamalai. It seems to us that the learned Judge was not warranted in dismissing the suit with costs of defendant 1 for the simple reason that the plaintiff had come to Court for establishing the will. The will having been established it is the duty of the probate Court to direct letters of administration with will annexed, in cases where no executor had been appointed, to such persons as are under the Act competent to administer the estate, thus avoiding further expense and litigation. We therefore think that letters of administration with will annexed ought to be issued to the widow.

In regard to the question of security, Mr. Raghava Rao represents to us that Unnamalai was appointed receiver in the lower Court and that she has given security and that the hundi business which was one of the items bequeathed under the will was wound up and the sale proceeds have been realized and deposited into Court. It is open to the lower Court to take this matter into consideration and fix such security as is necessary in the circumstances of the case before directing letters of administration to issue. In regard to the other questions gone into by the learned District Judge which relate to the respective rights of parties under the will, we think it is unnecessary to go into them and we therefore set aside the findings of the learned Judge on those issues and leave the questions raised by

them open. As the plaintiff had to come to Court to establish the will the learned Judge was not warranted in depriving him of his costs. The usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and where the will has not been attacked but the plaintiff is merely put to proof of it, is to award costs to both parties from and out of the estate. In the result, we set aside the order of the lower Court and direct the issue of letters of administration with will annexed to Unnamalai on taking security as aforesaid. The costs of both parties here and in the lower Court will come out of the estate.

C.R.K./G.N. *Order set aside.*

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(28) A. I. R. 1941 Madras 504

HORWILL J.

In re Ramanujam Appalaswamy and others — Petitioners.

Criminal Revns. Nos. 789 and 790 and Petitions Nos. 744 and 745 of 1940, Decided on 29th January 1941, from judgments of Sub-divisional Magistrate, Vizianagaram, D/- 2nd September 1940.

Companies Act (1913), Ss. 76 (2) and 131— Registrar condoning delay in holding general meeting must be deemed to have condoned delay in filing balance sheet before general body.

Where the Registrar condones the delay in holding a general meeting, the delay in filing a balance sheet before the general body at its meeting must also be deemed to have been condoned.

[P 504 C 2]

S. Suryaprakasam — for Petitioners.

K. Venkataraghavachari for the Public Prosecutor — for the Crown.

Order.—*(Cr. R. C. No. 789 of 1940):*— The petitioners were convicted by the Sub-divisional Magistrate, Vizianagaram, under S. 76 (2), Companies Act, for not holding a general meeting of the company of which they are the directors within 18 months from the date of the incorporation, and they have been sentenced to a fine of Rs. 50 each. One of the defences of the petitioners was that the Registrar had condoned the delay. He was examined as a witness and he says:

List of members and summary of share capital under S. 32 was delayed. The Registrar of Joint Stock Companies condoned that delay. That has nothing to do with the subject-matter of this case.

The letter of the Registrar, which is Ex. I, says in para. 2: "The delay in holding the general meeting is condoned and the list of members and summary is filed this time." This letter would appear to condone the failure of the petitioners and the other directors to hold a general meeting within 18 months as required by S. 76. The learned Sub-divisional Magistrate, in convicting the petitioners says:

The letter dated 14th March 1940 (Ex. I-a) of the Company to the Assistant Registrar (P. W. 1) is about the list of annual members and summary and notice of change in directors. The letter R. C. No. 72 of 1940 dated 7th May 1940 of the Assistant Registrar is a reply to Ex. I-A. The Assistant Registrar stated that the condonation was of the delay in filing the annual list of members and summary only.

It is true that the directors did not ask expressly in their letter EX. I-A, to have their delay in holding a general meeting condoned; but the Assistant Registrar, who knew that he would have to condone the failure to hold a general meeting if he had to condone the delay in sending up a list of members and summary, also condoned the delay in holding a general meeting. This is clear from EX. I. The learned Sub-divisional Magistrate therefore found the petitioners guilty under a misapprehension. I have asked the learned counsel for the petitioners — as well as the learned Public Prosecutor — whether there is any provision in the Companies Act whereby the Registrar can condone the delay in holding a general meeting, and they have been unable to point out any such provision. Section 131 enables the Registrar to condone only the sending up of balance sheets. It was not however contended in the lower Court that the Registrar had no such power; and so I do not think that any decision on that point is called for here. The criminal revision case is allowed and the conviction and sentence are set aside.

Cr. R. C. No. 790 of 1940: — This case is connected with CR. R. C. NO. 789. The petitioners have been convicted under S. 131, Companies Act, of not having laid before the general body within 18 months of the incorporation of the company a balance sheet. As has been found in CR. R. C. NO. 789, the Registrar condoned the delay in holding a general meeting. He must therefore be deemed to have condoned the delay in filing a balance sheet before the general body at its meeting. The acquittal of the petitioners in the connected case implies that they are not guilty of the offences with which they have been charged in this case. This criminal revision case is therefore allowed and the conviction and sentence are set aside.

C.R.K./G.N. *Revisions allowed.*

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(28) A. I. R. 1941 Madras 505

PANDRANG ROW J.

P. P. Ar. Rm. Sp. Ramanathan Chettiar

v.

A. R. R. M. Somasundaram Chettiar.

Civil Revn. Petn. No. 2378 of 1939 and Civil Misc. Petn. No. 1048 of 1940, Decided on 27th September 1940.

(a) Civil P. C. (1908), O. 32, R. 15—Appellate Court finally disposing of case — Applications by major defendant's mother for appointment as defendant's guardian ad litem on ground of his mental infirmity and for applying provisions of Madras Agriculturists' Relief Act to appellate decree—Court not holding enquiry under R. 15 but relying on previous history of litigation and on its own opinion formed after looking at defendant and eliciting answers to some questions —No opportunity given for production of doctor's certificate—Court held bound to hold regular judicial enquiry and invite parties to adduce evidence.

After the final disposal of the suit by the appellate Court, the major defendant's mother put in applications for her appointment as his guardian ad litem on the ground of the defendant's mental infirmity and inability to manage his affairs and for applying the provisions of the Madras Agriculturists' Relief Act to the appellate decree. The applications were remitted to the lower Court which instead of holding a regular judicial inquiry contemplated by R. 15 thought it sufficient to rely on the previous history of the litigation and on its own opinion formed after looking at the defendant and eliciting answers to some questions. The mother was given no opportunity of adducing evidence especially in the shape of a doctor's certificate:

Held that it was incumbent on the Court to hold a regular judicial inquiry and desirable to invite the parties to adduce proper evidence even if the parties were somewhat indifferent, especially where the consequence of the dismissal of the petition would be to prevent the application of the provisions of the Madras Agriculturists' Relief Act to a case to which they may apply. [P 505 C 2]

(b) Civil P. C. (1908), O. 32, R. 15—Fact that person is of weak intelligence may be sufficient for appointing guardian ad litem.

The fact that a person is a man of weak intelligence may be a sufficient ground to hold that he is an insane man or to appoint a guardian ad litem. It depends on the degree of weakness of intelligence. If the weakness is very great and such as to make him incapable of protecting his interest when being sued or when suing, he would certainly come within the protection given to such persons by O. 32, R. 15. [P 506 C 1]

V. Ramaswamy Iyer — for Petitioner.

A. V. Viswanatha Sastri — for Respondent.

Order. — This is a petition to revise the order of the subordinate Judge of Devakottai dated 31st October 1939 dismissing an application made under O. 32, R. 15, Civil P. C., for the appointment of a guardian ad litem of defendant 4 in O. S. No. 208 of 1932 on his file. The application was made necessary by reason of the fact that after the suit had been finally disposed of by this Court in appeal, an application was presented on behalf of defendant 4, who is a major, by his mother as guardian ad litem to apply the provisions of the Madras Agriculturists' Relief Act (4 of 1938) to the decree passed in the appeal. That petition to apply the provisions of the Madras Agriculturists' Relief Act, as well as this petition for the appointment of the mother as the guardian ad litem were both remitted to the lower Court for disposal. Reliance had been placed in support of the application for appointment of a guardian ad litem in the provisions of O. 32, R. 15, Civil P. C. The case put forward before the Court below was that defendant 4, though a major, was mentally infirm and unable to manage his affairs. The lower Court instead of holding a regular judicial inquiry which is contemplated by R. 15 appears to have thought that it was sufficient to rely on the previous history of the litigation and on its own opinion formed after looking at defendant 4 and eliciting answers to some questions. It would appear that the petitioner was desirous of adducing evidence especially in the shape of a doctor's certificate, but no opportunity was given for this purpose as the lower Court was of opinion that the production of the medical certificate would not advance the case any further, a view which it is difficult to justify in the circumstances. There is no doubt that in a matter of this kind where the consequence of a dismissal of the petition would be to prevent the application of the provisions of the Madras Agriculturists' Relief Act to a case to which they may apply, it was incumbent on the Court to hold a regular judicial inquiry and desirable to invite the parties to adduce proper evidence even if the parties were somewhat indifferent, for otherwise justice could not be done.

It seems as if the petitioner must have been under the impression that the date on which the petition was finally disposed of was not the date on which evidence was to be taken but that defendant 4 was merely to be produced and that some other date would be fixed for inquiry. In any case I have no doubt that the disposal of this petition has been very unsatisfactory and that serious injustice might be done if things are allowed to remain in the present state. There has been no inquiry of the kind contemplated by law in this matter and the order made by the subordinate Judge without proper inquiry must be deemed to be an order passed in the irregular exercise of his jurisdiction. The learned Judge says

that it may be that defendant 4 is not very intelligent or a little weak in intellect. Then he goes on to observe that the fact that he is a man of weak intelligence is not a sufficient ground to hold that he is an insane man or to appoint a guardian ad litem for him. This proposition is one which cannot be accepted as correct. It depends certainly on the degree of weakness of intelligence. If the weakness is very great and such as to make defendant 4 incapable of protecting his interest when being sued or when suing he would certainly come within the protection given to such persons by O. 32, R. 15. Moreover, the lower Court appears to have relied too much on the fact that defendant 4 appeared in Court when called upon—a perfectly natural proceeding when it is remembered that he was asked to be present and he was brought by his own mother to Court. Then again, it is said that defendant 4 was able to give coherent answers after understanding the questions put to him. In the absence of the questions and the answers, it is impossible for a Court of revision to decide whether the conclusion come to on this particular aspect of the case is justifiable.

In any case it seems to me that the interests of justice require that a matter of this importance should not be decided in this unsatisfactory and almost unjudicial fashion. The order of the subordinate Judge is therefore set aside and the petition is remanded to the Court below for fresh disposal according to law after giving both parties an opportunity to adduce evidence. The costs of this petition will abide the event and should be provided for in the revised order of the lower Court. The application (C. M. P. No. 1048 of 1940) to let in additional evidence in revision is dismissed, as an opportunity has now been given to adduce evidence in the lower Court.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 506

ABDUR RAHMAN J.

Narasaparaju Ramamurthy

v.

Parimi Venkatanarayana.

Second Appeal No. 633 of 1940, Decided on 25th October 1940, against decree of Sub-Judge, Bapatla, D/- 6th August 1940.

(a) Madras Local Boards Act (14 of 1920), Rules under, R. 1—Rule 1 does not debar civil Court from going into question whether election was in point of fact held or not.

Rule 1 does not debar a civil Court from going into the question whether an election was in point of fact held or not. If the Court comes to a finding that an election was held, it must at once stay its hands and allow the procedure under R. 1 to take its normal course. If, on the other hand, it comes to a decision that no election was held, its duty is equally clear. It must grant a declaration that no election was held. [P 507 C 1]

(b) Second Appeal—Objection regarding non-joinder of party cannot be raised for first time in second appeal.

It is impossible for a party to raise an objection regarding non-joinder for the first time in second appeal. [P 507 C 2]

K. Raja Iyer and N. Krishnamachari — for Appellant.

B. Jagannadha Das — for Respondents.

Judgment. — An order was passed by the president of the District Board of Guntur on 7th February 1939 appointing defendant 1 as temporary president to conduct an election of the president of the Panchayat Board of Inukollu, (Ex. 25). Notices to the members of the panchayat board intimating that the election of the president would be held on 25th February 1939 are stated to have been issued on 16th February 1939, Exs. 12 to 23. It was alleged on behalf of defendants 1 and 2 that certain proceedings took place on the date mentioned in which defendant 2 was elected to be the president. An order was passed by the Government of Madras on 12th May 1939, G. O. No. 1879, (Ex. 8), holding that defendant 2 was validly elected. It is not necessary for me to refer to any more letters written by or on behalf of the inspector of municipal councils subsequently. But before the election was held on 25th February 1939, a suit was instituted by the plaintiff against defendant 1 for an injunction restraining him from holding an election. A temporary injunction was also asked for but it was not granted. After the so called election defendant 2 was impleaded by an order of this Court passed in C. M. P. No. 2481 of 1939 on 6th June 1939 as a party to the suit. The main question that has to be decided now, relates to the maintainability of the suit. The plaintiff alleged that in point of fact there was no election. The first Court, the District Munsif of Bapatla, held against the plaintiff but on appeal his judgment was reversed by the Subordinate Judge and the suit decreed. Defendant 2 has consequently come up to this Court in second appeal. Section 9, Civil P. C., provides that:

The Courts have jurisdiction to try all suits of a civil nature except suits of which their cognizance is either expressly or impliedly barred.

In order to determine therefore whether the present suit is not maintainable in a civil Court, I have to decide whether the cognizance of the present suit is either expressly or impliedly barred. Learned coun-

sel for the appellant contends that S. 19, Madras Local Boards Act, read along with R. 1 framed by the Local Government constitutes the bar and the civil Courts are not entitled to adjudicate on this question. The contention on behalf of the plaintiff really is that there was no election at all. He is not objecting to the election on the ground of any irregularity but denies the election having been held on 25th February 1939. Section 19 of the Act provides that the election or appointment of a president of a local board shall be notified in the prescribed manner. This obviously has no application at the present moment. Rule 1 framed by the Local Government under the Local Boards Act reads as follows :

> Save as otherwise provided, no election held under the Act whether of member, president or vice-president of a local board shall be called in question except by an election petition presented in accordance with these rules to the election commissioner as defined by sub-r. 2 by any candidate or elector against the candidate who has been declared to have been duly elected (hereinafter called the returned candidate).

It assumes that an election was held under the Act and if an election is admitted to have been held, there is no doubt that the procedure would be as provided for by this rule and it could not be called in question except by an election petition. But as pointed out above, that is not the dispute in this case. The contention is that no election was held. This rule does not debar a civil Court from going into the question whether an election was in point of fact held or not. If the Court comes to a finding that an election was held, it must at once stay its hand and allow the procedure under R. 1 to take its normal course. If, on the other hand, it comes to a decision that no election was held, its duty is equally clear. It must grant a declaration that no election was held. It is not necessary for me to go into the question as to what would happen to the notification issued by the Local Government declaring that an election was actually held or what the result of that particular election was. No authority has been shown to me that this declaration by the Local Government is final in regard to the factum of election and cannot be questioned in a civil Court. In the absence of any such provision, the provision contained in S. 9, Civil P. C., must be allowed to have its full effect. My attention was drawn by learned counsel for the appellant to S. 234 (3) where it is laid down that the action of the Local Government in regard to certain matters mentioned in that section would be final and binding on the authorities mentioned in that section. That section has no application to the present case. It clearly shows that, whenever the Legislature wished to make a decision by the Local Government final, it said so. Nothing has been said in the Act declaring a notification by the Local Government under S. 19 to be final in regard to the factum of election and, in the absence of any such provision, it is impossible to hold that the civil Courts have no power to adjudicate on that question.

A feeble attempt was made towards the end to contend that the Local Government should have been impleaded as a defendant in the case, but no such objection was ever raised at the time when the suit was taken up for trial and it is impossible for a party to raise an objection regarding non-joinder for the first time in second appeal. I would therefore hold that the civil Court was entitled to entertain the present claim and adjudicate on the question whether the election was held or not. The lower appellate Court's finding that the election was not held in fact is a finding of fact and binds me in second appeal. It would therefore follow that the suit for declaration was rightly decreed. As regards the injunction my attention was drawn by learned counsel for the appellant to S. 225 (a) of the Act, but under that section an injunction cannot be issued for the preparation or publication of the electoral rolls or for the conduct of any election. We are not dealing either with the preparation or publication of electoral rolls or with the conduct of any election in this case. If we were, S. 225 (a) of the Act would certainly apply. But unfortunately for the appellant we are not. In view of the fact that the lower Court came to the decision that the election was not held, not only was a decree for declaration correctly passed by the Court, but the relief as to injunction was rightly granted. The result is that the appeal fails and is dismissed with costs. Leave to appeal refused.

C.R.K./D.S. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 507

WADSWORTH AND PATANJALI SASTRI JJ.

Yeddula Chinnabbi

v.

Yeddula Venkata Subbamma.

Appeal No. 500 and Civil Revn. Petn. No. 1561 of 1938, Decided on 4th November 1940, against order of Dist. Court, Cuddapah, D/- 25th August 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 4 (h)—Daughter's right under decree to fixed monthly maintenance allowance is property.

A daughter's right under an agreement or a decree to a fixed monthly maintenance allowance from her father's estate is property within the meaning of S. 4 (h). Section 6 (dd), T. P. Act, does not affect the question whether such a right is in the nature of property or not : 28 Cal 621 (P C) ; A I R 1924 Mad 22 (F B); 38 Cal 13 ; A I R 1929 Mad 586 (F B) and 7 I C 80, *Rel. on* ; (1884) 27 Ch D 160 and (1859) 28 L J (N S) P D & Ad Dn 28, *Disting*; 34 Mad 7, *Not approved*; A I R 1940 Mad 664, *Ref.* [P 508 C 2; P 509 C 1; P 510 C 1]

The fact that the allowance has been charged on immovable property has no bearing on the question whether the right to it constitutes property or not : 7 I C 80, *Rel. on.* [P 509 C 2]

Kasturi Seshagiri Rao — for Appellants.

A. Bhujanga Rao and D. R. Krishna Rao — for Respondents.

Patanjali Sastri J. — This is an appeal brought by the judgment-debtors from an order of the District Court of Cuddapah refusing to scale down the decree in O. S. No. 17 of 1936 on the file of that Court on the ground that the debt due to the respondents is excluded from the purview of the Agriculturists' Relief Act by S. 4, cl. (h) thereof. The appellants contend that the exemption under that clause does not apply to the respondents as they own "other property," inasmuch as each of them is entitled under the decree in O. S. No. 20 of 1935 on the file of the subordinate Judge's Court of Cuddapah to an allowance of Rs. 10 per mensem for her maintenance. The only question for determination is whether the right to receive this allowance can be regarded as "property." The respondents are the daughters by the second wife of one Chinna Venkatasubba Reddi who gave a third share of his properties by his will to his daughter by the first wife, and died intestate in respect of the rest of his properties which were inherited by his third wife who survived him. The devisee brought the O. S. No. 20 of 1935 referred to above for partition and delivery of possession of her third share of the properties against the surviving widow and her daughter, and the respondents were also impleaded as defendants 3 and 4 as being in possession of some of the assets of their father. A decree for partition was duly made and para. 6 of that decree provided that

> defendants 3 and 4 by guardian will be given Rs. 240 per annum as maintenance at Rs. 120 each till each of them is married and joins her husbands' family, from the date of plaint, i. e., 24th July 1933 in proportionate shares,

and liberty was reserved to the parties in para. 9 to apply for further directions in the matter. It is now admitted that respondent 1 is married and has joined her husband and for that reason, is no longer entitled to the allowance payable under the decree. As she has not been proved to own any other property, she is clearly entitled to the immunity provided under S. 4 (h) of the Act and the appeal must fail so far as she is concerned. The question arises therefore only with reference to the claim of the appellants to have the decree scaled down against respondent 2.

It is argued on behalf of this respondent that the right to receive the allowance under the decree cannot be regarded as 'property' as such right being no more than a right to future maintenance is neither heritable nor transferable having regard to S. 6, cl. (dd), T. P. Act. Our attention was also drawn to S. 60 (1) (n), Civil P. C., which provides that a right to future maintenance is not liable to attachment and sale in execution of decrees. These statutory provisions however do not, in our view, conclude the point at issue, for rights are readily conceivable which are neither transferable nor attachable but which are undoubtedly in the nature of property : *see* for instance S. 6 (d), T. P. Act, and S. 60 (1) (a) (b) and (c), Civil P. C. Still less is non-heritability a test, as a life estate or a widow's estate in immovable property is a well known species of property. The term 'property' is not defined in the Transfer of Property Act, but it is one of very wide import, and there seems to be no obvious reason why the right of respondent 2 to a monthly allowance of Rs. 10 payable under the decree should not be held to be "property." In 28 Cal 621[1] the Privy Council upheld an assignment of a monthly allowance of Rs. 50 bequeathed by a father to his daughter for her maintenance, and the numerous decisions in this country which had to consider the question whether the right to future maintenance is alienable and if so under what circumstances having regard to S. 6 (d), T. P. Act, before the introduction of the new cl. (dd) by the amending Act of 1929 all proceeded on the assumption that such a right is 'property' for the wording of clause (d) clearly postulates that the right or interest which is made inalienable thereunder is "an interest in property." In 34 Mad 7,[2] however, a Bench of this Court took the view that a widow's right to maintenance from her husband's estate where the amount is fixed

1. ('01) 28 Cal 621: 28 I A 159: 8 Sar 92: 5 C W N 729 (P C), Harris v. Brown.
2. ('11) 34 Mad 7 : 6 I C 439 : 20 M L J 785, Annapurni Nachiar v. Swaminathan Chetty.

by agreement or by decree is not property at all and that therefore S. 6 (d) did not affect an assignment of such right which they accordingly upheld. But this view has not been generally accepted and in the Full Bench case, 46 Mad 659,[3] Oldfield J. remarked with reference to that decision :

> But with all respect, we have not been shown that this view has been taken elsewhere; it is inconsistent with the statutory exclusion of such a right from property liable to attachment; and if it were acceptable, explanation would still be necessary as to the law by which the validity of a transfer of what is not property is recognized or can be tested at all.

And Schwabe C. J. observed :

> The right under a contract to a defined amount in cash or kind for future maintenance is in my judgment property under the enabling words of S. 6, T. P. Act of 1882.

The learned Chief Justice drew a distinction between a right to future maintenance properly so called, i. e., "the right to be maintained by the supply of clothing, board and lodging" and the right under a contract to receive a specified amount in cash or kind by way of maintenance, and expressed the view that the latter right was property, remarking that there was a divergence of opinion as to whether the former was property or not. In 12 C L J 130,[4] Mookerjee J. delivering the judgment of the Court held that where a claim to maintenance had been merged in a decree which also fixed the amount payable in that behalf, the decree was assignable whether the original claim was personal or not, and throughout the discussion it was assumed that such a right was in the nature of property. As already observed, the decisions which discuss whether the right to receive defined amounts periodically under a contract or a decree is one restricted in its enjoyment to the owner personally within the meaning of S. 6 (d), T. P. Act, proceed on the same assumption, as no question under that clause could otherwise arise. The new cl. (dd), no doubt, specifically provides that "a right to future maintenance, in whatsoever manner arising secured or determined, cannot be transferred." But as already remarked, this does not affect the question whether such a right is in the nature of property or not. We are aware that in 46 Mad 659[3] the allowance in question was actually charged on immovable property, but the nature of the right was discussed in general, no point being made of the charge. Indeed, as pointed by Mookerjee J. in 12 C L J 146,[5] the existence of a charge has not much bearing on the question,

> because, if the allowance is regularly paid by the person liable, no question of enforcement of a charge upon any interest in immovable property arises; unless a default has been made, and arrears are due, there is no charge to enforce.

Reference was also made in the course of argument to the English case in (1884) 27 Ch D 160,[6] where it was held that alimony payable to a wife under a decree for judicial separation was "not in the nature of property but only money paid by the order of the Court from time to time to provide for the maintenance of the wife." We do not think that English cases relating to alimony are of much assistance in the determination of the question before us. Alimony, as is well known, is an allowance which the Court orders to be paid for the maintenance of the wife in consequence of a judicial separation, and depends from time to time on the discretion or approval of the Court which "may alter it or take it away whenever it pleases." Even in England such allowance has been distinguished from an annual sum secured to the wife by an order of Court under S. 32, Divorce and Matrimonial Causes Act, 1857, which has been held to be property : *see* (1859) 28 L J (N S) P D & Ad Dn 28.[7] There is not much similarity between alimony which the Court allows or withdraws at its discretion during judicial separation and the right of an unmarried daughter of a Hindu to maintenance out of his estate in the hands of his devisees or heirs. A Full Bench of this Court has held in 53 Mad 84[8] that even against the father the daughter's right to maintenance is not based merely on his natural obligation to maintain his children, but is based on her right or interest in the family property. After an elaborate examination of the original texts and decisions bearing on the subject, Ramesam J. came to the conclusion that

> the right of the daughter for maintenance upto the going to the husband's house and for marriage expenses is a present remnant of the right to a share. Therefore the right of the daughters in the father's

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3. ('24) 11 A I R 1924 Mad 22 : 73 I C 584 : 46 Mad 659:45 M L J 533 (F B), Subraya v. Krishna Baipadithaya.
4. ('10) 38 Cal 13 : 6 I C 826 : 12 C L J 130 : 14 C W N 918, Asad Ali Molla v. Haider Ali.
5. ('10) 12 C L J 146 : 7 I C 80, Tarasundari v. Saradacharan.
6. (1884) 27 Ch D 160 : 53 L J Ch 986 : 33 W R 17, In re Robinson.
7. (1859) 28 L J (N S) P D & Ad Dn 28, Harrison v. Harrison.
8. ('29) 16 A I R 1929 Mad 586 : 121 I C 113 : 53 Mad 84: 57 M L J 826 (FB), Subbayya v. Anantaramayya.

lifetime however much it cannot be enforced by partition, must still be described as a right or interest in the property.

See also (1940) 2 M L J 358.[9] If such is the nature of the daughter's right to maintenance during her father's lifetime, her right on his death against persons who take his property must partake still more of the nature of an interest in property; for, then there is no question of personal relationship involving an obligation to maintain. We are therefore of opinion that English cases relating to alimony bear no analogy to the maintenance allowance decreed to a Hindu daughter against the heirs or devisees of her father. We therefore hold that respondent 2 owned "other property" on the material date within the meaning of S. 4, cl. (h), Madras Agriculturists' Relief Act, and is not entitled to the immunity afforded by that provision. The appeal is allowed as against respondent 2 and the application is remitted to the lower Court for disposal in the light of this judgment. The appellant will have his costs of the appeal against that respondent. As against respondent 1 the appeal is dismissed with costs. The civil revision petition is dismissed without costs.

C.R.K./G.N. *Order accordingly.*

9. ('40) 27 A I R 1940 Mad 664: I L R (1940) Mad 830 : (1940) 2 M L J 358, Cherutty v. Nagamparambil Ravu.

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(28) A. I. R. 1941 Madras 510

WADSWORTH AND PATANJALI SASTRI JJ.

T. V. Bhashyakar and others — *Appellants*

v.

Madras Hindu Religious Endowments Board and others — *Respondents.*

Appeal No. 298 and Civil Revn. Petn. No. 1355 of 1940, Decided on 14th November 1940, to revise order of Dist. Court, Chingleput, D/- 9th April 1940.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 84 (2) — Order under S. 84 (2) is not appealable.

There is no right of appeal against an order of the Court under S. 84 (2) : A I R 1934 Mad 103 (F B), *Rel. on*; A I R 1940 Mad 474 (F B), *Expl.* [P 511 C 1]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (5) — Members of family alone qualified for election to office of trustee and themselves constituting electoral body — Succession to office of trustee is not hereditary.

Where the actual trusteeship does not reside in the general body of the members of a certain family or group of families but the members constitute the electoral body and they alone are qualified for election as trustees, the succession to the office of trustee cannot be said to be hereditary though the power of election and the qualification for election are hereditary : 16 I C 225, *Ref.*; A I R 1938 Mad 98, *Disting.* [P 512 C 1]

(c) Madras Hindu Religious Endowments Act (2 of 1927), S. 9 (5) and (6)—Temple whose trustee succeeds by nomination by his predecessor or merely in accordance with usage is not excepted temple.

The definition of "hereditary trustee" in S. 9 (6) cannot be read into the definition of "an excepted temple" in S. 9 (5), and therefore a temple whose trustee succeeds by nomination by his predecessor or merely in accordance with usage, does not come within the definition of an excepted temple. [P 512 C 1, 2]

C. Narasimhachariar — for Appellants.

P. V. Rajamannar, K. Subba Rao, K. Bhashyam Iyengar and T. R. Srinivasan — for Respondents.

Wadsworth J.—This appeal and the civil revision petition which is filed in the alternative challenge the correctness of the decision of the District Judge of Chingleput on an application to set aside an order of the Hindu Religious Endowments Board declaring the temple of Sri Devarajaswami at Conjeevaram to be an excepted temple on the ground that the right of succession to the office of trustee has been hereditary. The learned District Judge agreed with the view of the Board that the temple was an excepted temple within the definition in S. 9 (5), Madras Hindu Religious Endowments Act.

A preliminary objection raises the question whether the appeal is maintainable and if not whether there are any grounds which justify interference in revision. In our opinion, there is no right of appeal against the order of the Court under S. 84 (2), Madras Hindu Religious Endowments Act. So much was decided by the Full Bench which heard the case in 57 Mad 271.[1] It has however been contended that this decision is no longer authoritative in the light of the decision of a later Full Bench in I L R (1940) Mad 791,[2] but we are unable to accept this contention. It is true that the later decision expresses the view that in the light of subsequent Privy Council decisions, 57 Mad 271[1] has given an explanation of the decision of the Privy Council in 45 Mad 320[3] which can no longer be regarded as authoritative; but

1. ('34) 21 A I R 1934 Mad 103 : 147 I C 614 : 57 Mad 271 : 66 M L J 43 (FB), Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras.
2. ('40) 27 A I R 1940 Mad 474 : 188 I C 447 : I L R (1940) Mad 791 : (1940) 1 M L J 732 (FB), Chikkanna v. Perumal.
3. ('22) 9 A I R 1922 P C 80 : 67 I C 408 : 45 Mad 320 : 49 I A 129 (P C), Ramachandra Rao v. Ramachandra Rao.

the Full Bench which took this view was not concerned with the correctness of the decision of the earlier Full Bench regarding the appealability of an order under S. 84 (2), Madras Hindu Religious Endowments Act. All that the learned Judges were concerned with was the earlier Full Bench's interpretation of a Privy Council decision which was quoted in support of an argument that a decision under S. 84 (2), Madras Hindu Religious Endowments Act, was a decree. 45 Mad 320,[3] like I L R (1940) Mad 791,[2] was concerned with the finality of a decision on a reference to the Court by the Collector under S. 30, Land Acquisition Act. The learned Judges who decided the case of Rajagopala Chettiar advanced various reasons for holding that a decision under S. 84 (2), Hindu Religious Endowments Act, is not a decree. Though a portion of the reasoning in the judgment may be said to have been shaken by the later Full Bench decision, it cannot, in our opinion, be said that the decision in 57 Mad 271[1] is no longer good law in so far as it decides the main question before the Full Bench. That decision binds us and we must hold that no appeal lies against the order of the District Judge. The matter is not one of very great importance in the present case, for an alternative revision petition has been filed and we are of opinion that there are materials for holding that the District Judge has acted illegally in the exercise of his jurisdiction, so as to justify interference in revision under S. 115, Civil P. C.

The Sri Devarajaswami temple is governed by a scheme laid down by this Court in 23 M L J 134.[4] This decision sets forth at length the previous history of the dispute regarding the management of the temple. We do not propose to repeat this historical matter. It is only necessary to say that in this scheme suit the plaintiffs claimed that the hereditary right of Dharmakartaship appertained to the lineal descendants of one Koti Kanyakadanam Thatha Desikar. The contesting parties were the existing trustees and certain other claimants who fell into different groups. One group represented by defendants 1 and 5 to 8 contended that the trusteeship belonged to particular branch of the large clan of descendants of Thatha Desikar by succession to an ancestor who was appointed as trustee by the Government in 1842. At the commencement of the judgment, the learned Judges point out that the contention in the plaint that the hereditary right of Dharmakartaship resides in all members of the family descended from Thatha Desikar was given up, that nothing more was claimed for the members of the Thathachar's family generally than the right to elect trustees and certain rights of interference beyond what ordinary worshippers possessed; and this concession is referred to again at p. 142 of the judgment where the learned Judges state :

> The vakil for the Thathachars generally admitted that the members of the family did not claim any right to trusteeship on behalf of all the members of the Thathachar families as a body.

The learned Judges after reviewing the evidence came to the conclusion that neither defendant 1 nor any of the members of his family could claim any exclusive right to the office of trustee. They held that the title of that branch of the family had been extinguished, that it was not an ancient title, but one derived if at all only under the appointment of the Government in 1842. In the light of these concessions and findings, the learned Judges proceed to lay down a scheme. Clause 3 prescribes that no one shall be eligible to be a trustee who is not a lineal male descendant of Thatha Desikar between the ages of 25 and 60, permanently residing within 50 miles of Conjeevaram and not disqualified by criminal conviction, insolvency, insanity etc., and it also lays down that no two members of a joint family shall at the same time be trustees and that of the five trustees three should belong to one branch and two to another branch of the descendants of Thatha Desikar. Having prescribed these qualifications, the scheme proceeds to lay down the manner of election. Trustees were to hold office for five years and were to be elected by the whole body of the adult lineal male descendants of Thatha Desikar. It will be seen that this scheme while recognizing the hereditary right of the descendants of Thatha Desikar to appoint trustees from out of their number, prescribes a mode of succession to the office which is essentially elective and not hereditary.

An attempt has been made to argue that when a trustee is appointed by election from amongst the members of a certain family or group of families, the trusteeship is hereditary and in support of this contention, the decision in (1937) 2 M L J 830,[5] has been quoted. We do not consider that this

4. ('12) 23 M L J 134 : 16 I C 225, Veeraragava Thathachariar v. Srinivasa Thathachariar.

5. ('38) 25 A I R 1938 Mad 98 : 173 I C 42 : (1937) 2 M L J 830, Madana Palo v. Hindu Religious Endowment Board, Madras.

decision has any application to the present facts. The learned Judges were dealing with evidence which justified the inference that the actual trusteeship resided in a particular family, though the rights were exercised by only one member of that family. We are concerned here with a carefully drafted constitution embodied in a scheme which proceeds on decisions set forth in a considered judgment. That judgment expressly rests on the admission that the actual trusteeship does not reside in the general body of the descendants of Thatha Desikar and on the basis of this admission and the evidence in the case, it provides that the descendants of Thatha Desikar shall constitute the electoral body and that only the descendants of Thatha Desikar shall be qualified for election. In our view, on such facts, though the power of election and the qualification for election are hereditary, the succession is not hereditary. An attempt has been made to argue that the definition of "hereditary trustee" in clause (6) of S. 9 of the Act has to be read into the definition of "an excepted temple" in cl. (5) of that section. The definition of "an excepted temple" runs as follows :

> Excepted temple means and includes a temple, the right of succession to the office of trustee or the offices of all the trustees (where there are more trustees than one) whereof has been hereditary, or the succession to the trusteeship whereof has been specially provided for by the founder.

The next clause defines a hereditary trustee as the trustee of a religious endowment,

> succession to whose office devolves by hereditary right or by nomination by the trustee for the time being, or is otherwise regulated by usage or is specially provided for by the founder so long as such scheme of succession is in force.

It will be seen that this definition enumerates four methods of devolution which qualify a trustee to be known as a hereditary trustee. Of these four methods of devolution, the first and the last have been specified as qualifying a temple to be considered an excepted temple. On the general rule *expressio unius exclusio alterius* it is impossible to resist the inference that when the Legislature in the definition of an excepted temple specified only two of the four types of devolution which are recognized in the definition of a hereditary trustee, they intended to exclude the other two types of devolution. It seems to us therefore to follow that a temple whose trustee succeeds by nomination by his predecessor or merely in accordance with usage, does not come within the definition of an excepted temple. In our opinion the learned District Judge has wholly misdirected himself regarding the basis for the decision of the matter referred to him. The words "has been hereditary" in the definition of an excepted temple clearly indicate a state of affairs which has prevailed in the past and continues up to the present. The learned District Judge has dismissed the scheme in one or two sentences at the end of his judgment and has devoted some 45 pages to a discussion of the ancient history of this institution in order to reach a conclusion that in the past the office of trusteeship of this temple was held hereditarily by the whole clan of the descendants of Thatha Desikar.

Having arrived at this conclusion, he reads the judgment in 23 M L J 134[4] as having adopted that view, though the learned Judges expressly point out that the contention to that effect has been abandoned and he concludes in disregard of the facts that the scheme recognizes that a hereditary trusteeship vests in the Thathachariar's family. The learned District Judge overlooks the fact that in deciding whether or not a temple is an excepted temple, the Court must have regard to the mode of succession to the trusteeship during the period immediately preceding the application to the Board. He devotes no detailed consideration to the scheme which has prevailed in this temple since 1912 and he appears to have treated the question which he had to decide as a matter for historical research with little regard to the legal effect of the existing constitution. We are of opinion that in dealing with the materials in this manner, the learned District Judge has acted illegally in the exercise of his jurisdiction. We are also emphatically of the opinion that this temple is not a temple the succession to the trusteeship whereof is hereditary, having regard to the provisions of the scheme. We therefore set aside the order of the District Judge and declare the temple to be a non-excepted temple. The respondents other than respondent 1 will pay the costs of the petitioners in the civil revision petition which is allowed. The appeal is dismissed; no order as to costs.

C.R.K./G.N. *Revision allowed.*

*** (28) A. I. R. 1941 Madras 513**

PANDRANG ROW AND SOMAYYA JJ.

Swayampakula Subbaramayya and others — Appellants

v.

Swayampakula Venkatasubbamma and others — Respondents.

Appeal No. 33 of 1939, Decided on 5th February 1941, against decree of Dist. Court, Nellore, in O. S. No. 22 of 1936.

(a) Evidence—Appreciation of — Trial Court arriving at finding after observing demeanour of witnesses — Fact that certain observations by trial Judge are open to criticism is not by itself sufficient to displace finding (Per *Pandrang Row J.*)

Fact that the trial Judge has made a few observations here and there which are open to criticism is not by itself sufficient to justify the displacing of the finding arrived at by him after observing the demeanour of the witnesses in the box.

[P 513 C 2]

(b) Hindu law—Sources— Sistachar is recognized source.

Sistachara or 'practices of the virtuous' is a recognized source of Hindu law. [P 519 C 1]

*** (c) Hindu law—Marriage — Anuloma marriage is invalid : 52 Mad 160 = A I R 1928 Mad 1279=111 I C 364, OVERRULED.**

Once a form of marriage is shown to be obsolete it must be taken to be invalid and it is not necessary to show further that it has been expressly prohibited in the law books or that it is contrary to a usage having the force of law. Consequently, Anuloma marriage being obsolete is invalid under the Hindu law in the absence of a custom or enactment to the contrary : 14 Bom L R 547 and 28 All 458, *Approved*; A I R 1922 Bom 32 and A I R 1931 Bom 89, *Not approved*; 52 Mad 160; A I R 1928 Mad 1279 : 111 I C 364, *OVERRULED*; A I R 1915 P C 41; 31 Mad 310 and A I R 1915 P C 70, *Ref.* [P 515 C 1, 2; P 524 C 1]

Sir A. Krishnaswami Ayyar, M. S. Ramachandra Rao, D. R. Krishna Rao and M. Krishna Rao — for Appellants.

P. V. Rajamannar and K. Subba Rao — for Respondents.

Pandrang Row J.—My learned brother has prepared a judgment dealing with both the points that arise in this appeal, namely the question of fact whether there was a form of marriage gone through by respondent 1 with the deceased Janakiramamoorthy and the question of law whether such a marriage is valid according to Hindu law. I have had an opportunity of seeing that judgment and it would have been unnecessary for me to deliver a separate judgment of my own but for the fact that, on the question of the factum of the marriage, I find myself unable to agree with the conclusion arrived at by my learned brother. I am of opinion that no sufficient reason has been shown for disturbing the finding of the trial Judge on this point. While I do not attach much importance to the evidence of the so-called admissions of Janakiramamoorthy said to have been made to P. Ws. 3 and 11, there is the important evidence of the actual marriage given by P. W. 7, the purohit, and P. Ws. 9, 10 and 16, of whom P. W. 16 is the owner of the house in Madras where the marriage is said to have taken place, and that of plaintiff 1 herself as P. W. 15. It may be a fact that none of these witnesses can be regarded as being absolutely beyond reproach or criticism, but at the same time it cannot be said that these witnesses have shown themselves to be so untrustworthy that their evidence is not entitled to credit.

It is impossible in the circumstances of this case to say that the finding of the trial Judge who saw the witnesses is obviously wrong. No doubt the trial Judge has made a few observations here and there which are open to criticism, but this fact is not by itself sufficient to justify the displacing of the finding which must have been arrived at by him after observing the demeanour of the witnesses in the box. There is nothing inherently improbable in the story that there was a marriage ceremony gone through on or about the date mentioned. It may well be that the purohit made a slight mistake as to the date, for there is no doubt that plaintiff 1 left her employment for good on or about 16th September 1926 and that Janakiramamoorthy also must have been away from his place of business at Nellore from or after 17th September for about four or five days. It will be too great a coincidence for both these to be absent more or less at the same time from their usual places of residence unless they had the same business elsewhere and to some extent there is corroboration afforded by the photograph which seems to indicate that plaintiff 1 was then a recently married bride.

In any case, having regard to the fact that plaintiff 1 was a young lady who had received some education and was employed as a teacher, it is not likely that she would have agreed to accept the position of a kept woman without at least satisfying the proprieties by going through a form of marriage, though no one at the time including herself would have had any strong belief that the marriage would be regarded as valid under Hindu law. Indeed, this consciousness on the part of plaintiff 1 and even of her original legal adviser that, though a ceremony of marriage was gone through, the

marriage itself would not be regarded as valid under Hindu law, appears to me to explain the admission contained in EX. II to which a great deal of importance has been attached in the argument before us, and the other pieces of evidence which seem to show that plaintiff 1 did not regard herself as the legally wedded wife of Janakiramamoorthy. It is otherwise impossible, in my opinion, to explain the frame of the plaint as originally drafted, plaintiff 1 being described as the permanently kept concubine at the very outset in the plaint and later on reference being made in more than one place to the marriage between herself and Janakiramamoorthy. More or less the same explanation, in my opinion, may be given in respect of the description contained in EX. II of plaintiff 1 as the permanently kept concubine of Janakiramamoorthy. There was at no time any admission that there was no marriage ceremony gone through. As would appear later on, the general consciousness of Hindu society had been that a marriage between a Brahmin and a Sudra girl is not valid according to Hindu law, and it was this consciousness which must have pressed on the minds of those who were responsible for drafting the plaint and EX. II. I am aware of the fact that this is not the explanation given by plaintiff 1; but the explanation is such that plaintiff 1 could not be expected reasonably to put it forward because if she did so, it would amount to a practical abandonment of her case as regards the validity of the marriage.

In any case, after giving full consideration and weight to the admission contained in EX. II and to other pieces of evidence which appear to show that plaintiff 1 did not change her family name after the marriage ceremony, I am of opinion that it is impossible to dismiss the evidence of so many witnesses regarding the actual marriage ceremony and to characterise all the witnesses who have spoken to that ceremony as liars. There is no particular motive for any of them, except perhaps plaintiff 1 herself, to perjure themselves in a matter of this kind and having regard to the fact that the Court below which heard these witnesses was prepared to accept their testimony as reliable. I am unable to say that that finding is clearly wrong. The finding is in my opinion, according to the probabilities of the case, and I do not feel myself pressed by the admission in EX. II to such an extent that it becomes necessary to ignore my own view as to what must be the truth of the case, because of certain observations made in 29 ALL 184.[1] I am therefore unable to agree with my learned brother that the finding of the Court below on the factum of marriage must be reversed; on the other hand I accept it as being in accordance with truth.

On the other point, however, I find myself in full agreement with my learned brother and as the subject will be dealt with very fully by him in his judgment, it seems hardly necessary for me to say more than a few words on that part of the case. The question also has been discussed at considerable length and in an exhaustive manner by the learned author of Mayne's Hindu Law, Edn. 10, paras. 123 to 127. What has been said by the learned author in his book and what will be said by my learned brother in his judgment which is about to be delivered more or less exhaust everything useful that can be said on the topic and I need only add a few general words of mine own. There is no doubt, in my opinion, that though anuloma marriages were recognized by several of the smrithi writers, at the same time and almost in the same breath they were condemned. The recognition cum condemnation by the smrithi writers ripened later on into a definite prohibition by the time of the puranas, for we find that in the puranic period such marriages were regarded as improper and invalid, the reason given for this change by the commentators being that such marriages were regarded as not permissible during the Kali Age. This sort of change in the law unconsciously brought about by the general acceptance of the views of the text writers and the puranas by the community is not uncommon. There are other subjects in which the old Hindu law has been similarly modified or has become obsolete. Whether the word used is 'ananushteeyam' or 'varjyam' it is very clear that, after the puranic period and certainly after the well known commentators wrote their commentaries, marriages of this kind, especially marriages between a Brahmin and a Sudra girl, were universally regarded as not permissible under the law during the Kali Age was concerned. After all, much importance cannot be attached to what is contained in the texts of the smrithis or what the commentators have said in the absence of the real sanction behind what the smrithis and the commentators have written, namely the sanction of long usage and acceptance by the community which

1. ('07) 29 All 184 : 4 A L J 102 (P C), Chandra Kunwar v. Chandri Narpat Singh.

alone gives the contents of these smrithis and the commentaries their real force as law. My learned brother has been able to find some corroboration of the actual usage in the Hindu community from the accounts of travellers from the seventh century A. D. onwards. There has been as pointed out by him, an invaluable usage not to permit marriages between a Brahmin and a Sudra girl for at least a thousand years past and this, in my opinion, affords very strong corroboration of the view which one arrives at independently that marriages of this kind, though permitted in very ancient times, had ceased to be regarded as permissible under the later Hindu law. Indeed, the final conclusion expressed by Mr. Srinivasa Ayyangar in his book in para. 127 appears to me to be quite correct, namely,

> whatever may be the correct interpretation of the Mitakshara on the point, marriages between members of different castes have been prohibited and discontinued by the usage of the community for such a length of time that the only legal course is to treat them as invalid except where there is a custom or enactment to the contrary.

There is no such custom or enactment pleaded in this case. The result is that the appeal must be allowed and the decree of the Court below set aside and the suit dismissed. Plaintiffs 1 and 3 will be at liberty to claim maintenance on the footing of a permanently kept concubine and an illegitimate son respectively in a separate suit, if so advised. We do not think it necessary or desirable that we should deal with this aspect of the case for it was made clear in the Court below by plaintiff 1 in her evidence that she did not want any relief except on the footing that she was the lawfully wedded wife of Janakiramamoorthy and there is no reason why any other claim should be considered in this appeal. The appellants will have their costs of the appeal in this Court, and the costs in the lower Court will be borne by the parties themselves.

Somayya J.—This is an appeal preferred by the defendants against the decree of the District Court of Nellore in O. S. No. 22 of 1936 which was a suit brought by three plaintiffs for recovery of maintenance from the estate of one Swayampakula Janakiramamoorthy who died on 17th June 1935. Defendants 1 to 3 are the sons of Janakiramamoorthy and defendant 4 is his wife. They are all Brahmins to which caste Janakiramamoorthy belonged. Plaintiffs claim that plaintiff 1 who is a Kapu or Sudra was married to Janakiramamoorthy and that plaintiffs 2 and 3 are the daughter and son born of Janakiramamoorthy by plaintiff 1. The defendants who are the Brahmin wife and the sons by the Brahmin wife deny that plaintiff 1 was ever married to Janakiramamoorthy and state that the marriage even if true is invalid under the Hindu law. Two questions arise (1) whether there was in fact a marriage between plaintiff 1 and the late Janakiramamoorthy and (2) whether the marriage, even if true, is valid under the Hindu law. Both these questions were answered in the affirmative by the lower Court and the plaintiffs were granted maintenance at the rate of Rs. 20 per month. The defendants appeal against the said decree and repeat the objections that the marriage was not true in fact and that even if it was a fact, it is invalid in law. The defendants raised another contention in the lower Court and urged that Janakiramamoorthy had nothing to do with plaintiff 1, that plaintiff 1 was not living with Janakiramamoorthy as man and wife, and that plaintiffs 2 and 3 are not his children.

The plaintiffs adduced a large volume of evidence to show that Janakiramamoorthy was visiting plaintiff 1, that he was on terms of intimacy with her, that he took a house for her and maintained her, that plaintiffs 2 and 3 were his children born to plaintiff 1 and that he acknowledged them to be his children on several occasions. Relying upon this evidence the Court below held that it is proved beyond doubt that plaintiff 1 was living with Janakiramamoorthy as man and wife and that plaintiffs 2 and 3 are his children born of her. In view of the fact that this finding is not now attacked, the only questions that arise for decision are the question of fact whether there was a marriage and the question of law whether the marriage between a Brahmin and a Sudra woman is valid under the Hindu law. The evidence of the factum of marriage lies within a small compass. (After discussing the oral and documentary evidence in the case, his Lordship proceeded.) I hold that there was no marriage between plaintiff 1 and the late Janakiramamoorthy.

Assuming that there was a marriage between Janakiramamoorthy and plaintiff 1, the question is whether it is valid under the Hindu law. Plaintiff 1 is a Sudra and Janakiramamoorthy was a Brahmin. The marriage was thus between a Brahmin and a Sudra woman and is known in Hindu law as "Anuloma marriage." The appellants contend that marriages between members of different castes as opposed to members of

different sub-castes are invalid. On the other hand, the respondents urge that whereas a marriage between a woman of a higher caste and a man of a lower caste or a pratiloma marriage as it is called may be invalid, a marriage between a man of a superior caste and a woman of an inferior caste is not invalid and point out that an anuloma marriage has been recognized by all ancient Smrithi writers, that their works contain rules for the performance of such a marriage and provide for a share to be given to the sons of such a marriage. The learned Advocate-General who appeared for the appellants did not urge that anuloma marriages were not recognized by the ancient Smrithi writers. His whole argument is that even the Smrithi writers without an exception condemned such marriages though they recognized the existence of such marriages in their times, that by the time of the Puranas these marriages were prohibited as unsuited for the Kali age and that the Nibhandhakaras or commentators prohibit these marriages altogether as unsuited for this age. He urges that several centuries ago this form of marriage became obsolete and that therefore if performed at the present day, such a marriage is illegal. We therefore start with this: that all the Smrithi writers recognized this form of marriage as a lawful marriage. That they condemned it at the same time is clear; and we may in this connexion refer to the texts of two of the Smrithi writers. Manu, Chap. 3, verses 12 and 13 recognize that a Brahmin may take a Sudra wife. Then verse 14 says :

> In no history or chronicles can be found that, even in the time of distress, a Brahmana or a Kshatriya has (lawfully) married a Sudra wife.

Verse 16 says :

> He, who marries a Sudra woman, becomes degraded .... By visiting a Sudra wife for the purpose of begetting offspring on her, a twice born one becomes degraded.

Verse 17 says :

> By lying with a Sudra woman in his bed, a Brahmana falls into degraded existence; by begetting a child on her he stands divested of his Brahmanism.

Yajnavalkya, Chap. 1, sloka 56 says :

> There is a saying that twice born ones can get their wives from among the Sudras. I do not approve of it. For the atman (self) itself is born there, i. e., in the wife as a son.

Both Manu and Yajnavalkya, while recognizing the existence of Anuloma marriages and providing for the rights of the Sudra wife and her offspring, have expressed their strong disapproval of such marriages, and Yajnavalkya personally prohibits them altogether. Then we come to the Nibandhakaras or commentators. The commentators take the Smrithi of Manu, Yajnavalkya or Parasara as their text and comment upon it and incidentally refer to the other Smrithi writers and sages and sometimes they give their own opinion. Medhathithi and Kulluka are well known commentators on Manu. The Mitakshara is the principal commentary on Yajnavalkya Smrithi and Viswarupa and Apararka have also written commentaries on the Yajnavalkya Smrithi. Parasaramadhaviyam is a commentary on Parasarasmrithi. Dayabhaga is an independent work by Jimutavahana. As is well known, the Dayabhaga prevails in Bengal and the contiguous places and the Mitakshara in the rest of India. There are also commentaries on Mitakshara and Dayabhaga which are also of very high value and of recognized authority yielding only to the Mitakshara or the Dayabhaga when there is a conflict. On points on which Mitakshara or Dayabhaga is silent, these commentaries prevail.

We have Sri Krishna Tarkalankara who is the author of Dayakrama Sangraha, a commentary of Dayabhaga. Balambhatti and Subodhini are commentaries on Mitakshara. In addition to these, we have two works which are regarded in Southern India as of very high authority. These are Parasara Madhaviya which is a commentary on Parasara Smrithi and Smrithi Chandrika which is an independent work and not a mere commentary. We have the Mayukha of Nilakanta whose authority prevails in the island of Bombay, Gujarat and in North Konkan. Some of these commentaries expressly prohibit anuloma marriages as unsuitable for Kali age. They refer to this or that Purana as the authority. Some of them even refuse to discuss those portions of the Smrithis regulating the rights of the issue of anuloma marriages on the ground that such marriages being prohibited for this age, a discussion of the rights of the children would be a mere waste of time. The Smrithichandrika, which in this part of the country is regarded only as next to the Mitakshara, says in Chap. 10, verse 7 :

> Even a son of the body does not become a legitimate son when he is born of a wife of an unequal class, the marriage of a woman of an unequal class being in itself prohibited in the Kali age. Accordingly Dharmajnya : 'The marriage of girls of an unequal class by twice born men.' Add to these, 'is prohibited by the great in the Kali age, in view to maintain virtue.' We have not therefore detailed the laws relating to partition of property among sons of unequal classes, secondary sons (an adopted son excepted), appointed daughters and the sons of such daughters, as it would tend in vain to swell

the work; such a partition being in the present age obsolete.

This is the translation given by Mr. T. Krishnaswami Iyer in his translation of Smritichandrika published in the year 1867. On reference to the original the Sanskrit expression corresponding to the word 'obsolete' is "ananushtiya" (अननुष्टीय). It is urged by Mr. Rajamannar for the respondents that the expression "samprathiananushtiy amanathwath" has not been correctly translated by Mr. Krishnaswami Iyer and that the correct translation is not that it is now obsolete but "it ought not be observed or practised in these days." I do not think it matters much whether we take the one or the other translation. There is a distinct prohibition against such a marriage and there is also the fact that the author even refuses to discuss the rights of inheritance of the children on the ground that it is a waste of time. It will be observed that he treats the sons born of marriages of persons belonging to different castes, secondary sons except the adopted son and appointed daughters and their sons, all on the same footing and declines to discuss their rights as being a waste of time. It is undoubted that the system of appointed daughters and appointed daughter's sons and secondary sons (except adopted son) has long become obsolete. In 40 Bom 270,[2] the Judicial Committee laid down at p. 287 :

> It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that whatever may have been the position and rights between themselves of such twelve sons, in very remote times, all of these twelve sons, except the legitimately born and adopted, are long since obsolete. A discussion as to their rights and interests, even if they could now be ascertained, would be beside the point . . . . . Hindu law and customs have not stood still, and what we are concerned with is the position at the present time of an adopted son in a Hindu family.

As regards the position of an appointed daughter and an appointed daughter's son it is enough to refer to the decision of this Court in 31 Mad 310.[3] The translation by Krishnaswami Iyer of the word "अननुष्टाय" as "obsolete" correctly describes the situation as regards secondary sons other than adopted son and the appointed daughter's son. The author treats these two and the case of the sons of Anuloma marriages on the same footing. If these institutions were still in observance the author would not have dismissed them in this summary fashion. We think that Krishnaswami Iyer's rendering brings out the real meaning of the author. Parasara Madhaviyam is a work of a very great scholar known as Vidyaranya, who was a Prime Minister of the Kings of the Vijayanagar dynasty. He is said to have flourished, as is pointed out in Mayne's Hindu Law, Edn. 10, pp. 50 and 51, in the fourteenth century. Being a great scholar and also the Prime Minister of the great Vijayanagar kingdom, his opinion is entitled to very great weight. In Volume 1, part 2, verses 97 and 98 (Parasara Dharma Samhita, edited by Pandit Vaman Sastri Islampurkar, printed in 1893, Bombay Sanskrit Series, 48), he says:

"युगभेदेन व्यवस्था च स्मृत्यन्तरे स्पष्टीकृता, 'असवर्णासु कन्यासु विवाहश्च द्विजातिभिः' इत्यादिमनुक्रम्य 'कलौ युगे त्विमान् धर्मान् वर्ज्यानाहुर्मनीषिणः' — इत्युपसंहारात्।"

> Distinguishing the different ages, the law is clearly established by a Smrithi, which referring to the marriage of persons of any of the twice born castes with persons of the other castes, declares 'that the learned say that these practices must not be followed in the age of Kali'.

Apararka is one of the principal commentators on Yajnavalkya. His authority has been acknowledged by the Privy Council in 42 I A 208 at p. 221 = 37 ALL 604[4] at pp. 617, 618. In commenting on slokas 128 to 132 of Yajnavalkya he points out that in the Kali Age the son of a Sudra wife is not in vogue. To understand his statement we must refer to the definition of "Aurasa" as given by Yajnavalkya in verse 128 where he says :

औरसो धर्मपत्नीज:

Commenting on this definition, Apararka says this :

"यो धर्मपत्नीजः स औरसो ज्ञेयः। यया सह धर्मश्चर्यते सा धर्मपत्नी। यद्यपि पत्नी शब्देनैव सह धर्मचारिणी कथ्यते, तथाऽपिधर्मशब्दोपादानादत्र पत्नीशब्दो भार्यामात्र परः। धर्मपत्नीशब्देन शूद्रा व्यावर्त्यते, तस्याः सहधर्मचारित्वाभावात्। यदाह वसिष्ठः 'कृष्णवर्णा वै रामा रमणायैव न धर्माय' इति।" (Anandasrama Edn. 1904, Part II, p. 734).

As translated in 21 M L J 254, journal portion :

> He who is born of the dharmapatni is known as the Aurasa son. She with whom he observes his

2. ('15) 2 A I R 1915 P C 41 : 32 IC 403 : 40 Bom 270 : 43 I A 56 (P C), Nagindas Bhagwandas v. Bachoo Harkisandoss.
3. ('08) 31 Mad 310 : 18 M L J 420 : 4 M L T 9, Venkata Narasimha Apparao v. Venkata Purushothama.
4. ('15) 2 A I R 1915 P C 70 : 30 I C 529 : 37 All 604 : 42 I A 208 (P C), Buddah Singh v. Laltu Singh.

religious duties is the dharmapatni. Though even the term patni (by itself) indicates companionship in religious duties, yet by the use of the term dharma here patni means only wife. By the term dharmapatni the Sudra wife is excluded because of the absence of her companionship in religious duties. Vasistha says: "A Sudra wife is only for conjugal felicity and not for religious duties."

Verse 132 of Yajnavalkya runs thus:

पिण्डदोऽशहरश्चैषां पूर्वाभावे पर: पर:

"Of these, the one succeeding, in default of all preceding, gives the pinda and takes the wealth." In commenting on this, Apararka says:

एषामुक्तानामौरसादिनां मुख्यामुख्यपुत्राणां मध्ये पूर्वस्य पूर्वस्याभावे उत्तर उत्तर: श्राद्धादाने धनादाने चाधिक्रियते। पुत्रप्रतिनिधीनां मध्ये दत्तक एव कलियुगे ग्राह्य:। अत एव कलौ निवर्तन्त इत्यनुवृत्तौ शौनकेनोक्तम् "दत्तौरसेतरेषां तु पुत्रत्वे न परिग्रह:" इति। (Anandasrama Edn. 1904, Part II, p. 379).

It is correctly translated in 21 M L J at p. 305 (journal portion) thus:

Of the sons mentioned, Aurasa etc, primary as well as secondary, in default of the preceding son, the succeeding i. e., the succeeding son, is authorised to give (sraddha) pinda and to take the wealth. Of the substitutes of a son, only the adopted son is accepted in Kaliyuga. Therefore only, it is mentioned by Saunaka when dealing with things not in vogue in the Kaliyuga: 'The acceptance of all others except the aurasa (son) and the adopted (son) in the place of son is mentioned among things not in vogue.

The term 'Aurasa son' or 'Dharmapatnija' as defined by Yajnavalkya is rendered by Mitakshara in Chap. 1, S. 11, placitum 2 thus:

The issue of the breast (Uras उरस) is a legitimate son (औरस Aurasa). He is one born of a legal wife. A woman of equal caste, espoused in lawful wedlock, is a legal wife (धर्मपत्नी Dharmapatni); and a son begotten on her, is a true and legitimate son and is chief in rank. (See Setlur's Book, Part I, page 30.

Viswarupa who is an earlier commentator than Vignaneswara also gives the same meaning to the terms "Aurasa son" and "Dharmapatni": "Lawful wedded wife—a wife of equal caste . . . ; the aurasa is the son begotten by him on her." (Seetharama Sastri's translation of Viswarupa, 1900 edition, p. 8). Thus an "Aurasa son" as defined by Yajnavalkya, means according to Vignaneswara, Apararka and Viswarupa "the son born to a wife of an equal class." According to Saunaka's text set out in Apararka's commentary all other sons excepting 'a son by a wife of an equal class' and an adopted son are not in vogue. The sons by wives of unequal classes were not in vogue even in Saunaka's time or at any rate by the time of Apararka, who adopts Saunaka's text. Nilakanta, the author of Vyavahara Mayukha, seems to me to say that the son by a wife of an unequal class is prohibited in Kali Age. In Chap. IV, S. 4, Nilakanta deals with the mode of partition. He sets out in placitum 41 the texts of Yajnavalkya relating to 12 kinds of sons including aurasa or Dharmapatnijas already referred to by me in dealing with Apararka's view. Then we have the following: Placitum 42:

सवर्णायां धर्मपत्न्यां उत्पन्न: औरस: पुत्रो मुख्य:।

Translation: "The aurasa, or the legitimate son born of a lawfully married wife of equal class, is the principal son." Then in placita 43, 44 and 45, Nilakanta sets out the secondary sons dealt with by Yajnavalkya's text and concludes in placitum 46 thus: Placitum 46:

अथ दत्तकाभिन्ना गौणा: पुत्रा: कलौ वर्ज्या: दत्तौरसेतरेषां तु पुत्रत्वे न परिग्रह: इति तन्निषेधेषु पाठात्।

Translation:

All the secondary sons mentioned here, except dattaka or the adopted son, are forbidden (recognition) in the Kali Age; because we read in the prohibitions (in the Kali Age). 'There is no acceptance as sons, of others than the Dattaka (adopted) and an Aurasa or legitimate sons.

This translation is from Mandlik's "Vyavahara Mayukha and Yajnavalkya Smrithi" (1880 edition Part II, pp. 49-50). The texts above set out are in the same book (Part I, pp. 38-39). We start in verse 42, with the definition of an "Aurasa" as "a son of a wife of an equal class." Excepting the adopted son (dattaka) and the Aurasa (as defined in placitum 42), there is no acceptance of other kinds of sons and they are all forbidden recognition in the Kali Age. So, the son by a wife of an unequal class is forbidden, not to be recognized and there is no acceptance of him as a son. We must read placitum 46 along with placitum 42 and then we get the opinion of Nilakanta. Subodhini, a commentary on Mitakshara also lays down the rules just as Apararka and Nilakanta do as pointed out above. He, like them, takes the enumeration of 12 kinds of sons, gives the definition of an "Aurasa" as a son born of a wife of an equal class, then sets out the rights of the secondary sons and winds up by saying,

एतच्च सर्वं युगान्तरविषयम्। कलौ तु औरसदत्तकावेव औरससमत्वात् पुत्रिकाच 'दत्तौरसेतराणांतु पुत्रत्वे न परिग्रह:' इति स्मरणात्। अत्र शेषे कलौ युगे तु इमान् धर्मान् वर्ज्यानाहुर्मनीषिण: इति वाक्यशेष:। शिष्टाचारोऽपि तथैव दृश्यते कलौ।

(Setlur's Mitakshara with commentaries thereon in Sanskrit, 1912 edition, p. 710). The above passage may be translated as follows :

All this pertains to another age (yuga); but in Kali (age) only 'Aurasa' and 'Dattaka'' sons (are) recognized; also putrika (appointed daughter) by reason of equality of status with an aurasa. Because it is said in a Smrithi ;

'There is no acceptance as sons of others than the adopted son (Dattaka) and an aurasa or legitimate son.'

Add to this,

That the learned say that these practices must not be followed in the age of Kali.

Even the practices of the virtuous are seen to be the same in the Kali age. Sistachara or 'practices of the virtuous' is a recognized source of Hindu law. In Dayakrama Sangraha of Sri Krishna Tarkalankara, a leading commentary on Dayabhaga, we find in Chap. 1, S. 2, placitum 7 :

In the present age, a widow is exclusively of the same class with her late husband, since marriage with a woman of unequal class is prohibited during the Kali or Iron Age. (Setlur's Hindu Law Books Part II page 111.)

Kamalakara in Nirnayasindhu under the heading "कालिवर्ज्यानि" or "Prohibitions in the Kali Age", says : "The marriage of a dwija (twice born) with a maiden of a dissimilar class is prohibited in the Kali Age." (Nirnayasindhu, Nirnayasagara, Edition 1901, p. 275 ; see also Mandlik, Vyavahara Mayukha, Part II, p. 218 foot-note). Mr. Rajamannar drew our attention to Mr. Setlur's Hindu Law Books, Part I, p. 24, where Vijnaneswara is said to refer to Anuloma marriages as actually occurring during his time. In Chap. I, S. 8, placitum 2, it is set out thus :

Under the sanction of the law, instances do occur of a Brahmana having four wives; a Kshatriya, three; and a Vysia, two; but a Sudra, one. In such cases, the sons of a Brahmana born to him by women of the several castes shall have four shares, three, two or one in the order of these castes.

On a reference to the original, this translation appears to be clearly incorrect. The words "instances do occur" do not correctly translate the Sanskrit expression 'darsitaha' (दर्शिता:). This passage of Mitakshara occurs while commenting upon Yajnavalkya's text II, 125. Mr. Setlur seems to have taken this translation from Mr. Colebrooke. It is necessary to set out that passage to understand the author.

"तिस्रो वर्णानुपूर्व्येण इति ब्राह्मणस्य चतस्र: क्षत्रियस्य तिस्र: वैश्यस्य द्वे, शूद्रस्येकेति भार्या दर्शिता:। तत्र ब्राह्मणात्मजा ब्राह्मणोत्पन्ना वर्णश:।" (Setlur's edition, page 667).

No doubt Vignaneswara took the text of Yajnavalkya II, 125, and wrote his commentary that it was pointed out, that is, by the author Yajnavalkya that four wives for Brahmins etc., were pointed out but that does not mean that at the time when Vijnaneswara was writing the Mitakshara he chronicles an existing fact. Several other commentaries like the Mitakshara take the above and other texts of Yajnavalkya and expound the meaning. All these commentators also set out those portions of Yajnavalkya relating to Niyoga practice, that of subsidiary sons other than the adopted son, and that of an appointed daughter's son and give their commentary but that does not mean merely because the commentator for the sake of completeness of the work wrote an elaborate commentary on these portions of Yajnavalkya or the other Smrithis that at the time when they were writing the commentaries, these practices were still in vogue. Even by the time of Manu, the Niyoga practice had become obsolete. He says so in fact and yet he mentions the practice of Niyoga and the rules relating to it: Manu, 9, 64, 66-68.

What is more important and more relevant to my mind is the fact that one at least of the commentators refuses even to discuss the rights of the issue of such marriages on the ground that it will be a sheer waste of time. That could only be on the footing that it is not necessary to devote any time to a discussion of the rights of these persons because these institutions are no longer in vogue and it is not necessary to prescribe for the state of society as it was when he was writing the commentary. That is why the discussion in Smrithichandrika seems to be of very great importance in finding out whether really this system of Anuloma marriages had not become obsolete by the time he was writing. There can be only one answer. It seems to me clear therefore that by the time of the Nibandhakaras which began by about the tenth century A. D., if not earlier, this practice of Anuloma marriages had become obsolete.

Now coming to the text writers after the advent of the British rule, there are several treatises of various English and Indian writers of eminence. All these without an exception state that this practice of Anuloma marriage has become obsolete. In Edns. 6, 7, 8 and 9 of Mayne which alone are available to us this subject is dealt with in para. 89. Edition 6 is of the year 1900 and in all the

editions it is pointed out that such marriages had become obsolete. In Edn. 10 it is pointed out in para. 124 that the rules in ancient law books regarding marriages between persons of different castes have long ago become obsolete. Sir Thomas Strange in his Hindu Law published in 1825 discusses it at pages 39 and 40. He winds up by saying :

But it is unnecessary to dwell upon these distinctions, the practice of such inter-marriages being considered to have been prohibited from the commencement of the present (the Kali) age; since when equality of tribe has been ever, as it continues to be in the strictest sense, essential to legal marriage, though not to the legitimacy of the issue ; inasmuch as, should one so prohibited take place, the issue would notwithstanding be legitimate.

It is not now contended before us that if the marriage is invalid the issue can be legitimate. The above passage from Strange written in 1825 shows that he understood that it was unnecessary even to dwell upon these distinctions as the system of marriages of persons belonging to different castes was considered to have been prohibited from the commencement of the Kali age and that equality of tribe was in the strictest sense essential to a legal marriage. Sir Gurudoss Banerjee in his work on Marriage and Stridhanam and J. C. Ghose all say that such marriages had become obsolete from the commencement of the Kali age. (Banerjee, Edn. 5, 76-82, Ghose Vol. I, 809-810). Mandlik also is of the same opinion (see his edition of Vyavahara Mayukha, Part II, p. 218, foot-note). Dr. Jolly also takes the same view (Hindu Law—Tagore Law Lectures, 1883, pp. 179-181).

Shamcharan Sircar who was one of the Tagore Law Lecturers, says in his Vyavastha Darpana the second edition of which was published in 1867 on p. 656, Vyavastha, 399 : "The marriage with a girl of a different caste is prohibited in the present (Kali) age." And he relies on passages from the Vrihat Naradiya Purana and Aditya Purana. Again, in the chapter treating of the castes of the Hindus, he says on p. 1038, Vyavastha, 674 :

Each of the castes or classes above mentioned is at present a separate or distinct tribe. Intermarriages, between any two of these castes or classes, being abrogated or not being in practice ; it must be concluded that the marriage between any two of them, if contracted, is null and void, and the issue of such marriage not entitled to inheritance, the same being considered as unlawfully born.

The writer says the same thing in his Vyavastha Chandrika, Vol. II, p. 454, paragraph 693 (1880 edition.) Of these, Vyavastha Darpana relates to the law as current in Bengal and the "Vyavasthachandrika" relates to the law as current in all the provinces of India, except Bengal proper. Thus, the institution of Anuloma marriage is prohibited by the Nibandhakaras or commentators and also by the modern text writers as unsuited for this Kali Age. As stated in Mayne's Hindu Law, Edn. 10, on p. 178 :

When Hindu writers say that certain practices have become prohibited in the Kali age, they do not merely mean that the ancient practices are now prohibited and are therefore no longer law. The prohibition was due to a new consciousness and wide disapproval, to a new usage, discontinuing or abrogating the old usage.

Coming to the decisions, the question directly arose for decision before the Allahabad High Court in 28 ALL 458.[5] There, the marriage was between a Brahmin male and Kshatriya female. There is no discussion in the judgment. Burkitt J. says :

Now whatever may have been the case in ancient times, as shown in old text books, I have no hesitation in saying that at the present day marriage between a Brahmin and a Chhatri is not a lawful marriage in these Provinces and that the issue of such a marriage is not legitimate.

Aikman J. says :

Whatever may have been the case in ancient times, and whatever may be the law in other parts of India, I think that there can be no doubt that in these provinces there cannot in the present day be a lawful marriage between a Brahmin and a member of a different caste.

The question came up before the Bombay High Court in 14 Bom L R 547,[6] a case of a Pratiloma marriage (i. e.,) a marriage of a woman of a higher caste with a man of a lower caste. Chandavarkar J. while pointing out that a Pratiloma marriage was expressly prohibited even by the old Smrithi writers, says that an Anuloma marriage would in the present day be invalid. The learned Judge begins the discussion by referring to Anuloma marriages. After referring to various portions of Manu and other text writers, he points out that Yajnavalkya's own opinion was against such marriages. Then, he refers to the comment of Vignaneswara that the text of Yajnavalkya was a prohibition of the marriage of a woman of the Sudra caste with a man of the twice born class. He then refers to Nilakantha's Mayukha which is a leading authority in the Bombay Presidency. He says :

From this gloss of the Mitakshara, from which Nilakantha, the author of the Vyavahara Mayukha, expresses nowhere any dissent, it is reasonable to infer that, according to the leading authorities on Hindu law as recognised in this Presidency, a

5. ('06) 28 All 458 : 3 A L J 209 : 1906 A W N 83, Padam Kumari v. Suraj Kumari.
6. ('12) 14 Bom L R 547 : 16 I C 133, Bai Kashi v. Jamnadas.

Shudra wife is not permitted to a Brahmin, a Kshatriya, or a Vaishya. If that is so, it is a necessary corollary from it that the marriage of a Brahmin woman with a Shudra is also prohibited. This inference is supported by a text cited by Madhavacharya in his commentary on the Parasharasmrithi, which is regarded by Hindus as an authority of special force in these times called Kaliyug. In that commentary, after quoting the conflicting texts on the question of marriage between persons of different castes, Madhavacharya concludes as follows :

Distinguishing the different ages, the law is clearly established by a Smrithi, which, referring to the marriage of persons of any of the twice born castes with persons of other castes declares: 'The learned say that these practices must not be followed in the age of kali.'

Chandavarkar J. after pointing out that if in the case of Anuloma marriages, the marriage is invalid, it is an a fortiori case in the case of a Pratiloma marriage, then goes on to say that in the case of a Pratiloma marriage it is not a case of a mere inference and that there are several texts prohibiting Pratiloma marriages. His view therefore is that an Anuloma marriage is not valid, though the point did not directly arise before him for decision. The validity of an Anuloma marriage directly arose in 46 Bom 871.[7] Shah J. delivering the leading judgment, held that such a marriage is valid; and Venkatasubba Rao J. sitting as a single Judge followed this decision in 52 Mad 160[8] at p. 173. In a later decision of the Bombay High Court in 55 Bom 1,[9] the decision in 46 Bom 871[7] was not challenged and the validity of an Anuloma marriage was upheld. There is, however, a discussion by Patkar J. and he follows in the main the reasoning of Shah J. in the earlier case. It is therefore necessary to consider the reasoning in 46 Bom 871.[7] The question divides itself into two parts: (1) Has it become obsolete? and (2) if so, whether it could be revived? Shah J. refers to Manu and Yajnavalkya and points out, quite rightly in our opinion, that Manu recognizes the existence of such marriages in his time and the validity thereof. After referring to Manu, Yajnavalkya and Vignaneswara, he says at page 883 :

Thus Yajnavalkya and Vignaneswara, whose opinions are binding upon us, do not lay down any prohibition as distinguished from disapproval of anuloma marriages.

Then, he takes up Nilakantha's opinion as expressed in his Mayukha and points out that Nilakantha practically accepts the view as propounded in the Mitakshara. He winds up the discussion of the texts on p. 885 by saying :

It would thus appear that Manu and Yajnavalkya, Vignaneswara and Nilakantha are agreed that the Anuloma marriages are not prohibited.

Then, after referring to Chandavarkar J.'s reading of the Mayukha, he expresses his dissent from that view and says :

Thus the argument for the appellant derives no support from the two principal Smritis nor from the Mitakshara and the Samskara Mayukha. How is then the prohibition to be inferred contrary to these opinions? The only ground suggested is that such marriages are obsolete and must be taken to be prohibited by usage. I am unable to accept the view that because such marriages are obsolete they are illegal or prohibited by law. The prohibition must be found in the law books or in the usage having the force of law. Such usage must be proved like any other fact. It may be that the fact of their being obsolete may render the proof of such usage easy . . . The opinions of Manu and Yajnavalkya and Vijnaneswara and Nilakantha, if I may say so, are fairly reflected in the general attitude of the castes in these matters. They approve of marriages within their respective circles, and generally speaking disapprove of marriages outside their circles. They do not however necessarily refuse to recognize the marriages outside their circles but extend the same toleration socially to those who depart from the usual rule as the Smrithi writers and the commentators have extended legally to Anuloma marriages. . . . . But the attitude of the castes, which is stated in different modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages according to the rules of practice of each different caste. It does not afford a sufficient justification for treating as illegal what has not been prohibited but in terms contemplated and allowed by law.

Shah J. does not, it is clear, refer to any other ancient text writer except Manu, Yajnavalkya, Vijnaneswara and Nilakantha. There are a number of commentators who expressly prohibit these marriages and, as I pointed out, at least one of them goes so far as to refuse to waste any time on the discussion of the rights of the children of such marriages. Even the prohibition contained in Parasara Madhaviya, a work of great authority, being the work of a great scholar and statesman, which is fully set out by Chandavarkar J. in 14 Bom L R 547[6] is not even referred to by Shah J. The whole of his judgment is that there is no prohibition in the law books. He says that the prohibition must be found in the law books or in the usage having the force of law. Evidently, if his attention had been drawn to the fact that the prohibition is found in the law books, his view might have been

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7. ('22) 9 A I R 1922 Bom 32 : 65 I C 602 : 46 Bom 871 : 24 Bom L R 5, Bai Gulab v. Jiwanlal Harilal.
8. ('28) 15 A I R 1928 Mad 1279 : 111 I C 364 : 52 Mad 160 : 55 M L J 478, Ratansi D. Morarji v. Administrator-General of Madras.
9. ('31) 18 A I R 1931 Bom 89 : 130 I C 17 : 55 Bom 1 : 32 Bom L R 1348, Natha Nathuram v. Chotalal Dajibhai.

otherwise. Having regard to what we have set out above, we think it is not correct to say that there is no prohibition in the law books. That this institution was obsolete is recognized by Shah J. when he says at page 886 :

> It seems to me that far too much weight is sought to be placed upon the circumstance that the Anuloma marriages are more or less obsolete.

His entire reasoning is contained in this, that in his opinion in addition to being obsolete, there must be a prohibition contained in the law books or in a usage having the force of law. Such a prohibition is contained in the commentaries above referred to even if such a prohibition is necessary. As observed already, it is conceded that Manu, at any rate, while disapproving of such marriages, recognized the existence of these marriages and made rules for the performance of the marriages and the like. Yajnavalkya in unmistakeable terms says that his own opinion is against the validity of such a marriage. Then, no doubt, he gives what, according to him, was the share of the son of a Sudra wife; but that personally he prohibits them can admit of no doubt. Mitakshara simply comments on the various portions of Yajnavalkya and it has not given any independent opinion of its own. And Mayukha, as shown already, is against the validity of such marriages on the ground of its being obsolete. The passages from Nilakantha set out above were evidently not brought to the notice of Chandavarkar and Shah JJ. Therefore, Chandavarkar J. is, we think, though not on the ground mentioned by him, quite justified in saying that Nilkantha's opinion is also against the validity of such a marriage. Coming to the judgment of Venkatasubba Rao J. in 52 Mad 160[8] we must point out that after referring to 46 Bom 871[7] he says that even Chandavarkar J. in 14 Bom L R 547[6] took the view that Anuloma marriages are valid. This, we point out with great respect, is erroneous. Venkatasubba Rao J. says at page 173 :

> Chandavarkar J. in 14 Bom L R 547,[6] after an examination of the Smrithis and commentaries, also arrives at the conclusion that Anuloma marriages are valid.

Then he says that he was prepared to follow the decision in 46 Bom 871[7] and 14 Bom L R 547[6] and to decide that an Anuloma marriage was valid. There is no independent discussion of his own. His judgment is therefore vitiated by his misunderstanding of what Chandavarkar J. decided in 14 Bom L R 547.[6] Then coming to the decision in 55 Bom 1,[9] Shingne J. points out at p. 17: "The correctness of the decision in 46 Bom 871[7] was not challenged on behalf of the plaintiff."

Therefore, Shingne J. did not think it necessary to go into the various texts of Hindu law on the point and stated that his learned brother considered them. Patkar J. who delivered the leading judgment does not add materially to the discussion of Shah J. in 46 Bom 871.[7] Like Shah J., he refers to Manu and Yajnavalkya. Then, his attention was drawn to the opinion expressed in Mayne's Hindu Law, Edn. 9, pp. 108 and 785, "that marriages between persons of different castes are obsolete, and a son born of such marriage would be illegitimate." Dealing with it he says at page 9 :

> Shah J. in 46 Bom 871[7] was unable to accept the view that because such marriages are obsolete, they are illegal or prohibited by law, and held that the prohibition must be found in the law books, or in the usage having the force of law, and such usage must be proved like any other fact.

Then, he wound up this part of the judgment by referring to Shah J.'s opinion, that the attitude of the castes which is stated in different modern books as prohibiting inter-caste marriages altogether, is generally indicative of nothing more than the disapproval of such marriages according to the rules of practice of different castes and that it does not afford a sufficient justification for treating as illegal what was not prohibited but in terms contemplated and allowed by law. We have sufficiently dealt with the opinion of Shah J. It therefore appears that the view of Shah J. is vitiated by his omission to refer to those commentators who expressly prohibit these marriages and who even refuse to discuss the rights of the issue of such marriages and also by what we consider is an erroneous view of the law when he says that when an institution is shown to be obsolete, the party must also go further and show that there is an express prohibition against such an institution in some law books or that it was prohibited by usage having the force of law. It may be difficult to arrive at the conclusion that a particular institution like an Anuloma marriage or the practice of Niyoga or that of an appointed daughter's son is obsolete. But once you come to the conclusion that they are obsolete, it is difficult to postulate a further condition that the act questioned should, in addition to being proved to be obsolete, also be shown to have been expressly prohibited in the law books or that it is contrary to usage having the force of law.

In systems of jurisprudence where there is a law making body such as a Parliament, there is no such thing as a law becoming obsolete. However long it may be before it is put into force or enforced, once a law is enacted, it is always a law and it continues to be the law until it is repealed by a later statute. But so far as Hindu law is concerned, it was never the subject of any legislative enactment. It is the growth of several ages and the Smrithi writers and the commentators prescribe what, according to the needs of the society as it existed in their times, was necessary for regulating the relations between the various members of that society. As is clear from the various differences between the Dayabhaga and the Mitakshara school, the Hindu law did not stand still but was moulded to the needs of the particular age and was developed from time to time. As pointed out by the Judicial Committee in 40 Bom 270,[2] already referred to, Hindu law did not stand still. The further growth of the Hindu law was arrested by the advent of the British rule and now further changes have to be made by the Legislature. In fact, the Legislature has enacted Act 3 of 1872 and amended it in 1923 to suit the requirements of the changed conditions. If further changes are felt necessary, we can only look to the Legislature.

In addition to the commentators to whose opinions I have just referred, we have the writings of certain travellers who visited India some centuries back. They have noted what they observed to be the customs and practices of the country. We shall refer to them only for the purpose of showing that during the time when they visited India the system of Anuloma marriage was not in vogue or rather that marriages within the caste were very strictly observed. Reference to these writings is necessitated by a vehement argument put forward on behalf of the respondents that the practice of Anuloma marriage has not in fact become obsolete. It is urged by Mr. Rajamannar that marriages between the members of different castes are unusual and would occur only once in a way. He also says that all the cases which occur do not come to Court and that from the mere fact that we have not very many instances where the question has been dealt with by Courts of law, it ought not to be taken that the institution itself became obsolete. He says that there is no evidence in this case to show that it was obsolete. It is with a view to meet this argument that we think it necessary to refer to the writings of some of these travellers. Yuan Chwang came from China and visited India in the early part of the 7th century (629-645 A. D.). A work of his travels has been edited by Mr. J. W. Rhys Davids and Dr. Bushell and published by the Royal Asiatic Society. On p. 168 of this book the following account is given :

> These four castes form classes of various degrees of ceremonial purity. The members of a caste marry within the caste, the great and the obscure keeping apart.

The Editor referring to the original wording in Chinese says :

> What our author states seems to be clear and simple. Marriages take place within a caste and a Vaisya man, for example, may marry any Vaisya maid. And he will marry no other. . . . . But though a man might espouse any maid of his caste, the rich and the great married among themselves, and the poor and the obscure kept to themselves in their marriages: ["On Yung Chwang's Travels in India, 629-645, A. D." by Thoms Watters, 1904 Edition, p. 168-169.]

Then we have a chronicle of what Alberuni, a traveller from Persia, observed during his visit between 997 to 1030 A. D. Dr. Edward C Sachu has published an English translation of this traveller's book. Of Alberuni, Romesh Chandar Dutt in his work on "A History of Civilization in Ancient India", Vol. II, p. 318, says :

> But it is always a gain to see ourselves as others see us, and we propose in the present chapter to draw a similar sketch of Hindu Civilization at the commencement of the modern age, from materials supplied to us by a cultured and large-hearted foreigner, Alberuni, who wrote in the eleventh century.

In Dr. Sachu's edition of Alberuni, we find in Chap. LXIX the following passage in Vol. II, p. 156:

> In our time, however, the Brahmans, although it is allowed to them, never marry any woman except one of their own caste.

R. C. Dutt referring to this passage of Alberuni says on page 323 :

> Every man of a particular caste could, under the ancient law, marry a woman of his own caste, or one of the castes below his. But this practice had fallen into disuse; caste had become more rigid, and 'in our time, however, the Brahmans, although it is allowed to them, never marry any woman except one of their own caste.' (Chap. 69.)

Sir Thomas Roe in his journal "Voyage into the East Indies," says :

> This people marry into, and consequently still keep in their own tribes, sects, occupations and professions, for instance, all Brahmins (which are their priests, the sons of all which are priests, likewise) are married to Brahmin's daughters.

The Travels of Sig. Pietro, printed in 1665 (Madras University Library), p. 434. Francois Bernier in his "Travels in the Moghul Empire," translated and published by

Archibald Constable and re-edited by Vincent Smith says on p. 325:

These books enjoin that the people shall be divided, as in fact they are most effectually, into four tribes, (Tribus): first, the tribe of Brahmans, or interpreters of the law; secondly, the tribe of Quetterys or warriors; thirdly, the tribe of Bescue, or merchants and tradesmen, commonly called Banyanes; and fourthly, the tribe of Seydra or artisans and labourers. These different tribes are not permitted to inter-marry, that is to say, a Brahman is forbidden to marry a Quattery and the same injunction holds good in regard to the other tribes.

That is what Bernier observed in his travels between 1666-1668 A D. Steele in his "Law and Custom of Hindu Castes within the Dekhun provinces subject to the Presidency of Bombay," dealing with marriages in Chap. 3 which is headed "Existing Customs—Marriage," says, "the parties must be of the same caste." (Page 163 of the edition of 1868). Steele published his first edition in 1826. I hold therefore that an Anuloma marriage is invalid. I agree that the question of maintenance on the footing that there was no marriage between plaintiff 1 and Janakiramamoorthy cannot be gone into in this suit and that the appeal should be allowed with costs in this Court.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 524

VENKATARAMANA RAO AND HORWILL JJ.

Chapalamadugu Govindayya and another — Appellants

v.

Suddapalli Ramamurthi and others — Respondents.

Appeals Nos. 195 and 293 of 1937, Decided on 28th October 1940, against decree of Sub-Judge, Bapatla, in O. S. No. 39 of 1931.

(a) Res judicata—Matter in issue in two suits same — Finding in one suit followed in other suit — Appeal against one of those decrees is not barred by res judicata on ground that decree in other suit is not appealed against.

Where matter in issue in two suits was the same, and the finding in one suit has been adopted in the other, an appeal against one of these decrees is not barred by res judicata on the ground that no appeal was filed against the other decree: 29 Mad 333 (F B) and A I R 1916 Mad 1133, *Foll.* [P 525 C 2]

(b) Civil P. C. (1908), O. 32, R. 15 — R. 15 does not contemplate that there must be preliminary inquiry and finding that person by reason of unsoundness of mind was incapable of protecting his interests.

Before a next friend can represent a person incapable of protecting his rights it is not necessary that there should be a preliminary inquiry by the Court that the person by reason of unsoundness of mind or mental infirmity is incapable of protecting his interests. All that is needed is that there should be some prima facie proof such as to satisfy the Court that the person was by reason of unsoundness of mind or mental infirmity incapable of protecting his interests, because an order permitting the next friend to represent such a person is not final. It is always open to the defendant to take out an independent application to have the said order revoked when the Court can go fully into the matter. But when once the Court permits the next friend to sue on behalf of such a person, it is not open to the Court to raise an independent issue in the trial as to the competency of the next friend to represent him in the suit: (1914) 1 Ch 968 and A I R 1939 Mad 657, *Rel. on.* [P 526 C 2; P 527 C 1]

K. Rajah Iyer, M. S. Ramachandra Rao, D. R. Krishna Rao and K. Kotayya—for Appellants.

B. S. Ramachandra Rao, A. Bhujanga Rao and R. Hari Prasada Rao — for Respondents.

Venkataramana Rao J. — These two appeals arise out of a suit to enforce a mortgage dated 16th January 1919 executed in favour of Chappalamudugu Govindayya by one Yagnayya and his undivided son Ramamurti, and Hanumantha Rao for himself and as guardian of his sons Venkatanarasimham and Satyanarayana who are defendants 2 and 3 in this suit. All the members of the family of Hanumantha Rao are also impleaded as defendants herein besides Ramamurti, the son of Yagnayya. The said Ramamurti, Venkatanarasimham and Satyanarayana are impleaded as trustees of Seetaramaswami and Anjaneya temples on the ground that the father of defendant 1, Yagnayya and Hanumantha Rao, the father of Venkatanarasimham and Satyanarayana were trustees of the said temples. The reason for the inclusion of these defendants in the capacity of trustees apart from their individual capacity is that items 19 and 20 of the plaint schedule property which are also comprised in the said deed of mortgage are properties dedicated to the said temples and vested in the trustees in trust for the temples. The validity and the binding nature of this mortgage on the minor defendants was the subject-matter of an issue in the partition suit (O. S. No. 63 of 1932) on the file of the Sub-Court, Bapatla out of which Appeal No. 293 of 1937 arises. The evidence relating thereto has been elaborately discussed by the learned subordinate Judge who came to the conclusion that the said mortgage was binding on all the members of the family including the minor plaintiffs in O. S. No. 63 of 1932. In that suit the properties mortgaged were described as items 1 to 26 of the B schedule to the plaint. In those properties the family of Hanumantha Rao was en-

titled to two-thirds and the other one-third belonged to Yagnayya.

The case for Hanumantha Rao in the partition suit was that the said properties were his self-acquisitions whereas the case of the other members of the family was that they were purchased for the benefit of the family. Those properties originally belonged to one Venkatappayya who died leaving him surviving his widow Seetamma and his mother. On the death of his widow and mother, the succession opened and the reversioners who were entitled to the said properties were Yagnayya, the father of Ramamurti and one Venkataramayya and another Sriramamurti each entitled to one-third share. It appears that Venkataramayya became entitled to two-thirds subsequently. On 26th June 1915 Hanumantha Rao purchased the two-third share of Venkataramayya under Ex. H. In regard to these properties the reversionary rights of Yagnayya and Venkataramayya were questioned by certain persons who filed O. S. No. 72 of 1910 on the file of the Sub-Court, Bapatla, which ended ultimately in favour of the said Yagnayya and Venkataramayya. Another suit was filed for recovery of these properties (O. S. No. 6 of 1919) and expenses had to be incurred in connexion therewith. The suit mortgage was executed partly for the purpose of meeting those expenses, the debts incurred in connexion therewith and also for discharging a debt incurred for averting a court sale of items 19 and 20 in execution of the decree in O. S. No. 585 of 1910 obtained on a deed of mortgage executed by the original owner of the property.

In both the suits (O. S. No. 63 of 1932 and in the present suit) the validity of the mortgage was dealt with on the footing that the said two-thirds acquired under Ex. H was joint family property and the case set up by Hanumantha Rao was negatived. The question whether the mortgage deed was true and supported by consideration and binding on the members of the family was also raised in this suit. The learned Judge adopted the finding arrived at in O. S. No. 63 of 1932 in this suit also. He however came to the conclusion that the mortgage was not enforceable against items 19 and 20 on the ground that they were trust property and that there was no satisfactory evidence to show that they were comprised in the mortgage decree in pursuance of which the properties were alleged to have been brought to sale. Appeal No. 195 of 1937 was filed by plaintiff 1 in so far as the decree was against him in relation to items 19 and 20. Appeal No. 293 of 1937 was filed by the plaintiffs in O. S. No. 63 of 1932 who are also defendants 3, 5 and 6 in the suit out of which this appeal arises. Mr. Rajah Ayyar has raised two contentions in these appeals (1) that the suit itself is incompetent and ought to have been dismissed, and (2) that the mortgage was not supported by consideration in respect of two items which formed part of the consideration namely a sum of Rs. 4713-14-4 being the amount borrowed for the purpose of discharging a promissory note dated 14th January 1919 in favour of the plaintiff and a sum of Rs. 1140-6-11 being cash alleged to have been paid on the date of the mortgage.

Mr. M. S. Ramachandra Rao, who appears for the plaintiff, raised a preliminary objection that the appeal itself is incompetent. We shall briefly dispose of the preliminary objection. The contention of Mr. Ramchandra Rao is that the finding as regards consideration was incorporated in the decree in O. S. No. 63 of 1932 and no appeal was preferred in regard thereto and the adjudication therein has become final and will operate as res judicata. But we think this contention is unsustainable in view of the Full Bench decision in 29 Mad 333[1] and 29 M L J 551.[2] We shall now deal with Mr. Rajah Iyer's contention as to the competency of the suit. The plaint was filed on behalf of Govindayya as plaintiff 1 represented by his brother's son Rangayya and also by Rangayya as plaintiff 2. Govindayya is described in the cause title thus : "Chapalamadugu Govindayya being lunatic by next friend Chapalamadugu Rangayya." The plaint was filed on 15th January 1931. Three years afterwards on 20th March 1934 plaintiff 1 filed an application stating that he was of sound mind that plaintiff 2 had no right to the suit amount and that he should be removed from the suit and also as his next friend and he should be permitted to conduct the suit himself. Plaintiff 2 had no objection and the order was made in terms of the petition. Later on after all the witnesses were examined plaintiff 2 filed an application stating that he might be appointed as the next friend of plaintiff 1; but that application was dismissed on the ground that Govindayya was not so mentally infirm as to be incapable of

1. ('06) 29 Mad 333: 16 M L J 63 (F B), Panchanda Velan v. Vaithinatha Sastrial.
2. ('16) 3 AIR 1916 Mad 1133 : 31 I C 216 : 29 M L J 551, Ramaswami Chetti v. Karuppan Chetty.

protecting his interests. One of the issues in the suit was whether plaintiff 1 was a lunatic and plaintiff 2 had a right to represent plaintiff 1. On that issue the learned Judge recorded his finding thus :

I find on issue 9 that plaintiff 1 was of unsound mind and incapable of protecting his interests when the suit was filed and plaintiff 2 was consequently entitled to file the suit as his next friend.

Mr. Rajah Iyer challenges this finding and says that the suit must be held to be incompetent on the ground that when it was filed plaintiff 1 must be deemed to have been of sound mind and the plaint must be held to have been validly presented only on the date when it was amended by striking out the name of the next friend and this suit having been filed more than twelve years of the execution of the bond is barred by limitation. He further contends that even assuming plaintiff 1 was of unsound mind the plaint was not filed in accordance with O. 32, R. 15 as no enquiry was held and no order passed permitting plaintiff 2 to sue as the next friend of plaintiff 1. He relied in support thereof a decision of the Calcutta High Court in 38 C W N 1081,[3] and a decision of our learned brother Mockett J. in 1937 M W N 398.[4] Before dealing with this contention the question we have to find is whether plaintiff 1 was really of unsound mind on 16th January 1931, the date when the plaint was filed. The learned Judge on a consideration of the evidence came to the conclusion that he was. It is in evidence that he was really of unsound mind from 1923 to 1933 for a period of ten years and was also kept in the Mental Hospital, Waltair, that up to 1933 in litigations had with reference to his estate, plaintiff 2 was acting as his next friend and guardian. There was also oral evidence to the effect that plaintiff 1 was really of unsound mind in the beginning of 1931 when the present suit was filed. Nothing has been shown to us that the finding of the learned Judge that the plaintiff was really of unsound mind on the date of the plaint is wrong. We therefore affirm the said finding. In view of this finding the question is whether there has been a valid presentation of the plaint on 16th January 1931. Order 32, R. 15 runs thus :

The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on enquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

According to the above rule the provisions relating to minors should be applied as far as they are applicable. In the case of a person who is not adjudged to be of unsound mind but by reason of unsoundness of mind or mental infirmity is incapable of protecting his rights the plaint should be filed on his behalf by a next friend. That has been done in this case. But what is urged is that before a next friend can represent such a person it must be found on enquiry by the Court that the person by reason of unsoundness of mind or mental infirmity is incapable of protecting his interests. That is, there must be a preliminary enquiry and a finding of the Court before the plaint was filed. That is the view taken by our learned brother Mockett J. It seems to us that such a procedure is not contemplated by the provisions of the Code. Apparently our learned brother was having in view the procedure similar to that adopted in pauper suits or the English practice. There is no provision in the Civil Procedure Code under which such an enquiry can be had. What is contemplated is that the plaint must be filed by a next friend and the Court, before admitting the plaint, should satisfy itself on enquiry that the person on whose behalf the plaint is presented was by reason of unsoundness of mind incapable of protecting his interests and should be represented by a next friend. Ordinarily the next friend ought to file an application supported by an affidavit along with the plaint and the Judge should pass an order thereon. That the section does contemplate an enquiry there can be no doubt, but the nature of the enquiry is not indicated.

It seems to us that if the affidavit in support of the request to permit a person to sue as a next friend discloses all the facts which would satisfy the Court that the person on whose behalf the plaint is presented is by reason of unsound mind or mental infirmity incapable of protecting his interests, without any further enquiry the Court can permit the next friend to sue on his behalf, or if the allegations in the affidavit are not convincing, it is open to the Court to direct the next friend to produce witnesses before it in order that it may satisfy itself as to the mental capacity of the person on whose behalf the plaint is presented. All that is needed is that there should be some prima facie proof such as to satisfy the Court that

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3. ('35) 22 A I R 1935 Cal 224 : 155 I C 696 : 38 C W N 1081, Nirendra Lal Bhattacharya v. Bepin Chandra Bhattacharya.
4. ('37) 1937 M W N 398, Rajammal v. Mahadeva Iyer.

litigation and by Yegnayya and Hanumantha Rao in their capacity as trustees so far as Rs. 4713-14-4 is concerned. The decree must therefore be modified by declaring that only items 19 and 20 can be brought to sale in respect of the sum of Rs. 4713-14-4 with interest thereon and for the rest of the consideration the other items are to be brought to sale.

In regard to the sum of Rs. 1140-6-11 paid as cash, we must hold the said item of consideration as binding on the plaintiffs. The said sum was admittedly borrowed for the purpose of the reversionary litigation as a result of which the properties mortgaged were obtained for the benefit of the family. Time for redemption six months. The appellants in both the appeals will pay and receive proportionate costs. The appellant in appeal No. 293 of 1937 is hereby directed to pay the court-fee payable on the memorandum of appeal to Government, and he will get proportionate costs in the appeal which will be recovered by him from the respondents.

C.R.K./D.S. *Decree modified.*

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(28) A. I. R. 1941 Madras 528

KING J.

Al. Sp. Pl. Subramanian Chettiar — *Appellant*

v.

Muthusami Goundan and others — *Respondents.*

Appeal No. 106 of 1939, Decided on 10th October 1940, against appellate order of District Court, Coimbatore, D/- 22nd November 1938.

Limitation Act (1908), Art. 182 (5) — Decree for certain amount passed against some defendants—One of defendants depositing portion of amount and revised decree passed taking notice of amount deposited — Applications by decree-holder for execution based on original decree and not on revised decree held in accordance with law.

A decree for about Rs. 1600 was passed ex parte against three defendants on 1st October 1929. There was an application by one of the defendants only to have this decree set aside and an order was passed in his favour that it would be set aside if he deposited a sum of Rs. 1100 odd. Some of this money was deposited but not all and on 27th June 1930, a revised decree was passed by the Court, in which due notice was taken, in calculating the amount due by the defendants, of the amount which had so been deposited and was to be withdrawn by the decree-holder. The decree-holder subsequently filed a number of execution applications beginning with 1932 and continuing until 1936 and in all these applications, he proceeded on the assumption that the liability of the defendants was that recorded in the original decree :

Held that even though the decree-holder had applied to the Court to execute not the decree of June 1930 but the decree of October 1929, which had no further existence or validity, the applications of the decree-holder between 1932 and 1936 must be deemed to have been made in accordance with law within the meaning of Art. 182 (5) : AIR 1933 Mad 872 and A I R 1936 Pat 26, *Rel. on.*

[P 528 C 2; P 529 C 1, 2]

K. V. Ramachandra Iyer — for Appellant.

V. Ramaswami Iyer — for Respondents.

Judgment. — The appellant in this appeal obtained a decree for about Rs. 1600 ex parte against three defendants on 1st October 1929. There was an application by defendant 1 only to have this decree set aside and an order was passed in his favour that it would be set aside if he deposited a sum of Rs. 1100 odd. Some of this money was deposited but not all and on 27th June 1930, a revised decree was passed by the Court, in which due notice was taken, in calculating the amount due by the defendants, of the amount which had so been deposited and was to be withdrawn by the decree-holder. The decree-holder subsequently filed a number of execution applications beginning with 1932 and continuing until 1936 and in all these applications, he proceeded on the assumption that the liability of the defendants was that recorded in the original decree. In execution, defendant 1's properties were brought to sale in February 1937 and an application was filed under O. 21, R. 90, Civil P. C., by the guardian of defendant 1's children to set that sale aside. While that application was pending, the decree-holder stated that he discovered that he had had the properties sold for an amount larger than what was due to him; he accordingly, on his own initiative, asked the Court to set the sale aside, and the sale was set aside accordingly. Then comes the application, from which the present appeal arises, made by the decree-holder in July 1937 for the attachment and sale of the properties of defendants 2 and 3. In this execution application, the decree-holder, of course, bases his claim upon the revised decree of 1930. Both the Courts below hold that the application is barred by limitation on the ground that the previous applications were not in accordance with law and this is the question which it is necessary to decide in this appeal.

The main reason given by both the Courts for holding that the present execution application is barred is that in the previous applications, the decree-holder applied to the Court to execute not the decree of June

1930 but the decree of October 1929, which had no further existence or validity. Put in this way, the argument has some plausibility but the learned advocate for the appellant has been able to show me that in very similar circumstances, such an argument has not found favour with the Courts. My attention has been called to two authorities. The first of these is a decision of a single Judge of the Madras High Court in 38 M L W 877.[1] In that case, there was an original decree and an appeal from that decree, the result of that appeal being that the decree was modified and a lesser sum was held to be due to the decree-holder. In spite of that modification, the decree-holder applied for execution alleging that the full amount decreed by the first Court was due to him and making no reference to the modification introduced by the decree of the appellate Court. It was held that such an application cannot be said to be one not in accordance with law. The learned Judge says :

> As those petitions were erroneous in particulars, if anybody had taken care to detect the error, the decree-holder should have been required to correct the errors and re-present the petition with correct particulars. This not having been done . . . . they (the petitions) were dismissed . . . . . the omission from the previous execution petitions of the particulars required by clauses (d) and (g) was not sufficient to make them otherwise than in accordance with law.

The second case is reported in A I R 1936 Pat 26.[2] This is a case of a decree which has not been appealed against but which has been amended and the result of the amendment was that some of the persons who were liable under the original decree were exonerated from liability. In spite of this fact, the decree-holder applied for execution against all the defendants. It was held that such an application was in accordance with law; that an error of this kind was not one of substance but of form and the legality of the execution proceedings should not be allowed to be affected by it. Here, in the present case, it seems to me quite clear that the matter is one not of substance but of form. Though, there might have been two decrees one superseding the other and though technically speaking the second decree is the only one that can possibly be executed there is only one liability and there has never been any doubt that the judgment-debtors in this case were under liability, as a result of the litigation, to the appellant. The essential facts of the situation are simply that the appellant, it may be, owing, as the learned District Munsif puts it, to gross negligence, when he came to Court has omitted to study the papers connected with the case and is claiming more money than is legitimately due to him. The fact that he supports that claim by putting forward the decree of 1929 seems to me to have no serious bearing on the situation. There were also cited two cases in which it was held that an application by the decree-holder to execute his decree for more than is due to him is not in itself an application not in accordance with law.

In 59 Bom 1[3] the decree-holder omitted to mention that there was a cross decree against him and that therefore he could execute his decree only for the balance : 1940 M W N 547,[4] was a clear case of too much money being claimed. These cases are not quite so directly to the point as 38 MLW 877[1] and A I R 1936 Pat 26,[2] but they do strengthen the argument for the appellant that this question of claiming more than is due is an irregularity which does not affect the legality of the application. As against these authorities nothing of any value has been cited by the learned advocate for the respondent. The only case which bears remotely on this point is 24 Mad 672,[5] in which the decree of the first Court was confirmed by the appellate Court which also added a decree for costs, but the facts of that case are essentially different from the facts of this case. For the reasons which I have given I think that the applications of the appellant between 1932 and 1936 must be deemed to have been made in accordance with law within the meaning of Art. 182 (5), Limitation Act, and therefore the present application of July 1937 must be held to be in time. This appeal will therefore be allowed, the order of the District Judge set aside and the execution application restored to file to be disposed of according to law. The respondents must pay all the costs of the appellant hitherto incurred. Leave to appeal refused.

C.R.K./D.S. *Appeal allowed.*

1. ('33) 20 A I R 1933 Mad 872 : 147 I C 386 : 38 M L W 877, Vittala Hedge v. Sheenappa Shetty.
2. ('36) 23 A I R 1936 Pat 26 : 160 I C 678, Ram Prasad v. Beni Madho.
3. ('34) 21 A I R 1934 Bom 307 : 153 I C 273 : 59 Bom 1 : 36 Bom L R 643, Ramgopal Sriram v. Rangopal Bhutada.
4. ('40) 27 A I R 1940 Mad 893 : 1940 MWN 547, Muthukrishna Raza v. Viswalinga Kadavarayan.
5. ('01) 24 Mad 672, Appu Rao v. Ramakrishna Chettiar.

(28) A. I. R. 1941 Madras 530

FULL BENCH

LEACH C. J., WADSWORTH AND SOMAYYA JJ.

Secretary of State — Appellant

v.

Allu Jagannadham — Respondent.

Second Appeal No. 308 of 1938, Decided on 2nd April 1941, against decree of Sub-Judge, Vizagapatam, D/- 28th September 1937.

(a) Civil P. C. (1908), O. 41, R. 23 as amended by Madras High Court — Suit by President, Union Board for recovery of surcharge imposed for Board's failure to collect certain arrears of tax and paid by it under protest alleging that tax could not be recovered as notification under which it was levied was invalid — Plaintiff's allegation accepted and defendant's contention that Court had no jurisdiction to entertain suit rejected—Defendant appealing—Appellate Court upholding trial Court's finding but at plaintiff's request remanding case for decision whether earlier notification was valid and setting aside trial Court's decree — Trial Court on remand holding earlier notification also invalid and passing decree — Defendant appealing again—Appellate Court upholding trial Court's decree —Appeal by defendant to High Court—Plaintiff contending that plea of jurisdiction could not be raised as there was no appeal from order of remand — In circumstances of case defendant held not precluded from raising question of jurisdiction.

The President of the Union Board filed a suit against the Secretary of State for the recovery of a certain amount imposed as a surcharge for the Board's failure to collect certain arrears of tax and which the Board had paid under protest alleging that it would have been unlawful for the Board to collect the arrears of tax, because, according to him, the notification under which the tax was levied was invalid. The defendant's contention that the Court had no jurisdiction to try the suit was rejected by the trial Court, which accepted the plaintiff's plea that the notification was invalid. The defendant appealed and the appellate Court concurred in the findings of the trial Court, but at the request of the plaintiff remanded the case to the trial Court to decide whether the tax could be deemed to be lawfully levied under an earlier notification and set aside the decree of the trial Court. On remand the trial Court held that the earlier notification was also invalid and accordingly passed a fresh decree. This resulted in the defendant again appealing. The appellate Court held that the trial Court was right in declaring the earlier notification to be invalid. The defendant then appealed to the High Court : where the plaintiff contended that as there was no appeal against the order of remand the appellant was precluded from raising the question whether the trial Court had jurisdiction to entertain the suit and the question of the validity of the finding with regard to jurisdiction and the legality of the later notification could have been raised only on an appeal from the order of remand :

Held that in remanding the suit the lower appellate Court set aside the trial Court's decree and therefore there was no decree from which the appellant could appeal. The appellant was not aggrieved by the order of remand and therefore there was no ground for an appeal and hence the appellant in the circumstances was not precluded from raising the question of jurisdiction. The appellate Court's decree on the appellant's second appeal must be taken to embody the previous findings of the appellate Court that the trial Court had jurisdiction and that the later notification was invalid, and therefore the appellant had a right in appeal before the High Court to question all the decisions made by the appellate Court except the decision to order a remand : ('28) 15 A I R 1928 Mad 430, *held correctly decided.* [P 531 C 1, 2; P 532 C 1]

(b) Madras Local Boards Act (14 of 1920), S. 199 (2) (o), Rules under R. 6—R. 6 impliedly excludes right to file suit in respect of improper surcharge imposed thereunder — Power to surcharge arises not under common law but under statutory rules — Remedy provided by rules alone is open.

Rule 6 clearly impliedly excludes the right to file a suit in respect of an improper surcharge imposed thereunder. The power to surcharge arises not under the common law but under the statutory rules and hence the remedy provided by the rules in case of an improper surcharge alone is open and a civil suit in respect of it is barred : *Case law relied on.* [P 532 C 2]

(c) Jurisdiction — Civil Court's jurisdiction— When excluded.

To exclude the jurisdiction of the civil Courts the exclusion must be explicitly expressed or clearly implied : ('40) 27 A I R 1940 P C 105, *Rel. on* ; ('36) 23 A I R 1936 Mad 269, *Approved.* [P 532 C 2]

Where the liability is statutory as opposed to liability under the common law, the party must adopt the remedy given to him by the statute : (1859) 6 C B (N S) 337, *Rel. on;* 12 Mad 105 ; ('31) 18 A I R 1931 Mad 574 and ('39) 26 A I R 1939 Mad 967, *Approved.* [P 532 C 2]

(d) Madras Local Boards Act (14 of 1920), S. 199 (2) (o), Rules under R. 6 — R. 6 is not ultra vires the Local Government.

Section 199 (2) (o) confers full authority on the Local Government to make rules governing the powers of auditors to surcharge, and therefore authority to provide a remedy for the unlawful exercise of the auditors' powers and hence R. 6 cannot be said to be ultra vires the Local Government. [P 533 C 1]

K. Kuttikrishna Menon, Government Pleader — for Appellant.

B. Jagannadha Das — for Respondent.

Leach C. J. — The respondent filed a suit in the Court of the District Munsif of Chodavaram to recover with interest a sum of Rs. 389-8-0 which he alleged the Government had unlawfully made him pay. The respondent was the President of the Union Board of Dharmavaram, Vizagapatam district from 1921 to the month of April 1928. On 30th March 1928, the Examiner of Local Fund Accounts passed an order of surcharge against the respondent in respect of a sum of Rs. 455-8-0 on the ground that he had failed to collect arrears of house tax to this amount during the year 1921-22, 1922-23 and 1923-24, and consequently the claims had

become barred by the law of limitation. Rule 6 of the rules relating to the powers of auditors to surcharge, framed under Sec. 199 (2) (o), Madras Local Boards Act, provides that any person aggrieved by a disallowance, surcharge or charge made against him, may apply to the principal civil Court of original jurisdiction to set the order aside. The rule also provides that in lieu of applying to Court the aggrieved person may appeal to the Local Government. The respondent chose the alternative course, and asked the Local Government to cancel the order of surcharge. His petition was rejected, but on an application for review, the Local Government reduced the amount of the surcharge to Rs. 389-8-0, which the respondent paid under protest on 15th October 1928. On 14th December 1929, he filed this suit against the appellant, the Secretary of State for India in Council, for a decree for Rs. 426, being the Rs. 389-8-0 with interest. The respondent averred that it would have been unlawful for him to collect the arrears of tax, because, according to him, the notification under which the tax was levied was invalid. The appellant contended that the Court had no jurisdiction to try the suit. This contention was rejected by the District Munsif, who accepted the respondent's plea that the notification was invalid. The appellant appealed to the Court of the Subordinate Judge of Vizagapatam. The appeal was heard by the Additional Subordinate Judge, who concurred in the findings of the District Munsif, but at the request of the respondent remanded the case to the District Munsif to decide whether the tax could be deemed to be lawfully levied under an earlier notification. The Additional Subordinate Judge did not content himself with merely calling for a finding on this further issue, but set aside the decree which the District Munsif had passed. On remand the District Munsif held that the earlier notification was also invalid and accordingly passed a fresh decree. This resulted in the appellant again appealing to the Court of the Subordinate Judge. The Additional Subordinate Judge held that the District Munsif was also right in declaring the earlier notification to be invalid. The appellant then appealed to this Court and the appeal has been placed before a Full Bench as the Court is asked to re-consider the judgment in 27 M L W 483[1] which was decided by a Division Bench.

In 27 M L W 483,[1] Wallace and Thiruvenkatachariar JJ., held that S. 105 (2), Civil P. C., confines an appeal against an order of remand to the question of the correctness of the order of remand. It is open to the appellant to impeach the order of remand on the ground that it was illegal as the decision of the first Court was not on a preliminary point or on the ground that the decision of the preliminary point by the first appellate Court is erroneous. The learned Judges considered that no other questions could be raised in an appeal against an order of remand whatever bearing they might have upon the merits of the appellant's case. Section 105 (2) states that notwithstanding anything contained in sub-s. (1), where a party aggrieved by an order of remand made from which an appeal lies does not appeal, he shall thereafter be precluded from disputing its correctness. Order 41, R. 23 says that where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case and may further direct what issue or issues should be tried on the case remanded. This rule has been amended by this Court under the powers conferred upon it by the Code. The power of remand is not now confined to the case where there has been disposal of the suit upon a preliminary point.

The respondent contends that as there was no appeal against the order of remand passed by the Additional Subordinate Judge, the appellant is precluded from raising the question whether the District Munsif had jurisdiction to entertain the suit. He says that the appellant should have raised the question of the validity of the finding with regard to jurisdiction and the legality of the later notification on an appeal from the order of remand. This contention runs counter to the judgment in 27 M L W 483[1] which I consider was rightly decided. In remanding the suit, the Additional Subordinate Judge set aside the decree of the District Munsif and therefore there was no decree from which the appellant could appeal. The appellant was not aggrieved by the order of remand and therefore there was no ground here for an appeal. It would be monstrously unjust in these circumstances to hold that the appellant is precluded from raising the question of jurisdiction. He could not bring the question before this Court until the Additional Subordinate Judge had dismissed the appeal from the finding made by the

1. ('28) 15 A I R 1928 Mad 430 : 109 I C 130 : 27 M L W 483, Jainal Abideen v. Habibullah Sahib.

District Munsif on the point left undecided by him at the first hearing. The decree of the Additional Subordinate Judge on the appellant's second appeal must be taken to embody the previous findings of the Additional Subordinate Judge that the District Munsif's Court had jurisdiction and that the later notification was invalid. I hold that the appellant has a right in this appeal to question all the decisions made by the Additional Subordinate Judge except the decision to order a remand.

The learned Government Pleader does not ask the Court to inquire into the validity of the notifications which have been referred to. He says that the appellant confines his case to the contention that a civil Court had no jurisdiction to entertain the suit. In this connexion he relies on the decision of this Court in 12 Mad 105,[2] 54 Mad 928,[3] 50 M L W 364[4] and the judgment of the Privy Council in I L R (1940) Mad 599.[5] In 12 Mad 105,[2] Kernan and Muthuswami Ayyar JJ., following English authorities, held that where by an Act of the Legislature powers are given to a person for a public purpose from which an individual may receive injury, if the method of redressing the injury is indicated by the statute, the ordinary jurisdiction of civil Courts is ousted and a suit does not lie. This maxim was applied by Curgenven and Cornish JJ., in 54 Mad 928[3] and by Wadsworth J. in 50 M L W 364.[4] In 69 M L J 695,[6] Varadachariar J. pointed out, however, that where a person's liberty or property is interfered with, under colour of statutory powers, he has a cause of action which the civil Courts are bound to entertain unless a bar to such entertainment has been enacted by express legislation or by necessary implication. The correctness of this statement is to be gathered from the judgment of the Privy Council in I L R (1940) Mad 599.[5] There Lord Thankerton in delivering the judgment of the Board said that it is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred. The exclusion must either be explicitly expressed or clearly implied. And approval was expressed of the dictum of Willes J. in (1859) 6 C B (N S) 337 = 141 E R 486[7] that, where a statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it, the party must adopt the form of remedy given by the statute.

Therefore, we have here two principles clearly established. The first is that to exclude the jurisdiction of the civil Courts, the exclusion must be explicitly expressed or clearly implied. The second is that where the liability is statutory as opposed to liability under the common law, the party must adopt the remedy given to him by the statute. I cannot imagine a clearer case of implied exclusion of the right to file a suit than we have here. The person aggrieved by an order of surcharge is given the right of applying—that is of making an application—to the principal civil Court of original jurisdiction for an order remedying his grievance. If he does not want to petition the Court, he may apply to Government to redress the wrong complained of. Outside Madras the principal Court of original jurisdiction is the District Court. If the respondent's contention were to be accepted, it would mean that he could apply to the District Judge to cancel the order of surcharge and direct a refund of the money which has been paid, and if the District Judge decided against him, he could then file a suit in the District Munsif's Court and ask the District Munsif to decree what the District Judge had refused. This is absurd on the face of it. The second principle also applies here. The power to surcharge does not arise under the common law but under statutory rules, and the rules provide the remedy in case of an improper surcharge.

In an attempt to escape from this situation, the learned advocate for the respondent has suggested that R. 6 is ultra vires the Local Government. But this suggestion must also be rejected. Sub-section (1) of S. 199, Madras Local Boards Act, says that the Government may make rules to carry out all or any of the purposes of the Act not inconsistent therewith. Sub-section (2) says that in particular, and without prejudice to the generality of the foregoing power, the Local Government shall have power to make rules with regard to specified matters,

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2. ('89) 12 Mad 105, Ramachandra v. Secretary of State.
3. ('31) 18 A I R 1931 Mad 574 : 133 I C 8 : 54 Mad 928 : 61 M L J 117, Iswarananda Bharati Swami v. Commissioners, Hindu Religious Endowments Board.
4. ('39) 26 A I R 1939 Mad 967: 188 I C 200: (1939) 2 M L J 604 : 50 M L W 364, Subbayya v. Thippa Reddi.
5. ('40) 27 A I R 1940 P C 105 : 188 I C 231 : I L R (1940) Mad 599 : 67 I A 222 : I L R (1940) Kar P C 194 (P C), Secretary of State v. Mask & Co.
6. ('36) 23 A I R 1936 Mad 269 : 162 I C 419 : 69 M L J 695, Kamaraja Pandya Naicker v. Secretary of State.
7. (1859) 6 C B (N S) 337 : 141 E R 486, Wolverhampton New Waterworks Co. v. Hawkesford.

and cl. (o) gives them power to make rules "as to the powers of auditors to disallow and surcharge items, and as to the recovery of sums disallowed or surcharged." There is here full authority to make rules governing the powers of auditors to surcharge, and, therefore, authority to provide a remedy for the unlawful exercise of the auditor's powers. What better way could there be of controlling unlawful exercise of power by an auditor than by allowing the aggrieved person to apply to Court or to appeal to Government against the decision? I consider there is no substance in the contention that the rule is ultra vires. It may be mentioned that the contention was only put forward at the last moment in this Court and was never raised below. For the reasons indicated I hold that the Court below erred in entertaining the suit and I would allow the appeal with costs throughout.

Wadsworth J.—I agree with my Lord and have nothing to add.

Somayya J. — I also agree with my Lord, the Chief Justice.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 533

FULL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

In re Adilakshmi Ammal and others Petitioners.

Criminal Revn. Cases Nos. 1052 to 1054 and Criminal Revn. Petns. Nos. 1001 to 1003 of 1940, Decided on 17th March 1941, to revise judgments of Sub-divisional Magistrate, Vellore, in Criminal Appeals Nos. 55 to 57 of 1940.

(a) Madras Prohibition Act (10 of 1937), S. 4 (1) (a)—S. 4 (1) (a) is completely ultra vires the Provincial Legislature in so far as it relates to dangerous drugs by reason of S. 107 of Government of India Act—Madras Abkari Acts and rules thereunder remain in force in so far as they relate to dangerous drugs inasmuch as Provincial Legislature had no power to repeal them to that extent.

Dangerous drugs being in the Concurrent Legislative List of the Government of India Act and the Madras Abkari Act, 1886 as amended and the rules framed thereunder being an existing Indian law permitting a dangerous drug such as ganja to be possessed, the Madras Legislature could not by reason of the provisions of S. 107, Government of India Act, legislate to prohibit entirely the possession of a dangerous drug such as ganja without reserving the measure for the consideration of the Governor-General, or for the signification of His Majesty's pleasure. The Madras Prohibition Act was not reserved for the assent of the Governor-General or for the signification of His Majesty's pleasure and therefore the Madras Legislature had no power to interfere with the Madras Abkari Acts so far as the possession of dangerous drugs was concerned. Consequently S. 4 (1) (a), Madras Prohibition Act, is completely ultra vires the Provincial Legislature in so far as it relates to dangerous drugs, and therefore the Madras Abkari Acts and rules made thereunder remain in force in relation to the dangerous drugs such as ganja. [P 535 C 1, 2]

(b) Interpretation of Statutes—Section of Provincial Act found ultra vires — Court cannot re-write section.

Where a section of the Provincial Act is found to be ultra vires the Provincial Legislature the Court has no power to re-write the section. [P 535 C 1]

M. Natesan and A. N. Veeraraghavan — for Petitioners.

Advocate-General, A. S. Sivakaminathan for Public Prosecutor — for the Crown.

Leach C. J. — These three petitions all raise the question whether S. 4 (1) (a), Madras Prohibition Act, 1937, is ultra vires the Provincial Legislature in so far as it relates to dangerous drugs. Section 4 (1) (a) states that whoever imports, exports, transports or possesses liquor or any intoxicating drug shall be punished with imprisonment which may extend to six months or with fine which may extend to Rs. 1000, or with both. To the sub-section there is a proviso which says that nothing contained in the sub-section shall apply to any act done under, and in accordance with, the provisions of the Act or the terms of any rule, notification, order, licence or permit issued thereunder, but so far as dangerous drugs are concerned the total prohibition imposed by the sub-section has been left unaffected. The petitioners reside in the North Arcot district of the Madras Presidency and have been convicted on charges framed under this sub-section of being in unlawful possession of ganja. The petitioner in Criminal Revision Case No. 1052 of 1940 was sentenced in the Court of the second class Magistrate of Vellore to four months rigorous imprisonment for being in possession of ten tolas of ganja. The petitioner appealed to the Sub-divisional Magistrate of Vellore, who confirmed the conviction and sentence. The second class Magistrate of Vellore convicted the petitioner in Criminal Revision Case No. 1053 of 1940 of being in possession of one tola of ganja, and the petitioner in Criminal Revision Case No. 1054 of 1940 of being in possession of two grains of the drug, and sentenced them to four months and six weeks rigorous imprisonment respectively. These convictions and sentences were also upheld by the Sub-divisional Magistrate.

Ganja, which is a form of Indian hemp, is not only an intoxicating drug, but is regarded as a dangerous drug both in England

and India. The English Act is the Dangerous Drugs Act, 1925. Section 1 (2) of that Act defines Indian hemp as meaning dried flowering or fruiting tops of the pistillate plant known as cannabis satival from which the resin has not been extracted, by whatever name such tops are called. The Indian Act is the Dangerous Drugs Act, 1930. Hemp is defined by S. 2 (c) of that Act as meaning, (i) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (Cannabis satival) including all forms known as bhang, siddhi, or ganja; (ii) Charas, that is the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport, and (iii) any mixture, with or without neutral materials, of any of the above forms of hemp or any drink prepared therefrom.

Rule 2 of the Hemp Drugs Rules which were framed and notified under the Madras Abkari Act, 1886, as subsequently amended, defines ganja as meaning the dried flowering tops of cultivated female hemp plants which have been coated with resin in consequence of having been unable to seed freely and by R. 3 "hemp drugs" are given the same definition as "hemp" in the Drugs Act, 1930. The Madras Prohibition Act applies to the Salem, North Arcot, Cuddapah and Chittoor districts of the Madras Presidency. It came into force in the North Arcot district on 1st October 1939. Section 2 provides for the total repeal of the Madras Abkari Acts of 1886, 1905, 1913, 1915 and 1929 in respect of areas to which the Prohibition Act is applied and for the repeal of so much of Sch. 2, Dangerous Drugs Act, 1930 as relates to the Madras Abkari Act, 1886. With the exception of the Dangerous Drugs Act, 1930, which is an Act of the Central Legislature, all these Acts are Local Acts, being either the Acts of the Governor of Fort St. George in Council or of the Madras Legislature. The Madras Abkari Acts did not prohibit the possession of ganja altogether. Section 13 of the Act of 1886, as amended by subsequent Acts, states that no person, not being a licenced manufacturer or vendor of liquor or intoxicating drugs, shall have in his possession any quantity of liquor or intoxicating drugs in excess of such quantities as the Governor in Council may from time to time prescribe by notification, unless under a licence granted by the Collector in that behalf. The Hemp Drugs Rules framed under statutory authority were notified on 1st February 1936. By R. 23, a person may have in his possession in the Agency Tracts of Ganjam, Vizagapatam and East Godawari any quantity of ganja not exceeding six tolas, in the Madras District any quantity not exceeding two tolas, and elsewhere in the Presidency any quantity not exceeding three tolas. Therefore, before the application of the Prohibition Act to the North Arcot District a person there could lawfully possess three tolas of ganja.

The petitioners say that in passing the Prohibition Act the Madras Legislature had no power to repeal the Abkari Acts so far as the possession of dangerous drugs is concerned or to prohibit the possession of such drugs, and they rely on the provisions of S. 107, Government of India Act, 1935. Eliminating the words of sub-s. (1) of that section which have no application here, the sub-section says that if any provision of a Provincial law is repugnant to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of the section, the existing Indian law shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void. Sub-section (2) provides that where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains a provision repugnant to the provisions of an existing Indian law with repect to the matter, then, if the Provincial law having been reserved for the consideration of the Governor-General, or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that province prevail, subject to a right given to the Federal Legislature to enact further legislation with respect to the same matter after obtaining the previous sanction of the Governor-General in his discretion. Section 311 (2) defines "existing Indian law" as meaning,

any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation.

Part III, Government of India Act, 1935 came into force on 1st April 1937, and the learned Advocate-General naturally concedes that the rules framed under the Madras Abkari Act, 1886, as amended, constitute an existing Indian law within the meaning of S. 107, Government of India Act, 1935. A Provincial Legislature has power, subject to restrictions, to legislate with regard to intoxicating liquors and narcotic drugs. The power and the restrictions are both embo-

died in cl. 31, Provincial Legislative List. This clause reads as follows:

> Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List 1 and, as respects poisons and dangerous drugs, to the provisions of List 3.

List 3 is the Concurrent Legislative List and by reason of the terms of clause 31 of the Provincial Legislative List, a Provincial Legislature in legislating with regard to intoxicating liquors and narcotic drugs can only do so subject to the provisions of the Act relating to the Concurrent Legislative List and cl. 19 of the Concurrent Legislative List places dangerous drugs in that list. Dangerous drugs being in the Concurrent Legislative List and there being an existing Indian law permitting ganja to be possessed, the Madras Legislature could not by reason of the provisions of S. 107 legislate to prohibit entirely the possession of ganja without reserving the measure for the consideration of the Governor-General, or for the signification of His Majesty's pleasure. The Prohibition Act was not reserved for the assent of the Governor-General or for the signification of His Majesty's pleasure and this being the case the Madras Legislature had no power to interfere with the Madras Abkari Acts so far as the possession of dangerous drugs was concerned.

The learned Advocate-General has very properly said that he cannot resist this argument, but he has asked the Court not to declare S. 4 (1) (a), Prohibition Act, to be ultra vires the Provincial Legislature altogether so far as dangerous drugs are concerned. Pointing to the words "to the extent of the repugnancy" in S. 107, Government of India Act, 1935, the learned Advocate-General suggests that the Court should rewrite S. 4 (1) (a), Prohibition Act, to make it read that no person shall be in possession of ganja in excess of the quantities allowed by R. 23 of the Hemp Drugs Rules. The Court has no power to re-write the sub-section. The effect of S. 107, Government of India Act, 1935 is that where the offending statute offends to a limited extent it shall be void only so far as it is repugnant to the dominant measure. As S. 4 (1) (a) now stands, it is entirely repugnant to the Hemp Drugs Rules because it prohibits a person possessing any ganja whatsoever. Therefore, it must be declared to be completely ultra vires so far as the possession of ganja or any other dangerous drug is concerned. The learned Advocate-General has been unable to point to a single case, Canadian or Australian, which supports the contention that the Court is entitled to say that S. 4 (1) (a) is only ultra vires the Provincial Legislature in part so far as dangerous drugs are concerned. If the Prohibition Act had permitted of the possession of ganja in quantities different from those permitted by the Hemp Drugs Rules, the position would have been different, but here the Prohibition Act imposes a total prohibition and therefore there is no room for even a partial reconciliation of the two Acts.

It follows from what has been said that the Provincial Legislature had no power to repeal the Abkari Acts in so far as dangerous drugs are concerned and those Acts and the rules made thereunder remain in force in relation to ganja, which means that the petitioners in Criminal Revision Cases Nos. 1053 of 1940 and 1054 of 1940 have been wrongly convicted, because they were not in possession of more ganja than the law allowed. Consequently, their convictions and sentences will be set aside. The conviction of the petitioner in Criminal Revision Case No. 1052 of 1940 stands on a different basis. While the Court was wrong in convicting her under S. 4 (1) (a), Prohibition Act, she did commit an offence under the Abkari Act, 1886, as amended. She was found to be in possession of ten tolas of ganja whereas the maximum she could have lawfully held without a licence granted by the Collector was three tolas and she possessed no licence to hold a larger quantity than three tolas. The conviction under the Prohibition Act will be altered to a conviction under S. 55, Madras Abkari Act, but the sentence will be reduced to one of rigorous imprisonment for twenty days, the period during which she was in prison before being liberated on bail. A certificate will be issued under S. 205, Government of India Act, 1935, to the effect that the cases involve a substantial question of law as to the interpretation of the Act.

C.R.K./G.N. *Order accordingly.*

*** (28) A. I. R. 1941 Madras 535**

SPECIAL BENCH

LEACH C. J., SOMAYYA AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras— Petitioner

v.

M. Jamal Mohamed Sahib, Trustee for "Allajanathud-Deeniya" — Respondent.

O. P. No. 308 of 1940, Decided on 18-3-1941.

(a) Income-tax Act (1922), S. 4 (3) (i) as amended in 1939—Exemption under S. 4 (3) (i) applies only to trust object of which is public utility—Provision in wakf deed for setting aside of income for donor's descendants cannot be said to constitute trust for general public utility —Aforesaid income remaining unspent in hands of mutwali is assessable to income-tax.

The expression "charitable purposes" in S. 4 (3) (i) must be construed strictly and can only be applied to a public charity. There is no such thing as a private charitable trust. There may be a private trust for religious purposes and therefore S. 4 (3) was amended in 1939 in order to put beyond all doubt the intention of the Legislature not to exempt even private trusts for religious purposes. Consequently, the exemption in S. 4 (3) (i) only applies to a trust the object of which is public utility : (1891) A C 531 ; ('39) 26 A I R 1939 P C 208; ('31) 18 A I R 1931 Lah 578 (S B) and ('36) 23 A I R 1936 Pat 532, *Rel. on.* [P 536 C 2; P 537 C 1, 2]

A provision in a wakf deed for the maintenance, education, marriage, funeral and other necessities of the poor and needy among the descendants of the wakif in the male line cannot be said to constitute a trust for general public utility. The trust being clearly of a private nature, the income allotted under the wakf deed for the purposes mentioned therein which remains unspent for want of beneficiaries is assessable in the hands of the mutwali. [P 536 C 2]

(b) Income-tax Act (1922)—Act expressed in English language — Words used must be given same meaning as given in construction of similar statutes in England.

Where an Indian enactment such as the Income-tax Act is expressed in the English language the words used in it must be given the same meaning as is given in the construction of similar statutes in England. [P 537 C 1]

K. V. Sesha Ayyangar — for Petitioner.

B. Pocker — for Respondent.

Leach C. J. — The assessee in this case is the muthavalli of a wakf called the Allajanathud-Deeniya, which was created by one Jamal Mohideen Sahib by a deed dated 21st December 1923. The deed directs that half of the annual net income shall be utilised for the expenses of maintenance, education, marriage, funeral and other necessities of such members of the donor's family in the male line as in the opinion of the muthavalli are in poor and needy circumstances. The muthavalli himself is allowed to benefit from this portion of the net annual income if he also happens to be in poor and needy circumstances. The other half of the annual net income is to be utilised for such charitable purposes as (a) helping new converts to Islam by giving them religious instruction, (b) giving help to Muslim orphans, (c) giving secular, especially industrial and technical education to Muslims, (d) helping poor and needy Muslims of the Sunni sect, (e) spreading knowledge of the Islamic religion, (f) giving contributions to public institutions established for the purposes mentioned and (g) starting and maintaining institutions for the purpose of giving education to Muslim orphans, if considered necessary by the muthavalli. The deed also provides that if the income allotted for the benefit of the needy members of the donor's family remains unspent for three consecutive years the moneys are to be transferred to a reserve fund.

For the assessment year 1935-36 the Income-tax Officer found that the assessee was in receipt of an income of Rs. 13,907. This includes half of the net income of the trust properties for the year of account. The reason for his finding was that the direction in the deed that half of the income shall be set aside for the needy descendants of the donor does not constitute a trust for charitable purposes within the meaning of S. 4 (3), Income-tax Act, 1922. The Income-tax Officer recognised that the deed did constitute a public charitable trust in so far as it dealt with the other half of the net income. The muthavalli challenged the validity of the assessment and when the matter came in due course before him, the Commissioner of Income-tax referred the following questions to this Court for decision under the provisions of S. 66 (2), Income-tax Act:

(1) Whether the provisions made in the wakf deed dated 21st December 1923 for the maintenance, education, marriage, funeral and other necessities of the poor and needy among the descendants of the wakif in the male line, constitute a charitable purpose and as such fall within the scope of S. 4, cl. 3 (i), Income-tax Act, 1922. (2) Whether the income allotted under the said wakf deed for the purposes mentioned in question 1 which remains unspent for want of beneficiaries is assessable in the hands of the muthavalli.

Section 4 (3) (i) provides that the income derived from property held under trust or other legal obligation wholly for religious or charitable purposes shall not be liable to income-tax. It is stated that the expression "charitable purposes" includes,

relief of the poor, education, medical relief, and the advancement of any other object of general public utility ; but nothing contained in cl. (i), cl. (i-a) or cl. (ii) shall operate to exempt from the provisions of the Act that part of the income of a private religious trust which does not enure for the benefit of the public.

The words which constitute the proviso were added by an amendment made in 1939. The expression "charitable purposes" must be construed strictly. As the result of decisions in England spread over a long period the expression can only be applied to a

public charity. There is no such thing as a private charitable trust. There may be a private trust for religious purposes and that is why the amendment was made to S. 4 (3) in 1939. It was made in order to put beyond all doubt the intention of the Legislature not to exempt even private trust for religious purposes. In (1891) A C 531,[1] a case which was decided by the House of Lords and had reference to the English Income-tax Act of 1842, Lord Macnaghten said :

How far then, it may be asked, does the popular meaning of the word 'charity' correspond with its legal meaning? Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

Later in his judgment he said :

On these grounds I have come to the conclusion that the expression 'trust for charitable purposes' in the Act of 1842, and the other expressions in the Act in which the word 'charitable' occurs, must be construed in their technical meaning according to English law.

The Income-tax Act is an enactment expressed in the English language and the words used in it must be given the same meaning as is given in the construction of similar statutes in England. Giving the words their accepted meaning, the exemption only applies to a trust the object of which is public utility. In delivering the judgment of the Privy Council in I L R (1939) Lah 475,[2] Sir George Rankin said :

Their Lordships are in agreement with this view and see nothing in the Income-tax Act to discharge the Court of its responsibility in coming to a finding as to the character of the object of a trust —a matter which bears directly upon its validity. It is to be observed moreover, that under the Income-tax Act the test of general public utility is applicable not only to trusts in the English sense but is to be applied to property held under trust 'or other legal obligation'—a phrase which would include Moslem wakfs and Hindu endowments.

In 5 I T C 402,[3] the Lahore High Court expressly held that the expression "religious or charitable purposes" in S. 4 (3) (i) has to be construed with reference to English law and not to the personal law of the assessee and this opinion was accepted by the Patna High Court in 10 I T C 7.[4] The learned advocate for the assessee (muthavalli) has suggested that the decision of the Judicial Committee in I L R (1939) Lah 475[2] has negatived this opinion, but we cannot read the judgment in that sense. The passage which has just been quoted from the judgment of the Privy Council speaks of the test of general public utility. As this is the test so far as the Income-tax Act is concerned, it is not necessary to consider whether the trust here would be deemed to be charitable in England. Even assuming that the Court may have regard to Muslim ideas in deciding whether a Muslim trust fulfils the test of general public utility, it cannot be said that that part of the trust deed which relates to the setting aside of income for the descendants of the donor constitutes a trust for general public utility. The beneficiaries are to be members of the donor's own family. The utility is not of a public, but clearly of a private nature. For these reasons we would answer the first question in the negative.

The second question calls for no discussion. The position is that the muthavalli has in his hands income belonging to a private trust. Income of a private trust is not exempt from taxation, and the muthavalli is assessable in respect of it, because he holds it. It follows that the answer to the second question is in the affirmative. As the questions referred have been answered against the assessee, he must pay the costs, Rs. 250.

C.R.K./G.N. *Answer accordingly.*

1. (1891) 1891 A C 531 : 61 L J Q B 265 : 65 L T 621 : 55 J P 805, Commissioner for Special Purposes of Income-tax v. Pemsel.
2. ('39) 26 A I R 1939 P C 208 : 182 I C 882 : I L R (1939) Kar P C 337 : 66 I A 241 : I L R (1939) Lah 475 (P C), Tribune Press, Lahore v. Commissioner of Income-tax, Punjab.
3. ('31) 18 A I R 1931 Lah 578 : 132 I C 689 : 12 Lah 725 : 33 P L R 349 : 5 I T C 402 (S B), Umer Baksh v. Commissioner of Income-tax, Punjab.
4. ('36) 23 A I R 1936 Pat 532 : 165 I C 32 : 10 I T C 7, Humayun Raja Chowdhury v. Commissioner of Income-tax, B. & O.

(28) A. I. R. 1941 Madras 537

WADSWORTH AND PATANJALI SASTRI JJ.

K. L. K. Rm. Ramanathan Chettiar, a Firm — Appellant

v.

Seetharama Ayyar — Respondent.

Appeal No. 134 of 1940, Decided on 5th November 1940, against order of Sub-Judge, Coimbatore, D/- 4th March 1940.

Madras Agriculturists' Relief Act (4 of 1938), S. 3—Firm of money lenders is not agriculturist.

A firm of money lenders cannot be an agriculturist. [P 538 C 1]

V. T. Rangaswami Iyengar and K. S. Sankararaman — for Appellant.

A. K. Sriraman — for Respondent.

Judgment. — It seems to us clear with reference to the definitions in S. 3, Madras

Act 4 of 1938 that a firm of money lenders cannot be an agriculturist. If the application be treated as one by the individual member of the firm it must fail, for the individual member has been assessed to income-tax during the period specified in proviso C to S. 3 (2), so that he cannot claim to be an agriculturist. The appeal is therefore dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 538

ABDUR RAHMAN J.

Vattappa Kone and another—Appellants

v.

Muthukaruppan Servai — Respondent.

Second Appeal No. 1071 of 1937, Decided on 5th November 1940, against decree of Sub-Judge, Ramnad at Madura, in A. S. No. 58 of 1937.

(a) Malicious prosecution — Suit for damages — Complaint to Magistrate charging certain person with offence of robbery — Magistrate ordering police enquiry and police reporting complaint to be false — No summons issued to person complained against — He cannot bring suit for damages for malicious prosecution.

A verbal complaint was made to a Village Magistrate against certain person charging him with the offence of robbery. The Magistrate ordered an enquiry by the police which made a report that the complaint was false and that no robbery had taken place in fact. He (the Magistrate) thereupon declined to take any further action and the proceedings were dropped. During the enquiry conducted by the police, the person complained against was not even summoned :

Held that the person complained against was not prosecuted and he could not for that reason, bring an action for damages for malicious prosecution: ('15) 2 AIR 1915 Mad 128; ('26) 13 AIR 1926 Mad 521 and 97 I C 351, *Rel. on.* 32 Mad 258, *Dist.* [P 538 C 2]

(b) Tort — Defamation — Statements made in complaint to Magistrate or even to police officer with view to their being repeated on oath before Magistrate are absolutely privileged.

Defamation is undoubtedly one of actionable wrongs but in order to prove the same one must be able to put those allegations in evidence. If they are found to have been made on an occasion which is found to be absolutely privileged they could not be permitted to be referred to statements made in a complaint to a Magistrate or even to a police officer which could only be made with a view to their being repeated on oath before the Magistrate are absolutely privileged: ('26) 13 AIR 1926 Mad 521 and ('41) 28 AIR 1941 Mad 26, *Rel. on.* [P 539 C 1]

T. R. Srinivasan—for Appellants.

R. Srinivasa Iyengar—for Respondent.

Judgment. — The only question to be determined in this appeal is whether a suit for damages for malicious prosecution would be maintainable when no summons was issued to the plaintiff on a verbal complaint made against him to a village Magistrate charging him with the offence of robbery. The facts may be briefly stated. Defendants 1 and 2 were stated to have lost some sheep on 8th September 1934. They went on the next day to the village Magistrate of Mudukulathur and made a statement to him that certain persons including the plaintiff had taken away their sheep by force. The facts stated by the defendants would have made the persons charged liable to be prosecuted for robbery. The village Magistrate sent a report on the same day to the police and to the Stationary Sub-Magistrate. The Magistrate appears to have ordered an enquiry by the police which made a report on 15th January 1935 that the complaint made by defendants 1 and 2 was false and that no robbery had taken place in fact. He (the Magistrate) thereupon declined to take any further action and the proceedings were dropped. During the enquiry conducted by the police, the plaintiff was not even summoned. He says that he was not called by the police as he had apprehended an arrest and run away after he came to know of the complaint. The plaintiff brought a suit for damages for malicious prosecution on these allegations. It was decreed by the District Munsif of Paramakudi and the decree was confirmed by the Subordinate Judge of Ramnad at Madura. The question to decide is whether in those circumstances an action for damages was competent.

From the facts which have been given above it would be clear that the plaintiff was not prosecuted and he could not for that reason, bring an action for damages for malicious prosecution. If any authority is required for that view, it would be found in 37 Mad 181[1] and in a later decision of a Division Bench of this Court in 49 Mad 315.[2] These two decisions were followed by Sir Owen Beasley in 24 M L W 22.[3] But it has been contended on behalf of the respondent that his suit was not one in respect of malicious prosecution but for bringing a false charge which is different from either defamation or malicious prosecution. This was attempted to be supported by a decision in 57 Cal 25[4] where the following dictum of

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1. ('15) 2 A I R 1915 Mad 128 : 21 I C 703 : 37 Mad 181 : 25 M L J 1, Meeran Sahib v. Ratna Velu Mudali.
2. ('26) 13 A I R 1926 Mad 521 : 98 I C 8 : 49 Mad 315 : 50 M L J 460, Sanjivi Reddi v. Koneri Reddi.
3. ('26) 97 I C 351 : 24 M L W 22, Arunachalam Mudaliar v. Chinnamunusami Chetti.
4. ('30) 17 A I R 1930 Cal 892 : 125 I C 667 : 57 Cal 25, Nagendranath v. Basanta Das.

Sir Lawrence Jenkins C. J. in 38 Cal 880[5] was cited with approval. The dictum of the learned Chief Justice was as follows:

> There are certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance, malicious abuse of the process of the Court, malicious arrest, malicious search and malicious execution.

This does not however remove the real difficulty. The statement or complaint to a police officer is not first of all covered either by the kindred wrongs mentioned by Sir Lawrence Jenkins in 38 Cal 880[5] or by other well known actionable wrongs such as those of false imprisonment, etc. And secondly, statements made in a complaint to a Magistrate or even to a "police officer which could only be made with a view to their being repeated on oath before the Magistrate were held in this Presidency to be absolutely privileged." This was held by Sir Murray Coutts-Trotter C. J. in 49 Mad 315[2] and followed by my learned brother King J. recently in (1940) 2 M L J 556.[6] The third difficulty in the plaintiff's way appears to be insurmountable even if the allegations made by defendants 1 and 2 in their statement to the Village Magistrate are held to be defamatory. Defamation is undoubtedly one of actionable wrongs but in order to prove the same one must be able to put those allegations in evidence. If they are found to have been made on an occasion which is found to be absolutely privileged, as held in 49 Mad 315[2] they could not be permitted to be referred to and the contention raised by learned counsel for the respondent must be for that reason alone repelled.

My attention was drawn by him to the Full Bench decision in 32 Mad 258.[7] It has no application as the only question raised in that case was whether a person giving false information about an alleged offence to a village Magistrate could be prosecuted for an offence under S. 211, Penal Code. I am not concerned here whether the defendants had committed an offence under S. 211 or not. As the making of a false charge or the institution of a criminal proceeding with intent to injure knowing that there is no just or lawful ground for such a charge or proceeding is itself an offence, the reference to the charge made by a person or to the proceeding taken by him cannot obviously fall within the doctrine of absolute privilege applied by the learned Chief Justice to 49 Mad 315.[2] But the position becomes changed when one comes to deal with the charge or complaint in a collateral proceeding such as a civil suit for damages for defamation is. The Full Bench decision would therefore have no application to this case. Reliance was again placed on behalf of the respondent in 37 M L J 234.[8] The facts of that case do not seem to have been given in the report very fully. I sent for the original records and found that the plaintiff was actually prosecuted by the police in that case and a charge was framed against him by the Deputy Magistrate of Salem but he was eventually acquitted. It is clear in those circumstances that the plaintiff was actually prosecuted and a suit for damages for malicious prosecution was if I may say so with respect rightly held to be maintainable. For the above reason I am constrained to accept the appeal and dismiss the suit, but in the circumstances of the case I leave the parties to bear their own costs throughout. Leave refused.

C.R.K./D.S. *Appeal allowed.*

5. ('11) 38 Cal 880 : 11 I C 311 : 15 C W N 917, Golap Jan v. Bholanath.
6. ('41) 28 A I R 1941 Mad 26 : (1940) 2 M L J 556, Bapalal & Co. v. Krishnaswami Iyer.
7. ('09) 32 Mad 258 : 1 I C 187 : 5 M L T 269 (F B), Sessions Judge of Tinnevelly v. Sivan Chetti.
8. ('19) 6 A I R 1919 Mad 229 : 52 I C 782 : 42 Mad 880 : 37 M L J 234, Peria Goundan v. Kuppa Goundan.

(28) A. I. R. 1941 Madras 539

FULL BENCH

LEACH C. J., VENKATARAMANA RAO AND PATANJALI SASTRI JJ.

Y. G. Peria Munisami Mudali and others — Appellants

v.

Sena Narasappa Mudali and others — Respondents.

Second Appeal No. 820 of 1936, Decided on 21st February 1941, against decree of Dist. Court, Chittoor, D/- 3rd February 1936.

(a) Madras Estates Land Act (1 of 1908), Ss. 112 and 53 — Transferee can be recognized as ryot without any formality — Transferee so recognized becomes defaulter within S. 112 whether patta issued to him or not — S. 112 cannot be invoked in view of S. 53 unless patta was in fact issued to transferee.

A transferee can be recognized as a ryot without any formality and if he is so recognized he becomes a defaulter within the meaning of S. 112, irrespective of whether a patta was issued to him or not : ('41) 28 A I R 1941 Mad 149 (F B), *Expl.*, and *Rel. on.* [P 543 C 1]

But in view of the provisions of S. 53, S. 112 cannot be invoked by the landholder unless he has in fact issued a patta to the transferee. [P 543 C 1]

(b) Madras Estates Land Act (1 of 1908), S. 189 (1) and (3) —According to S. 189 (1) suit to contest right of sale of holding can only be brought in revenue Court — S. 189 (3) does not detract from S. 189 (1) — Defaulting ryot duly served with notice must file suit in revenue Court within 30 days — Failure precludes him from challenging sale on any ground which could be urged in suit under S. 112 of the Act.

A suit to contest the right of sale of a holding can only be brought in a revenue Court. Section 189 (3) does not detract from absolute prohibition contained in S. 189 (1). It only means that where a matter has been decided in a revenue Court and the decision there is one of the factors in a civil suit the finding of the revenue Court cannot be questioned and must be taken as conclusive on the particular point at issue in the civil suit. Consequently, where notice has been duly served upon a defaulting ryot he must file a suit in a revenue Court within 30 days; otherwise he will be precluded from challenging the sale on any of the grounds which could be urged in a suit under S. 112 of the Act : ('36) 23 AIR 1936 Mad 402 and ('27) 14 AIR 1927 Mad 713, *Rel. on*; ('23) 10 A I R 1923 Mad 6 (F B), *Disting.* [P 543 C 1, 2]

(c) Madras Estates Land Act (1 of 1908), Ss. 112 and 189 — Pattadar mortgaging his interest — Mortgagee alone served with notice under S. 112—Mortgagee can sue in civil Court to set aside sale and is entitled to declaration that sale does not affect his position as mortgagee.

Where in the case of a mortgage of his interest by a pattadar notice under S. 112 is merely served on the mortgagee and neither the pattadar nor his sub-tenants are given any intimation of the intention to sell for default in payment of the rents due the omission to serve pattadar entitles the mortgagee to have the sale set aside by a suit in a civil Court and also entitles him to a declaration that the sale does not affect his position as mortgagee : ('23) 10 A I R 1923 Mad 6 (F B), *Rel. on.* [P 544 C 1]

(d) Madras Estates Land Act (1 of 1908), S. 6 (6) — S. 6 (6) contemplates right of permanent occupancy— Anything short of this can be purchased by ijardar — Ss. 6, 8 and 46 of Act make it clear that ryoti land can be held for agriculture without permanent right of occupation — S. 6 (6) does not bar ijardar from bringing his ryot's holding to sale for arrears of rent and purchasing it himself— Omission of word "permanent" in S. 6 (6) makes no difference.

The right of occupancy referred to in S. 6 (6) is the right of permanent occupancy and anything short of this may be purchased by the ijardar. The right of permanent occupancy is not the only right of occupancy contemplated by the Act. Sections 6 and 8 of the Act read in conjunction with S. 46 of the Act also show that a person can be in lawful possession of ryoti land for purposes of agriculture without having a permanent right of occupation. Consequently, S. 6 (6) does not operate as a bar to the ijardar purchasing at the auction the holding of his ryot put up for sale by him for arrears of rent. The omission of the word "permanent" in S. 6 (6) makes no difference. If after his purchase he lets in a tenant during the period of the ijara the tenant will automatically acquire a permanent right of occupancy. If he does not let in a tenant the ijardar will be left on the expiration of his lease merely with the right to possession of a non-occupancy ryot : ('38) 25 A I R 1938 Cal 804 and ('36) 23 A I R 1936 Mad 301, *Approved.* [P 544 C 1, 2; P 545 C 1, 2]

(e) Appeal — Evidence — Trial Court after detailed examination of evidence holding it to be true —Appellate Court should not reverse finding without stating reasons.

Where the trial Court after a detailed examination of the evidence comes to the conclusion that the evidence was true the appellate Court ought not to reverse this finding without stating its reasons. [P 545 C 2]

(f) Madras Estates Land Act (1 of 1908), Ss. 112 and 189 — Auction sale of occupancy holding — Question whether sale was nugatory by reason of acceptance of arrears of rent after sale — Civil suit lies.

In the case of a sale of an occupancy holding for arrears of rent the question whether the sale was rendered nugatory by the acceptance of the arrears of rent after the sale can be decided by the civil Court. [P 545 C 2]

S. Ramaswami Ayyar, S. V. Venugopalachari and S. A. Seshadri Ayyangar — for Appellants.

P. Satyanarayana Rao, A. Bhujanga Rao and D. R. Krishna Rao — for Respondents.

Leach C. J. — This appeal raises questions of importance with regard to the interpretation of the Madras Estates Land Act, 1908. As the case is not concerned with any of the alterations made by the Amending Acts of 1934 and 1936 the sections to which I shall refer in the course of this judgment will be those of the original Act. On 30th November 1925 Sadayyappa Govindappa Mudali, a tenant of ryoti lands in the village of Malapudi, which is in the Karvetnagar Zamindari, sold his interest in certain of the lands to one Kanniappa Mudali and mortgaged his interest in other of the lands to one Kandappa Mudali. The lands sold to Kanniappa have been referred to as Sch. A lands and the lands mortgaged to Kandappa as Sch. B lands, and it will be convenient to continue these descriptions. On 29th June 1926 Kanniappa sold his rights in Sch. A lands and Kandappa assigned his rights as mortgagee in Sch. B lands to respondent 1.

The owner of the zamindari was one Vijayammal, who leased the whole village to appellant 4 in 1929 for three faslis. The period of the lease commenced from 1st July 1929 and terminated on 30th June 1932. As the result, appellant 4 became the ijaradar or the farmer of the rents, of Sch. A and B lands and subject to the prohibition of S. 6 (6) of the Act which says that an ijaradar shall not, while so holding, acquire otherwise than by inheritance or devise a

right of occupancy in land comprised in the ijara. When Vijayammal granted this three years' lease to appellant 4 respondent 1 was in possession of Sch. A lands as a ryot with a permanent right of occupancy, and admittedly he continued to hold the lands in such capacity under appellant 4. It has been suggested in the course of this appeal that he also held Sch. B lands in the same capacity, but this has not been proved and it must be assumed that they were being cultivated by Sadayappa Govindappa Mudali or his sub-tenants. So far as this appeal is concerned, respondent 1 must be treated merely as the mortgagee of Sch. B lands. Respondent 1 defaulted in the payment of his rent in respect of Sch. A lands for Fasli 1339 (1929-30) and default was also made in the payment of the rents due for this period in respect of Sch. B lands. The result was that appellant 4 as the ijaradar issued notices under S. 112, Madras Estates Land Act, but these notices were only served upon respondent 1. It is common ground that no patta was ever tendered to respondent 1, but he was accepted as the lawful transferee and as the holder of the permanent right of occupancy of Sch. A lands. The notices issued by appellant 4 under S. 112 were ignored and in due course the lands comprised in both the schedules were sold by the Collector for default in payment of rents, appellant 4 being the purchaser. The sales took place on 26th August 1931, that is, before the term of the ijara expired, but possession was not delivered to him till 4th February 1933, which was more than seven months after the term had expired.

On 2nd February 1934 respondents 1 and 2 filed a suit in the Court of the District Munsif of Sholinghur for a decree setting aside the sale of Sch. A lands on the ground of irregularity and directing that possession be given to them. They also asked for a declaration of their rights as mortgagees of Sch. B lands. Respondent 2 is the brother of respondent 1. There were seven defendants, respondents 3, 4 and 5, and the four appellants in this appeal. Respondents 3, 4 and 5 were made parties as sub-tenants of respondents 1 and 2 who had attorned to appellant 4 after he had purchased Sch. A lands at the auction. Appellants 1 and 2 purchased from appellant 4 the interest which he acquired in the suit properties in the auction, and appellant 3 is his agent. The plaintiffs-respondents averred that the sale was invalid because notice under S. 112 had not been served on the original pattadar Sadayappa Govindappa Mudali, that S. 6 (6) operated as an absolute bar to appellant 4 becoming the auction-purchaser, and that after the sale had taken place the rents which were owing were paid, as the result of which the rights of all the defaulting ryots were restored. Appellant 4 and the other contesting defendants denied that the suit was maintainable and averred that the lands had been lawfully sold. They also denied that there had been any payment of the arrears of rent after the sale had taken place.

The District Munsif held that the sale was invalid because notice had not been served on the pattadar under S. 112 and that consequently the suit was cognizable by a civil Court. He considered that S. 6 (6) was not a bar to the ijaradar purchasing at the auction and he accepted the evidence of the plaintiffs-respondents that after the sale the arrears of rent had all been paid and the position of the ryots fully restored. On these findings he granted a decree declaring that the plaintiffs-respondents were entitled to Sch. A lands as owners and to Sch. B lands as mortgagees and directing the defendants to surrender possession of Sch. A lands to the plaintiffs. The appellants appealed to the District Judge of Chittoor. The District Judge considered that the chief question which arose for consideration was whether an ijaradar who had bought in a ryot's land for arrears of rent was entitled to hold the land as an occupancy ryot after he had ceased to be a landholder, and as in his opinion S. 6 (6) operated as a bar he held that the Collector should have refused to deliver the lands to appellant 4. On this ground he dismissed the appeal. The other questions raised in the trial Court were argued but in the opinion of the District Judge they did not really matter, although he held that the allegation of the plaintiffs-respondents that appellant 4 had accepted the arrears of rent and treated the rent sale as a nullity was both "false and an obvious after-thought." In making this sweeping assertion the District Judge did not discuss the evidence and it will be necessary to return to this matter later.

In this Court the appellants have advanced two arguments in support of their appeal. In the first place they say that the suit was not maintainable because the revenue Court alone had jurisdiction. On the assumption that respondent 1 was the holder of the kudivaram right in both the A and the B schedule lands they say that inasmuch

as he was served with notice under S. 112 he ought to have filed a suit in the revenue Court. That was, it is urged, his only remedy. The second contention is that the District Judge entirely misconstrued the effect of S. 6 (6). The plaintiffs-respondents meet the first argument by saying that the A and B schedule lands stand on different footings as respondent 1 was not the holder of the B schedule lands, but was merely a mortgagee, and that in any event there was no valid sale inasmuch as no notice was served on the original pattadar, Sadayappa Govindappa Mudali, no other patta having been issued since he was in occupation of the lands. They deny that respondent 1 was a defaulter within the meaning of S. 112 and would have it that the case comes within the Full Bench decision of this Court in 45 Mad 890.[1] They also say that the District Judge correctly interpreted S. 6 (6), but that he erred in holding against them on the question whether appellant 4 had accepted payment of all the arrears of rent after the sale had taken place.

The appellants obviously cannot treat their case with regard to the B schedule lands as being on the same basis as the A schedule lands. As I have already indicated there is no evidence that respondent 1 was ever in occupation of the B schedule lands as a ryot; in fact, appellant 4 and the other contesting defendants made no averment to the contrary in their written statements. Therefore, it will be necessary to deal with the A and the B schedule lands separately. For the moment, I will confine my observations to the case of the plaintiffs-respondents so far as the A schedule lands are concerned. Section 111 says that when an arrear is not paid within the revenue year in which it accrued due, it shall be lawful for the landholder to sell the holding or any part thereof, in the manner provided by the Act in satisfaction of what is due with interest and costs of the sale. Section 112 provides that when the landholder intends to avail himself of the powers given by S. 111, he shall serve on the defaulter through the Collector a written notice stating the amount due for arrears, interest and costs, the period for which and the holding in respect of which it is due, and informing him that if he does not pay the amount or file a suit before the Collector contesting the right of sale within thirty days from the date of service of the notice, the holding or any part thereof specified in the notice will be sold. If the arrears are not paid and no suit contesting the right of sale is instituted within the time stated the landholder may apply to the Collector for sale. Notice was served on respondent 1 and as he took no steps to contest the right of sale before the Collector, and as all the requirements of the Act with regard to the proclamation of sale and the holding of the auction were complied with the sale must be held to be valid so far as the A schedule lands are concerned, if respondent 1 is in law a defaulter within the meaning of S. 112.

The question of the meaning to be attached to the word "defaulter" in S. 112 was raised and decided recently by a Full Bench of this Court of which I and my learned brother Patanjali Sastri were members in S. A. No. 353 of 1937, since reported in A I R 1941 Mad 149.[2] It was there held that a transferee of ryoti land who has been accepted by the landholder as the ryot is a defaulter, notwithstanding that the procedure contemplated by S. 146 has not been complied with. In 44 Mad 534,[3] it was held that the word 'defaulter' within the meaning of the Madras Estates Land Act denotes only the person who is the registered pattadar or his heir or the person whom the landholder has become bound to recognize as the ryot under S. 146 of the Act. The Full Bench considered that this definition was too limited and the landholder might, if he so chose, accept the transferee without being served with a notice in writing or a certified copy of a decree or order of a civil Court establishing the transfer or by the production of a sale certificate, whichever happened to be appropriate.

The Full Bench pointed out however that before action can be taken under S. 112, S. 53 requires that the landholder shall have issued a patta to the transferee, not necessarily bearing his name, but a patta which is intended to be the transferee's patta. In that case a transferee had been accepted as a ryot without any formalities and a patta had been issued to him though it bore the name of the transferor. In the course of the argument in the present case it was suggested by Mr. Satyanarayana Rao, on behalf of the plaintiffs-respondents that the Full Bench judgment should be read as deciding that a

1. ('28) 10 AIR 1928 Mad 6 : 69 I C 923 : 45 Mad 890 : 48 M L J 264 (F B), Rajah of Ramnad v. Venkatarama Iyer.

2. *Since reported in* ('41) 28 A I R 1941 Mad 149 : 192 I C 469 : (1941) 1 M L J 1 (F B), Lakshmana Iyer v. Aiyasami Chettiar.

3. ('21) 8 AIR 1921 Mad 195: 62 I C 337 : 44 Mad 534 : 40 M L J 218, Midnapore Zamindari Co. Ltd. v. Muthupudayan.

person could not be a defaulter within the meaning of S. 112, unless in addition to being recognized by the landholder as the ryot a patta had been issued to him. There is nothing in the language used in the judgment in that case which justifies such a construction, and, in order to avoid a similar argument being raised again, I, as a member of the Full Bench and as the member who delivered the judgment, desire to say that what was laid down there was that a transferee could be recognised as a ryot without any formality and if he was so recognized he became a defaulter within the meaning of S. 112, irrespective of whether a patta was issued to him or not. In view of the provisions of S. 53, S. 112 could not however be invoked by the landholder unless he had in fact issued a patta to the transferee. It follows from the decision of the Full Bench in A I R 1941 Mad 149[2] that respondent 1 was a defaulter within the meaning of S. 112, but as a patta was not issued to him either by the zamindarini or by appellant 4 as the ijaradar, the sale was unlawful.

But this does not mean that the plaintiffs-respondents were entitled to challenge the validity of the sale in a suit in a civil Court. Section 189 (1) of the Act says that all suits and applications of the nature specified in parts A and B of the schedule can be heard and determined by a Collector or other revenue officer specially authorized under the Act, and no civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made. Clause 12 of Part A relates to a suit "to contest the right of sale of a holding." Therefore a suit to contest the right of sale of a holding can only be brought in a revenue Court. Subsection (3) of S. 189 provides that the decision of a revenue Court or of an appellate or revisional authority in any suit or proceeding under the Act on a matter falling within the exclusive jurisdiction of the revenue Court shall be binding on the parties thereto and persons claiming under them, in any suit or proceeding in a civil Court in which "such matter may be in issue between them." This sub-section does not however detract from the absolute prohibition contained in sub-s. (1). It only means that where a matter has been decided in a revenue Court and the decision there is one of the factors in a civil suit the finding of the revenue Court cannot be questioned and must be taken as conclusive on the particular point at issue in the civil suit. The position then is this. Where notice has been duly served upon a defaulting ryot he must file a suit in a revenue Court within 30 days; otherwise, he will be precluded from challenging the sale on any of the grounds which could be urged in a suit under S. 112. And there is authority of this Court for this assertion.

In 45 Mad 890,[1] the Court had to consider a case where no notice under S. 112 was given to the ryot by the landholder of his intention to sell. There was a complete disregard of the requirements of S. 112 in this respect and it was held that such a case did not come within cl. 12 of Part A of the schedule. Consequently, the civil Court had jurisdiction. The judgment did not go beyond the particular facts of the case and cannot be taken as having any application to a case where the notice was duly served although the question referred to and answered by the Full Bench was very wide. In 53 M L J 222,[4] Jackson J. held that where a ryot, upon whom notice had been served under S. 112, contested the landlord's right of sale on the ground that a patta had not been tendered to him under S. 53 he was bound to bring a suit in the revenue Court as such a suit fell within cl. (12) of Part A of the schedule. The learned Judge rightly pointed out that the decision in 45 Mad 890[1] had here no application. In deciding that the civil Court had no jurisdiction in such a case Jackson J. relied on the decision of this Court in 42 M L J 113,[5] where it was said that the absence of a patta or muchilika would be a ground for a suit before the Collector under the provisions of cl. (12). The latest decision on this question is that given by Venkataramana Rao J. in A I R 1936 Mad 402,[6] where the learned Judge said :

> The correct view in my opinion is that no suit will lie in a civil Court to set aside a sale on any of the grounds which could have been urged to contest the right of sale in a suit under S. 112, whether it relates to jurisdiction or mere irregularity in procedure. But where there is no notice of sale, or where the ground of attack relates only to matters arising out of or consequent on the sale and generally could not be urged in a suit under S. 112, the jurisdiction of the civil Court is not taken away.

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4. ('27) 14 A I R 1927 Mad 713 : 103 I C 851 : 53 M L J 222, Ayya Mudali Velalan v. Sourimuthu Udayan.
5. ('21) 8 A I R 1921 Mad 637 : 69 I C 918 : 42 M L J 113, Irulappan Servai v. Veerappan.
6. ('36) 23 A I R 1936 Mad 402 : 163 I C 463, Raju Goundan v. Kuppu Goundan.

With these observations I am in full agreement. When he was served by appellant 4 with a notice under S. 112 the proper course, if he wished to contest the right of sale of the A schedule lands, was for respondent 1 to file a suit in the revenue Court. The fact that no patta had been issued to him would have entitled him to a decision in his favour. He refrained, however, from taking this course and so far as the A schedule lands are concerned, he cannot challenge the validity of the sale in a civil Court. The sale was held after due compliance with all the procedure contemplated by the Act and must stand, unless the evidence tendered by the plaintiffs-respondents justifies a finding that after the sale had taken place the landholder accepted payment of the arrears and thereby cancelled the sale. Turning now to the B schedule lands, it is accepted that notice was merely served on respondent 1, who was the mortgagee. Neither the pattadar nor his sub-tenants were given any intimation of the intention to sell for default in payment of the rents due. The omission to serve the pattadar brings the case so far as the B schedule lands are concerned directly within the judgment in 45 Mad 890.[1] Therefore the plaintiffs-respondents are in a position to maintain the suit to this extent.

The next question for decision is the effect of S. 6 (6). In my opinion, the right of occupancy referred to in this sub-section is the right of permanent occupancy and anything short of this may be purchased by the ijaradar. The right of permanent occupancy is not the only right of occupancy contemplated by the Act. Section 46 provides the procedure by which a "non-occupancy ryot" of a holding, that is a ryot without a permanent right of occupancy, can, subject to certain exceptions which I shall mention in a moment, convert his interest in the land into a right of permanent occupation for agricultural purposes. He must tender a sum equal to two and a half times the annual rent payable in respect of the land together with the costs of preparing the necessary instrument. If he does so, the landholder must confer upon him a permanent right of occupancy. Exceptions however are made in the cases falling under sub-ss. (4) and (5) of S. 6 and sub-s. (4) of S. 8. Sub-section (4) of S. 6 states that admission to waste land under a contract for the pasturage of cattle and admission to land reserved bona fide by the landholder for forest under a contract for the temporary cultivation with agricultural crops shall not by itself confer upon the person so admitted a permanent right of occupation. Sub-section (5) of that section provides that when a landholer has reclaimed waste land by his own servants or hired labour he may by contract in writing prevent any person from acquiring a permanent right of occupancy in respect of that land during a period of 30 years from the date of the first cultivation after reclamation. Sub-section (4) of S. 8 says that in cases where the interest of the ryot in the holding has passed to the landholder by transfer for valuable consideration before the passing of the Act otherwise than at a sale for arrears of rent, or has passed by inheritance, the landholder shall have the right for a period of 12 years from the passing of the Act of admitting any person to the possession of the land on such terms as may be agreed upon and the person so admitted shall not be entitled during this period to the benefit of S. 46. Therefore, Ss. 6 and 8 when read in conjunction with S. 46 also show that a person may be in lawful possession of ryoti land for purposes of agriculture without having a permanent right of occupation. Section 153 sets out the grounds on which a non-occupancy ryot may be liable to ejectment by a suit in a revenue Court.

Emphasis has been laid by the learned advocate for the plaintiffs-respondents on the fact that in sub-ss. (1), (3), (4) and (5) of S. 6 the words "permanent right of occupancy" are used and that in sub-s. (6) the expression is merely "right of occupancy," but the explanation for this is that sub-s. (6) was taken from the Bengal Tenancy Act, 1885, and the draftsman forgot that he had used the adjective "permanent" in the other sub-sections. Sub-section (3) of S. 23, Bengal Tenancy Act, as it then stood, read :

> A person holding land as an ijaradar or farmer of rents shall not while so holding acquire a right of occupancy in any land comprised in his ijara or farm.

In the Bengal Tenancy Act there is no reference to "permanent occupancy" but only to "right of occupancy," although the right contemplated is a permanent right. The Calcutta High Court has consistently construed S. 23 (3) as not preventing an ijaradar from becoming a purchaser at a sale of an occupancy holding. If he bought at a sale held in default of payment of rent, the occupancy right only ceased and he was entitled to hold the land as a non-occupancy holding, to use the words of Sen J. in 43

C W N 57,[7] which is the most recent case dealing with the subject and in which the earlier cases are referred to. The effect of S.6 (6) of the Madras Act was considered by a Bench of this Court in 59 Mad 779,[8] an appeal under cl. 15 of the Letters Patent preferred against a decree passed by Curgenven J. in a second appeal. Curgenven J. said :

> What happens is that the defaulting tenant loses his holding, in which he held an occupancy right, while the ijaradar acquires the holding, but without acquiring the occupancy right.

This opinion was accepted by the Bench which heard the appeal, and I consider rightly so. Section 130 expressly permits a landholder to bid for or purchase a ryot's holding which is to be put up for sale for arrears of rent. An ijaradar is the landholder for the time being and it is difficult to see why he should be put in a less advantageous position than a permanent landholder when he has had occasion to bring a ryot's holding to sale for default in payment of rent. If a landholder buys his tenant's interest, that is the kudivaram right, his purchase does not change the character of the land from ryoti to non-ryoti. The landholder in such circumstances may cultivate the holding himself, but if he lets it to a tenant for the purposes of cultivation, except in the exceptional cases provided for in the Act, the tenant acquires the right of permanent occupancy. The position will not be changed if an ijaradar purchases. If after his purchase he lets in a tenant during the period of the ijara the tenant will automatically acquire a permanent right of occupancy. If he does not let in a tenant the ijaradar will be left, on the expiration of his lease merely with the right to possession of a non-occupancy ryot. Moreover, to read S. 6 (6) as prohibiting an ijaradar from buying in at a sale might lead to great injustice. There might be no other bidders, either as the result of boycott or lack of interest. Is the ijaradar in such circumstances compelled to leave the defaulting tenant in possession ? The intention of the Legislature could not have been to put an ijaradar in such a disadvantageous position. I have stated what I consider to be the reason why the word "permanent" was omitted from sub-s. (6) of S. 6, and I do not consider that this omission makes any difference. For these reasons I hold that S.6 (6) does not operate as a bar to the ijaradar purchasing at the auction.

The only other question which remains to be considered is that with regard to the finding of the District Judge that the plaintiffs-respondents had falsely claimed to have paid appellant 4 the arrears of rent subsequent to the sale. The District Munsif after a detailed examination of the evidence came to the conclusion that the evidence was true and the District Judge ought not to have reversed this finding without stating his reasons. As he considered that S. 6 (6) decided the appeal he could have abstained from considering any question of fact, but he did not content himself with this and therefore should have examined the evidence fully and stated his reasons for differing from the District Munsif. As the District Judge's judgment stands, this Court has no guidance as to what was in his mind, and as it has become necessary for this Court to decide the question of fact the case will have to be sent back to the District Judge for a statement of his reasons for holding that the evidence adduced by the plaintiffs-respondents on the payment of arrears was false and an afterthought. The District Judge will be directed to submit his reasons to this Court within three weeks. The position may be shortly put in this way. The suit does not lie so far as it challenges the right of sale of the A schedule lands, but it does lie on the question of whether the sale was rendered nugatory by reason of the acceptance of the arrears of rent after the sale. So far as the B schedule lands are concerned, the plaintiffs-respondents are entitled to a declaration that the sale does not affect the position of respondent 1 as a mortgagee. The question of costs will be decided when the case is further considered after the District Judge has submitted his reasons for his finding on the facts.

Venkataramana Rao J.—I agree.

Patanjali Sastri J. — I agree, and have nothing to add.

C.R.K./G.N. *Order accordingly.*

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7. ('38) 25 A I R 1938 Cal 804: 180 I C 278: I L R (1939) 1 Cal 349 : 69 C L J 51 : 43 C W N 57, Midnapore Zamindari Co. Ltd. v. Secy. of State.
8. ('36) 23 A I R 1936 Mad 301 : 164 I C 645 : 59 Mad 779 : 70 M L J 146, Mohamed Gosukani v. Mohamed Sikka Maracayar.

(28) A. I. R. 1941 Madras 546

FULL BENCH

LEACH C. J. KRISHNASWAMI AYYANGAR AND SOMAYYA JJ.

C. Thiruvengada Mudaliar — *Appellant*

v.

M. Rajabathar Mudaliar —

Respondent.

Letters Patent Appeal No. 18 of 1940, Decided on 8th April 1941, against judgment and decree of King J., *Reported in ('40) 27 AIR 1940 Mad 823.*

Religious Endowments Act (1863), Ss. 7 and 12 — Devasthanam Committee created under Act can appoint trustee for term of years — Trustee is not servant of Committee.

The Madras Hindu Devasthanam Committee created under the Act can appoint a trustee for a term of years and is not bound to make the appointment for life. The trustee is not a servant of the Committee : ('21) 8 A I R 1921 Mad 114 and ('15) 2 A I R 1915 Mad 38, *Approved; Case law referred.* [P 547 C 1]

N. Sivaramakrishna Ayyar and A. Venkatasubbu Mudaliar — for Appellant.

N. Srinivasa Ayyangar Amicus Curiæ.

Leach C. J. — This appeal raises the question whether the Madras Hindu Devasthanam Committee created under the Religious Endowments Act, 1863, is bound, in appointing a trustee to make the appointment for life or whether it can make the appointment for a term of years. On 8th March 1929, the Committee appointed the appellant a trustee for life of the Sri Thiruvateeswarar temple in Madras. On 18th November 1935, the Committee appointed the respondent a trustee of the same temple, but limited his appointment to a period of three years. The appellant objected to the respondent entering upon the duties of his office. The reason given was that the appointment to be valid must be for life. On 5th December 1935 the appellant filed in the City Civil Court the suit out of which this appeal arises for a declaration that the respondent's appointment is invalid and for an injunction restraining him from interfering with the appellant's management. The principal City Civil Judge who tried the case held that the Committee had power to appoint the respondent a trustee for a period of three years and dismissed the suit. The appellant appealed to this Court, but without success. The appeal was heard by King J. and the present appeal is from his judgment under Cl. 15, Letters Patent.

For the purpose of appreciating the provisions of the Religious Endowments Act, 1863, it will be useful to refer first to the Madras Endowments and Escheats Regulation, 1817, which governed religious endowments in the Presidency until the passing of the Act of 1863 by the Government of India. Clause 2 of the Regulation vested in the Board of Revenue the general superintendence of all endowments in land or money granted for the support of mosques, Hindu temples or colleges or for other pious and beneficial purposes. Clause 3 declared it to be the duty of the Board to take such measures as might be necessary to ensure that all endowments made for the maintenance of such establishments were duly appropriated to the purpose for which they were destined by the Government or the individuals by whom the endowments were made. To enable the Board the better to carry into effect the duties entrusted to it by the Regulation power was given in cl. 7 to appoint local agents in each zilla. Clause 12 provided that in those cases in which the nomination had usually rested with the Government or with the public officer, or in which no private person might be competent and entitled to make sufficient provision for the succession to the trust and management, it was the duty of the local agents to propose for the approval and confirmation of the board, a person or persons for the charge of trustee, manager or superintendent. On the receipt of the report and information required by cl. 12 the Board was required by cl. 13 either to appoint the person or persons nominated for their approval or to make such other provision for the trust management or superintendence as might seem "right and fit" to them with reference to the nature and conditions of the endowment. Therefore, by virtue of this clause, the Board had full power to make such arrangements as they considered to be necessary for the proper management of the trust.

The Religious Endowments Act, 1863 took away from the Board of Revenue the management of religious endowments and the Provincial Government was directed to appoint one or more Committees in every division or district to take the place and to exercise the powers of the Board and the local agents under the Regulation of 1817. The Provincial Government duly appointed a Committee to function in the city of Madras. Committees were also appointed to function in the mofussil, but only the Madras Committee now exists. So far as the mofussil is concerned, Hindu religious endowments are now governed by the provisions of the Madras Hindu Religious Endowments Act,

1926. Section 9 of the Act of 1863 provides that every member of a Committee appointed under the Act shall hold his office for life unless removed for misconduct or unfitness, but there is no corresponding provision in respect of appointments made by the committee to fill vacant trusteeships. The important section so far as this case is concerned is S. 12, which reads as follows :

Immediately on the appointment of a committee as above provided for, the superintendence of any such mosque, temple or religious establishment, and for the management of its affairs, the Board of Revenue, or the local agents acting under the authority of the said Board shall transfer to such committee all landed or other property which at the time of appointment shall be under the superintendence, or in the possession of the said Board or local agents, and belonging to the said religious establishment, except as is hereinafter provided for, and thereupon the powers and responsibilities of the Board and the local agents, in respect to such mosque, temple or religious establishment, and to all land and other property so transferred, except as above, and except as regards acts done and liabilities incurred by the said Board or agents previous to such transfer, shall cease and determine.

All the powers which might be exercised by any Board or local agent for the recovery of the rent of land or other property transferred under this section may from the date of such transfer be exercised by such committee to whom such transfer is made.

The committee has the same powers as the Board of Revenue had. As we have already indicated, there was nothing in the Regulation of 1817 which restricted the power of the Board of Revenue in respect of the appointment of trustees. On the contrary it was left to do what it considered right and fit. This can only mean that the Board had full power to appoint a trustee for a term of years unless the conditions of the endowment prohibited it or there was some special reason which demanded an appointment for life. The Act of 1863 must be read in conjunction with what went before the Regulation of 1817, and if this is done it will be seen that there is no warrant for the assertion that the Devasthanam Committee of Madras can only appoint trustees for life. The learned advocate for the appellant has however suggested that the decisions of this Court have interpreted the Act differently and therefore it is necessary to examine these decisions.

The first judgment bearing on the question was delivered by Collins C. J., and Parker J. in 1895. This case has not been reported, but an extract from the judgment is given in a footnote to the report in 26 Mad 243.[1] It was said that the trustee or manager was not in the position of a clerk or servant, removable at the pleasure of the Devasthanam Committee and that he held office permanently, though subject to removal for misconduct. Neither in this case nor in any of the subsequent cases was the question now before the Court discussed. It would appear that until recent times it was usual to appoint a trustee without limiting the term of his office, which, of course, meant that he held the office for life. There is no reason to suppose that this was not the position in the case before Collins C. J. and Parker J. In 21 Mad 179[2] Shepherd J. emphasized that a trustee was not a servant of the Devasthanam Committee. He had what may be called "a freehold" in the office, and except for a good cause shown he could not be removed from it. This case was concerned with whether the Devasthanam Committee had acted rightly in dismissing a trustee of a Hindu temple. There was no limitation of the term of his appointment, and in such circumstances the word "freehold" would not perhaps be out of place. The appellant has laid emphasis on the following passage from the judgment of Bhashyam Ayyangar J. in 27 Mad 435[3] :

The religious foundations known as debutter, devasthanams or temples are the most numerous in India and have the largest endowments, especially in the shape of lands, assignment or public revenue and jewellery. These institutions have been established for the spiritual benefit of the Hindu community in general or for that of particular sects or sections thereof. The management of these institutions is vested in one or more persons variously known in this Presidency as dharmakarthas, panchayats, urlans, etc., but referred to in the Religious Endowments Act (20 of 1863) and in judicial decisions as trustees, managers or superintendents. Their office is either hereditary or for life and, as a general rule, they have beneficial interest in the endowments or their income.

Bhashyam Ayyangar J. is here merely giving a general description of religious endowments as he found them, and incidentally refers to the fact that they were under the management of trustees who held their office hereditarily or for life. This statement is true of the conditions then extant, but is not quite an accurate description of things as they now are. The Court was concerned with maths and not temples in that case and was really not called upon to decide, and did not in fact decide whether the temple Committee has the power to make a term appointment.

1. ('08) 26 Mad 243 : 2 Weir 463, Pattikadan Ummaru v. Emperor.

2. ('98) 21 Mad 179, Seshadri Iyengar v. Nataraja Iyer.

3. ('04) 27 Mad 435 : 14 M L J 105, Vidyapurna Thirthaswami v. Vidhyanidhi Thirthaswami.

Another judgment relied upon by the appellant is the one delivered in 29 Mad 534.[4] There the question was whether the temple Committee, Trichinopoly taluk, had power to appoint two additional trustees to take part "temporarily" in the management of the temple. It was held that it had not. The Division Bench which decided this appeal considered that to lay down that the committee had an unqualified power of making temporary appointments would give it a power liable to grave abuse. Such temporary managers would, it was considered, be merely servants removable at the will of the committee, and would serve to give the committee a control over the management inconsistent with the policy of 1863, namely that the actual administration of affairs should be in the hands of the trustees, subject only to the supervision of the Committee. The finding that the committee could not appoint additional trustees is not in accord with subsequent decisions to which reference will be made presently. In 34 Mad 375,[5] 5 M L W 672[6] and in 13 M L W 212[7] the office of trustee was again spoken of as being "freehold," but these decisions cannot be taken as going beyond any of the earlier decisions.

While none of the cases already referred to renders real support for the appellant's case, there are certain decisions of this Court which are distinctly against him. In 38 Mad 1176,[8] a Division Bench of this Court (Sadasiva Iyer and Napier JJ.) held that for the better management of a Hindu temple, a temple committee had power to appoint additional trustees by virtue of the general power of superintendence over temples committed to the committee's care as successors to the Board of Revenue, but this power must be exercised reasonably and in good faith in the interests of the temple. This decision was approved of in 39 Mad 700.[9] In 13 M L W 153,[10] Wallis C. J. and Sadasiva Ayyar J. expressly recognized the power of the committee to appoint a trustee temporarily, although Sadasiva Ayyar J. considered that the appointment should only be made in an emergency. The fact that the Court had recognized the power to make a temporary appointment even although to meet an emergency meant the recognition of a full power in the committee to make suitable arrangements for the management of a religious trust.

Consideration of the authorities reveals no restriction in the power of this Court to interpret the Act of 1863 in accordance with what it considers to be the true intent of that measure and we hold that the Devasthanam Committee of Madras has an unfettered discretion subject to the special conditions of a particular endowment. If it considers that it is better in the interests of a particular trust that an appointment for life should not be made the committee has in the absence of some overriding factor the right of making the appointment for a term of years. And this is in effect the interpretation which the Calcutta High Court gave in 61 Cal 80.[11] The Calcutta High Court, however, was of the opinion that a trustee was a servant of the committee and he could not have a freehold in the office. It has always been the view of the Madras High Court that a trustee is not a servant of the committee and that must now be accepted so far as Madras is concerned. It has been urged that to recognize a right in the Devasthanam Committee of Madras to appoint a trustee for a limited term will result in the committee obtaining actual control over the management of trusts. It must be assumed that the committee will do its duty and if it does there is nothing to be feared. If it does not, the arm of the law is long enough to reach the committee and compel it to do its duty. It may here be pointed out that the Madras Hindu Religious Endowments Act, 1926, recognizes that it is expedient to make limited appointments. Some day perhaps the desirability of having one Act instead of two, governing religious trusts in the presidency, may also be recognized. For these reasons we consider that the case was rightly decided by King J. and the appeal will be dismissed.

4. ('06) 29 Mad 534 : 16 M L J 435 : 1 MLT 127, Ganapathi Iyer v. Vedavyasa Alasinga Bhattar.
5. ('11) 34 Mad 375 : 10 I C 301 : 21 M L J 305 : (1911) 1 MWN 304, Venkatachala Pillai v. Taluk Board, Saidapet.
6. ('18) 5 A I R 1918 Mad 816 : 38 I C 695 : 5 M L W 672, Sundararama Sastri v. Anantha-krishna Naidu.
7. ('21) 8 A I R 1921 Mad 511 : 61 I C 741 : 13 M L W 212, Sundaresa Gurukkal v. Subramania Mudali.
8. ('15) 2 A I R 1915 Mad 38 : 25 IC 965 : 38 Mad 1176 : 28 M L J 209, Thiruvengathaiangar v. Ponnappaiengar.
9. ('17) 4 A I R 1917 Mad 551 : 32 I C 211 : 30 M L J 29 : 39 Mad 700, Sitharama Chetti v. Subramania Iyer.
10. ('21) 8 A I R 1921 Mad 114 : 61 I C 783 : 13 M L W 153, Govindaraja Mudaliar v. Sabapathi Mudaliar.
11. ('34) 21 A I R 1934 Cal 328 : 149 I C 1215 : 61 Cal 80 : 58 C L J 333 : 38 C W N 214, Golam Hossain v. Altaf Hossain.

We thank Mr. N. Srinivasa Ayyangar for having acted as *amicus curiæ*. The Court has received great assistance from him and from Mr. N. Sivaramakrishna Ayyar who appeared on behalf of the appellant.

C.R.K./G.N. *Appeal dismissed.*

*** (28) A. I. R. 1941 Madras 549**

LEACH C. J. AND
KRISHNASWAMI AYYANGAR J.

Cheriyath Manayil Paru Amma and another — Appellants

v.

Kannamot Kelu Kurup — Respondent.

Letters Patent Appeal No. 68 of 1939, Decided on 12th November 1940, against judgment and decree of Patanjali Sastri J., *Reported in ('40) 27 A I R 1940 Mad 686.*

* Transfer of Property Act (1882), Ss. 76 (h) and 77—Mortgage of lessee's interest in land—Mortgage deed providing that mortgagee should retain possession and enjoy profits in lieu of interest, pay rent to lessor and at end of three years return possession to mortgagor merely on repayment of principal amount — Suit for redemption by mortgagor — He is not entitled to credit for unpaid rents : (1940) 1 M L J 693 = ('40) 27 A I R 1940 Mad 686, *REVERSED.*

A lessee mortgaged his interest by a mortgage deed which provided that the mortgagee should remain in possession of the property and enjoy the profits in lieu of interest, but he was to pay the rent due to the lessor. At the end of the three years the mortgagor was to regain possession of the property merely on the repayment of the principal amount. The mortgagee did not pay the rents but the lessor allowed the rent to fall into arrears:

Held that the effect of the document was to take the mortgage entirely out of the purview of S. 76(h) and as the lessor did not insist on the payment of the rent his inaction enured to the benefit of the mortgagee, not of the mortgagor. Hence, in a suit for redemption the mortgagor was not entitled to credit for the unpaid rents by virtue of the provisions of S. 76 (h): (1940) 1 M L J 693 = ('40) 27 A I R 1940 Mad 686, *REVERSED*; ('30) 17 A I R 1930 Mad 160, *Expl., and Disting.* [P 549 C 2; P 550 C 1, 2]

K. P. Ramakrishna Iyer — for Appellants.

P. Govinda Menon, C. S. Krishnamurthi Iyer, C. M. Balakrishnan and V. P. K. Nambiar — for Respondent.

Leach C. J.—This appeal arises out of a suit for the redemption of a usufructuary mortgage created on 25th January 1894 by the respondent's predecessor-in-title in favour of the appellant's predecessor-in-title. The respondent's predecessor-in-title was the lessee of certain agricultural lands situate in the district of North Malabar. The mortgage was of the lessee's interest in the land. The sum advanced by the mortgagee was Rs. 164 which was to be repaid at the end of three years. The deed provided that the mortgagee should remain in possession of the property and enjoy the profits in lieu of interest, but he was to pay the rent due to the lessor. At the end of the three years the mortgagor was to regain possession of the property merely on the repayment of the principal amount of Rs. 164. The lessor appears to have been a most complacent landlord because he allowed the rent to fall into arrears for 17 years, but then he filed a suit for the recovery of the possession of the property and the amount of the arrears, making both the mortgagor and the mortgagee parties. On 18th April 1910, a decree was passed in his favour, but he made no attempt to execute it, and as the result of his inaction he lost all right to the property and to the arrears of rent.

In 1933 the respondent as the representative in interest of the mortgagor, filed the present suit for redemption of the mortgage and he claimed to be entitled also to the amount which the mortgagee ought to have paid to the lessor by way of rent. He maintained that an account should be taken of the rents which had not been paid and that the amount found should be set off against the mortgage loan; any balance in his favour to be paid to him. In other words, he claimed that he was entitled to a decree for redemption with an order for a monetary payment in his favour. The District Munsif held that the appellant should give credit to the respondent for all the moneys he ought to have paid by way of rent during the 17 years but failed to pay, and granted a decree for redemption on this basis. The appellant appealed to the District Judge of North Malabar, who reversed the decision of the District Munsif. On appeal to this Court by the respondent, Patanjali Sastri J. restored the decision of the District Munsif, but granted a certificate permitting of the present appeal under cl. 15, Letters Patent.

The learned Judge considered that the respondent was entitled to credit for the unpaid rents by virtue of the provisions of S. 76 (h), T. P. Act, there being in his opinion no contract to the contrary within the meaning of S. 77. Section 76 states what shall happen when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property. Clause (h) of the section provides that the mortgagee's receipts from the mortgaged property shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and other expenses mentioned in cls. (c) and (d) and interest thereon, be debited against him

in reduction of the amount, if any, from time to time, due to him on account of interest, the balance being applied in reduction or discharge of the mortgage money. If there is any surplus it is to be paid over to the mortgagor. Section 77 states that nothing in S. 76, clauses (b), (d), (g) and (h) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of interest and defined portions of the principal. We are unable to accept the opinion of the learned Judge that the contract does not deprive the mortgagor of the benefit of cl. (h) of S. 76. In our opinion the mortgage deed allowed the mortgagee to go into possession and make what he could out of the property, subject to meeting the landlord's demands for rent and the right of the mortgagor at the end of the period to redeem on payment of the bare amount of principal. We consider that the effect of the document is to take the mortgage entirely out of the purview of S. 76 (h) and as the lessor did not insist on the payment of the rent his inaction enured to the benefit of the mortgagee, not of the mortgagor.

The learned Judge placed great reliance on the decision of this Court, in 57 M L J 800,[1] but we can see nothing in common in the two cases. In 57 M L J 800,[1] there was a usufructuary mortgage and it was calculated that the annual profits from the land would be Rupees 240. The deed provided that the mortgagee should pay annually Rs. 100 for revenue and village expenses, retain Rs. 80 on account of the mortgage debt and pay the balance of Rs. 60 to the mortgagor. The deed also provided that if the lender failed to pay the Rs. 60 he was bound to relinquish a proportionate part of the land. The mortgagee failed to pay the Rs. 60 annually to the mortgagor and it was held that the mortgagor was entitled to be given credit for the total amount which he ought to have received. Clearly, the mortgagor was entitled to be credited with the sums which the mortgagee ought to have paid him when it was being calculated what the mortgagor owed the mortgagee. In the course of the judgment the following observations were made:

> Let us suppose that the revenue on this land had been remitted by the zamindar and the sum representing that revenue had annually been left in the hands of the defendant. Can it be successfully maintained that it is not a part of the usufruct, which the mortgagee was bound to adjust against the mortgage debt? Clearly not. The same principle applies to the facts of the case.

The learned Judge has expressed the opinion that this passage puts in substance the position in the present case, but again we are unable to agree. The passage just quoted would have application if there were not a contract to the contrary within the meaning of S. 77, but there is a contract to the contrary in this case and that makes all the difference. For the reasons indicated we allow the appeal with costs throughout.

C.R.K./D.S. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 550

WADSWORTH J.

Kallam Narasareddi and another — *Petitioners*

v.

Thummuru Ranga Reddi—*Respondent.*

Civil Revn. Petn. No. 1894 of 1939, Decided on 18th December 1940, to revise order of Sub-Judge, Guntur, D/- 31st March 1939.

Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl.—Suit pronote for Rs. 391-15-1 executed on 1st July 1933 in renewal of earlier pronote for Rs. 255-15-0—Payment of Rs. 26-5-2 towards interest and Rs. 110-2-10 towards principal on 4th September 1934—Aforesaid appropriations held could not be undone—Principal of renewed pro-note being Rs. 255-15-0 interest outstanding on 1st October 1937 held could be cancelled under S. 8, Expln.

On 1st July 1933 the debtor executed the suit promissory note for Rs. 391-15-1 which was in renewal of an earlier promissory note for Rs. 255-15-0. On 4th September 1934 the debtor made a payment of Rs. 26-5-2 towards the interest and Rs. 110-2-10 towards the principal of the suit promissory note. The plaint was filed on 4th September 1937 :

Held that the appropriations made on 4th September 1934 could not be undone, with the result that as on that date the principal of the suit note was reduced to Rs. 281-12-3 made up of Rs. 255-15-0 being the principal originally advanced and Rs. 25-13-3 interest. Consequently the principal of the renewed promissory note being Rs. 255-15-0 the interest outstanding on 1st October 1937 could be cancelled under S. 8, Expln. [P 551 C 1]

V. Subramaniam — for Petitioners.

K. Kameswara Rao—for Respondent.

Order. — On 1st July 1933 the petitioner executed the suit promissory note for Rs. 391-15-1 which was in renewal of an earlier promissory note for Rs. 255-15-0. On 4th September 1934 the petitioner made a payment of Rs. 26-5-2 towards the interest and

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1. ('30) 17 AIR 1930 Mad 160 : 124 I C 282 : 57 M L J 800, Seshayya v. D. Lakshminarasima Rao Pantulu.

Rs. 110-2-10 towards the principal of the suit promissory note. The plaint was filed on 4th September 1937. On the basis of the Bench decisions the appropriations made on 4th September 1934 cannot be undone. The result is that as on this date the principal of the suit note is reduced to Rs. 281-12-3. This principal is made up of Rs. 255-15-0 being the principal originally advanced and Rs. 25-13-3 interest. Under S. 8 (explanation) of Act IV of 1938 the principal of the renewed promissory note will be Rs. 255-15-0 and the interest outstanding on 1st October 1937 will be cancelled. It is not possible for the defendants to prove either that the appropriation towards the principal of the suit note was really towards that portion of the principal which consisted of the original principal, or that there was a sum in excess of Rs. 25-13-3 and subsequent interest outstanding towards interest as on 1st October 1937. The decision of the lower Court is correct and the revision petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 551

HORWILL J.

Crown Prosecutor — Appellant

v.

Gopal alias Malayathan — Accused — Respondent.

Criminal Appeal No. 760 of 1940, Decided on 21st January 1941, against acquittal by Special Honorary Presidency Magistrate, George Town, Madras, in C. C. No. 2541 of 1940.

Evidence Act (1872), S. 45 — Court is not bound to accept expert's evidence — House broken into—On broken glass panes some finger impressions found—Expert testifying impressions on glass to be those of accused's two fingers—Expert not asked reasons for his opinion—Magistrate not being satisfied with expert's evidence giving accused benefit of doubt —Acquittal held justified—Appellate Court held would not interfere merely because Magistrate might have adopted sounder procedure—Magistrate held should ask Expert reasons for his opinion and then express his opinion.

A house was broken into and in the process some panes of glass were broken on which some impressions of fingers were found. These were photographed and magnified and sent to the Finger Print Bureau. The accused was arrested on suspicion and the impression of all his fingers were taken. They were compared by an expert of the bureau, who gave evidence to the effect that the impressions found on the glass were those of two of the fingers of the accused. The Magistrate declared himself not satisfied by this evidence and gave the accused the benefit of the doubt:

Held that the Court was not bound to accept the evidence of an expert even though there were no special reasons for not accepting it; and it was certainly proper for the Magistrate to satisfy himself by personal examination that the finger impressions of the accused and of those on the broken glass were identical. Even though he did not feel himself to be expert, yet he was bound, unless he was himself satisfied that the expert's evidence was correct, to acquit the accused. [P 551 C 2]

Held further that as the Magistrate did compare the impressions the appellate Court should not set aside the acquittal merely because the Magistrate might have adopted a sounder procedure. [P 551 C 2]

Held also that while dealing with the evidence of an expert witness the Court should ask the expert to explain in Court the reasons for his opinion. It is only after hearing those reasons in detail that the Magistrate should express his opinion whether or no the expert's opinion is satisfactory. [P 552 C 1]

Appellant in person.

N. T. Raghunathan — for Respondent.

Judgment. — The house of P. W. 4 was broken into and in the process some panes of glass were broken. The only clue that the investigating officer was able to obtain was that on the broken panes of glass there were some impressions of fingers. These were photographed and magnified and sent to the Finger Print Bureau. The accused was arrested on suspicion and the impressions of all his fingers were taken. They were compared by an expert of the bureau (P. W. 1), who has given evidence to the effect that the impressions found on the glass were those of two of the fingers, namely, the left index finger and the left ring finger of the accused. The Special Honorary Presidency Magistrate declared himself not satisfied by this evidence and gave the accused the benefit of the doubt. The Crown has appealed against this decision. The Court is not bound to accept the evidence of an expert even though there are no special reasons for not accepting it; and it was certainly proper on the part of the Magistrate to satisfy himself by personal examination that the impressions of the accused and of those on the broken glass were identical. Even though he did not feel himself to be expert, yet he was bound, unless he was himself satisfied that the expert's evidence was correct, to acquit the accused. As the learned Magistrate did compare the impressions, I do not think this Court should set aside the acquittal merely because the learned Magistrate might have adopted a sounder procedure.

One of the impressions found on the glass was a fairly good one, but the other was somewhat blurred; and it was probably difficult for the learned Magistrate to com-

pare all the points made by the expert merely with aid of the notes. What he should have done was to have asked the expert in Court to elucidate his notes and to point out in the two impressions the points of identity which he had found. The expert filed his notes with his evidence and he has pointed out no less than eleven points of identity with regard to one impression and ten points with regard to the other. If these points of identity really do exist, then there can be no doubt that the expert satisfactorily proved that the impressions on the glass were those of the accused. Unfortunately, the expert had no opportunity of explaining to the Magistrate. The Magistrate let him leave the box without questioning him with regard to any single point of his evidence. Although I am not interfering with the order of acquittal, I would like to express a hope that the learned Magistrate, if he has to deal with the evidence of an expert witness in future, he will take the pains to have the expert explain in Court the reasons for his opinion. It is only after hearing those reasons in detail that the Magistrate would be in a position to express a sound opinion whether or no the expert's opinion is satisfactory. The appeal is dismissed.

C.R.K./G.N. *Appeal dismissed.*

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* (28) A. I. R. 1941 Madras 552

VENKATARAMANA RAO J.

Janaki Ammal — Appellant

v.

Sanjeevi Chettiar and others — Respondents.

Second Appeal No. 987 of 1937, Decided on 30th September 1940, against decree of Subordinate Judge, Trichinopoly, in A. S. No. 70 of 1936.

*** Trust — Office of trustee — Alienation of— Validity.**

An alienation or release or renunciation of an office of a trustee not for value in favour of the next or immediate heir is valid; otherwise it is invalid: ('19) 6 A I R 1919 Mad 570; 15 Mad 183 and ('31) 18 A I R 1931 Mad 505, *Rel. on;* ('35) 22 I R 1935 Mad 220 and ('36) 23 A I R 1936 Mad 294, *Disting.;* 6 Bom 298, *Not approved;* ('31) 18 A I R 1931 Cal 776, *Approved;* 19 Mad 211, *Expl. and Approved;* 6 Mad 76, *Expl.* [P 556 C 1]

K. V. Srinivasa Iyengar — for Appellant.

A. V. Narayanaswami Ayyar—for Respondents.

Judgment. — The question for decision in this second appeal is whether a deed of release, EX. B in and by which the husband of defendant 4, one Pattabhirama Chetti, relinquished his right to the management of the temple of Sri Anjaneyaswami described in SCH. A to the plaint in favour of his brother Sanjeevi Chetti is valid. The learned District Munsif was of the opinion that it was invalid; the learned Subordinate Judge took a different view. It is against this decision that the present appeal has been preferred by defendant 4. It is necessary to set out a few facts. The said Anjaneyaswami temple was founded by the plaintiff's father Singaperumal Chetti, defendant 1's grandfather Thiruvengadam Chetti and the father of defendants 2 and 3, Muthukrishna Chetti. They were members of an undivided Hindu family. They also made certain endowments for the due administration of the said temple. On 15th June 1887 they became divided and entered into an arrangement by which all the family property they were possessed of including the right to the management of the temple and its properties was divided among themselves in accordance with the decision of the panchayatdars who were appointed by them to effect the said division. The arrangement is embodied in EX. A. So far as the management of the temple and its properties is concerned, the arrangement is set out thus:

That Thiruvengadam Chetti, the eldest member shall be in management of the aforesaid temple and the properties for a period of two years from the 1st Ani of Sarvajit year corresponding to 13th June 1887, that from the 1st Ani of the third year next the said Singaperumal Chetti shall be in management for a period of one year and that from the 1st Ani of the next year Muthukrishna Chetti shall be in management till the end of a period of one year and thus they shall be managers by rotation and conduct the charities of the said temple, that when the management changes hands from one sharer to the other sharer, the outgoing manager shall hand over possession of the moveable properties of the said temple such as jewels, vessels, etc., and also the fund and lands to the incoming manager and that he shall hand over possession of these things along with an account relating to the profits and expenses of the previous years. In this manner the aforesaid three parties and those persons succeeding them respectively by hereditary right shall be managers by rotation.

The arrangement was acted on, and the property was managed in rotation by the parties and their sons. Muthukrishna Chetti died leaving him surviving his two sons Pattabhirama Chetti, husband of defendant 4, and Sanjeevi Chetti, the plaintiff herein. Pattabhirama Chetti and Sanjeevi Chetti became divided on 31st January 1915 and in regard to their turns of management they came to an arrangement by which each of the brothers should manage the property

for a period of six months. Thus, even this right of management was divided between the brothers. Pattabhirama Chetti and Sanjeevi Chetti managed the temple by turns in accordance with the arrangement and on 7th July 1926, Pattabhirama Chetti executed a deed of release the validity of which is now in question in favour of Sanjeevi Chetti, the plaintiff and the operative portion of the said release runs thus :

> We both effected division on 31st January 1915 and as regards the rotation management which we both made for one year out of four years in the said temple, each of us looks after the same for six months according to the turn of each; and as I have no male issue, as I am suffering from diabetes, heart trouble and other trouble—some diseases and have become bodily weak and am quite infirm, as I am afraid of death at any moment and as you yourself are my future heir and brother, I have hereby released to you my six months rotation, hereditary management right, in the said temple; and hence along with your six months' rotation—management right—you and your heirs shall hereditarily and absolutely manage the entire one year's rotation—management right—of our family inclusive of my six months' right .... Hereafter, I and my heirs have no right or claim whatsoever in respect of the right of management to the temple or its properties.

Apparently this too was given effect to for some time but later its validity was questioned by the widow and defendant 1 refused to recognise the plaintiff's sole right to manage the property during the turn of management of Muthukrishna Chetti's branch of the family. Hence, the plaintiff has filed the suit for a declaration that he is entitled solely to manage the temple for a period of one year in every four years according to Ex. A by virtue of the said deed of release executed by his brother and for a permanent injunction restraining the defendants from interfering with the plaintiff's management of the trust during his turn of office. If the deed of release is valid he is bound to succeed in the suit or else he fails. The question therefore is whether it is valid. It will be seen from Ex. A that it provides a distinct rule of succession namely that the parties to the deed and their successors shall be managers by rotation. Prima facie therefore the deed of release contravenes the rule of succession and therefore is invalid. But it is contended that a renunciation of the right of management in favour of a person who is in the line of heirs is valid and that Sanjeevi Chetti being in the line of heirs, the release is valid though it may operate to defeat the right of the next heir, namely the widow and this is the view taken by the lower Court. In support of this view, reliance was mainly placed on a decision of the Bombay High Court in 6 Bom 298,[1] a decision of Varadachariar J. in 68 M L J 295=1935 M W N 59[2] and a decision of mine reported in 70 M L J 424=1936 M W N 585.[3] So far as my decision is concerned, I may at once state that I had not to consider this question in that case. The question there was whether a certain partition arrangement among the members of a family with reference to the trusteeship of a temple was valid. I referred to 6 Bom 298[1] and 68 M L J 295[2] to illustrate that usage was resorted to for supporting an alienation under certain conditions.

There can be no doubt that an alienation of the office of trustee of a temple, whether public or private, is invalid, though as pointed out in 23 Bom 131[4] by force of custom alienation was permitted under certain conditions: 68 M L J 295[2] is an instance in point and I shall discuss this decision later. In 6 Bom 298[1] an alienation by will in favour of a person who was not the immediate heir was upheld. I shall also discuss how far the view expressed in it is correct. It is settled by a uniform course of decisions that an alienation for value in favour of a stranger is invalid. But the question has arisen whether an alienation by a person in favour of a heir either next or remote is not valid. The question again would be whether such an alienation is for value or no consideration: the better and sounder view is that if for value it is invalid. In 6 Bom 298[1] what happened was this. Two brothers were jointly entitled to an office and each was enjoying severally by rotation. One of the brothers made a will bequeathing his right to the office in favour of his sister's son. The bequest was held to be valid. Melvill J. relied on the decision in 6 Bom H C R A C 250[5] particularly on the following observation referring to the facts of that case :

> In this case the purchasers were grandchildren, who would eventually succeed to the office as heirs and the grandfather did nothing more than relinquish his right in their favour. There have been previous dealings with this office of a somewhat similar nature, which is some evidence of a usage justifying the alienation in the present case.

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1. ('81) 6 Bom 298, Mancharam v. Pranshankar.
2. ('35) 22 A I R 1935 Mad 220 : 157 I C 547 : 68 M L J 295: 1935 M W N 59, Prayagdossjee Varu v. Gobindacharlu.
3. ('36) 23 A I R 1936 Mad 294 : 164 I C 82 : 70 M L J 424 : 1936 M W N 585, Alasinga Bhattar v. Venkatasudarsana Bhattar.
4. ('99) 23 Bom 131, Rajaram v. Ganesh.
5. ('69) 6 Bom H C R A C 250, Sitaram Bhat v. Sitaram Ganesh.

After referring to this observation Melvill J. observed:

> We do not think that there is much difference, in principle, between the case just cited and that now before us, though the endowment in the present case is of too recent a foundation to render any evidence of usage possible. In both cases the purchasers are persons standing in the line of succession, and claiming through females; and though in the present case the purchaser is not the next heir but only a possible heir for he is Ganpatram's sister's son, and therefore a bandhu, if not a sapinda—yet the next heir, Ganpatram's widow, has expressed her acquiescence in the bequest to the plaintiff.

The learned Judge concluded by the following observation:

> In the absence of a restriction to a particular class of heirs, imposed either by the founder or by usage there would appear to be no reason why an alienation should not be upheld, which is made in favour of any person, standing in the line of succession, and not disqualified by any personal unfitness.

It will be seen from this judgment that reliance was placed by Melvill J. on 6 Bom H C R A C 250,[5] which itself is founded on the usage governing a particular office. Again, in the case which the learned Judge was deciding, he relies also on the acquiescence of Ganpatram's widow and whether Ganpatram's sister's son was the next immediate heir after the widow or not it is not clear, in which case the decision can be supported on the ground that Ganpatram's widow would be deemed to have disclaimed and that therefore the alienation in favour of Ganpatram's sister's son would be taken to be an alienation in favour of the next heir. So far as the actual decision on the facts is concerned, it may be possible to support the view of Melvill J. either on the ground of the custom or on the ground of the alienation being in favour of the next heir. But what is relevant for the purpose of this case is the observation in the concluding portion of the judgment which I have just given. It seems to me that an alienation in favour of a person who is not the next heir would be contravening the intention of the founder if there is a deed which says that the office should be enjoyed by a trustee and his heirs. An alienation in favour of the next heir, if not for consideration, can be supported and is generally supported on the ground that it operates as a renunciation by the person making it of the office, and that the renunciation would in effect operate as a civil death just as in the case of a Hindu widow by a surrender accelerating the succession and the next heir in whose favour the alienation is made will be succeeding him in the office. In 35 C W N 768,[6] Suhrawardy J. took this view with which I agree. In the course of the judgment he observed thus:

> A holder of a life estate is entitled to accelerate succession by relinquishing his right in favour of the reversioner. This is the settled law in the case of a Hindu widow qualified by the condition that the relinquishment must be of the entire estate. The same view may legitimately be adopted in the case of a shebait who is the manager for life of an endowment and there is no violation of any principle of law in holding that such a manager is entitled to accelerate the succession of his successors in office by relinquishing or resigning the office.

In Mr. Ganapathi Iyer's book on Religious Endowments at p. 556, I find the following passage:

> The same considerations which may apply to gifts in favour of the next heir will not apply to gifts in favour of a person who though a member of the family is not the next or immediate heir. In the latter case the gift in effect contravenes the intentions of the founder. If the office is hereditary, the founder whose right it is to make rules has prescribed a course of succession, and it is contravening the course of succession pointed out by the founder if we uphold a gift to a member of the family who may be remotely connected as a Samanodaka or a Bhandhu.

I would adopt this reasoning as sound in principle. Once it is held that a transfer can be in the line of heirs, it would depend on the caprice of the last holder and he can disinherit the next heir however fit he may be, thus frustrating the intention of the founder. In 15 Mad 183[7] the question directly arose for decision. In that case there was an alienation by the last holder of an office in favour of the plaintiff's father. The learned Judges called for a finding whether the plaintiff's father was the next heir; if next, whether he was the sole heir. The finding was that the plaintiff's father was not the sole next heir because he had three brothers. They held that the alienation was invalid. Muthuswami Iyer and Shepherd JJ. made the following observations:

> Unless the alienee is the sole heir the alienor might be under the temptation to make the office the subject of bargain and thereby defeat the intention of the founder. It was in this view that we called for a finding at the former hearing. We are not prepared to dissent from the dictum above quoted, and to hold that in the absence of special usage an alienation would be valid if made in favour of any person other than the sole immediate heir.

Therefore the decision is direct authority for the view that an alienation of the office of a trustee in order to be valid must be in favour of the sole immediate heir. Though

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6. ('31) 18 AIR 1931 Cal 776 : 135 I C 273 : 54 C L J 544 : 35 C W N 768, Girischandra Sau v. Upendra Nath Giridas.
7. ('92) 15 Mad 183 : 2 M L J 19, Narayana v. Ranga.

the alienation was for value, the decision was rested on this ground. This was also the view taken by Phillips and Kumaraswami Sastri JJ. in 51 I C 979.[8] They seem to regard 6 Bom 298[1] as relating to a transfer to one next in the line of succession. In A I R 1931 Mad 505,[9] Madhavan Nair J. followed 15 Mad 183[7] and referred to that decision as enunciating the proposition that in the absence of a special usage the alienation of a religious office would not be valid if made in favour of any person other than the sole immediate heir. Then he dealt with the decision in 6 Bom 298[1] thus :

> The decision in 6 Bom 298[1] relied on by the appellants in support of the general proposition is accepted by this Court only for the view that a transfer to one next in the line of succession may be held to be valid : *see* 51 I C 979.[8]

The learned Judge decided against the validity of the transfer in the case with which he was dealing on the ground that the plaintiffs in whose favour the alienation was made were not the immediate heirs next in the line of succession. In 68 M L J 295,[2] Varadachariar J. was dealing with an alienation of the office of archaka by the last holder of the office in favour of his sister's son. The learned Judge adverted to several considerations for supporting the alienation. On p. 304 he says the case of an alienation of the office of archaka must be viewed differently from a bare transfer of a trustee's office. After referring to 1 Mad 235,[10] where their Lordships of the Privy Council refer to the doctrine of *delegatus non potest delegare* and the possibility that the recognition of a right of transfer may defeat the presumed intention of the founder of the endowment, the learned Judge remarks thus :

> These two considerations have greater relevancy to cases where the trustee's office is sought to be alienated than to transfers of archakaship; indeed, in the case of archakas, the right of delegation has been expressly recognized by permitting the system of proxies.

Then referring to the observation of Ranade J. in 23 Bom 131[4] that "by force of custom a limited right of partition and alienation might be established," the learned Judge again remarks : "This observation would suggest that custom must be invoked to justify alienation." After indicating these views in support of the alienation in question before him, he concludes thus :

> In this state of the authorities we think that in the circumstances of this case, our decision may be rested on a narrow ground. The facts here are almost ad idem with those in 6 Bom 298[1] and we have not been referred to any reported case where this decision has been dissented from on similar facts.

Then he referred to the cases in 6 Mad 76,[11] 15 Mad 183,[7] 19 Mad 211,[12] 38 Mad 850[13] and 36 M L J 355[8] and observed :

> This Court merely refused to apply the principle in 6 Bom 298[1] to transfers for value or to transfers in favour of strangers. This does not seem to require or justify our refusing to follow the decision in 6 Bom 298[1] even when the alienation is to one in the line of heirs, is not for consideration, and is not in any way opposed to or inconsistent with the interests of the institution.

Ultimately the learned Judge held that the custom of the institution was established in favour of the alienation in question. So far as the interpretation placed by the learned Judges on the Madras decisions is concerned, it seems to me, if I may say so with respect, that it is not accurate. In 15 Mad 183,[7] as I have already pointed out, the view taken was that an alienation could be upheld only in favour of the immediate heir and not to one in the line of heirs. In 6 Mad 76[11] the learned Judges expressly left open this question because referring to 6 Bom 298[1] they made the following observation :

> It is not necessary for us to determine in this case whether we should be disposed to go the length of what is decided in 6 Bom 298,[1] that a purchase by a person standing in the line of heirs or otherwise qualified should be upheld.

In 19 Mad 211[12] the learned Judges were inclined to accept the view taken in 15 Mad 183[7] because in the course of the judgment they referred to 15 Mad 183[7] with approval thus :

> It is clearly intended that the brothers other than the plaintiff shall divest themselves altogether of all right of control over the choultry. For the future it was intended that the right of management should devolve in the line of the plaintiff and his heirs to the exclusion of his brothers. In our opinion it makes no difference that the alienee is a member of the same family : *vide* 6 Mad 76[11] and 15 Mad 183.[7] We think the subordinate Judge was right in holding the alienation to be invalid.

No doubt the alienations in those cases were for value but the decisions were not put on that ground. The decision in 68 M L J 295[2] can be distinguished on the ground that

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8. ('19) 6 AIR 1919 Mad 570 : 51 I C 979 : 36 M L J 355, Rajam Bhattar v. Singarammal.
9. ('31) 18 AIR 1931 Mad 505 : 133 I C 198, Muthukumaraswami Pillai v. Subbaraya Pillai.
10. ('76) 1 Mad 235 : 4 I A 76 : 3 Sar 687 (P C), Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutti.
11. ('83) 6 Mad 76, Kuppa Gurukkal v. Doraisami.
12. ('96) 19 Mad 211, Alagappa Mudaliar v. Sivaramasundara Mudaliar.
13. ('15) 2 AIR 1915 Mad 561 : 23 I C 72 : 38 Mad 850 : 26 M L J 315, Sundarambal Ammal v. Y. Gurukkal.

there was a finding that a custom in support of the alienation in question was established and that it was a case of the office of archaka which according to Varadachariar J. ought to be viewed differently from the office of a bare trustee. In dealing with 35 Cal 226[14] the learned Judge observes thus:

> Cases where the hereditary office involves considerable beneficial interest cannot be put on the same footing as bare trusts for all purposes.

The present case is a case of a bare trust. It will also be seen that Varadachariar J. does not refer to the decision in 51 I C 979[8] or in A I R 1931 Mad 505.[9] It seems to me that on principle the view enunciated in 15 Mad 183[7] and followed in 51 I C 979[8] and A I R 1931 Mad 505[9] is sound. I would therefore hold that an alienation or release or renunciation of an office of a trustee not for value in favour of the next or immediate heir is valid: otherwise it is invalid. In this case the renunciation was made by Pattabhirama Chetti in favour of his brother on the assumption that he was the next heir. As the renunciation was not in favour of the next heir, the widow, the release must be deemed to be invalid. I therefore reverse the decision of the lower appellate Court. I direct each party to bear his own costs throughout. Leave to appeal is refused.

C.R.K./G.N. *Appeal allowed.*

14. ('08) 35 Cal 226 : 7 C L J 315 : 12 C W N 323, Rajeswar Mullick v. Gopeshwar Mullick.

(28) A. I. R. 1941 Madras 556

WADSWORTH AND PATANJALI SASTRI JJ.

Nagasundaram Pillai — *Appellant*

v.

Mathurbootham Ayyar — *Respondent.*

Appeal No. 99 of 1940, Decided on 25th November 1940, against order of Sub-Judge, Trichinopoly, D/- 29th November 1939.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 19 and 20—Application by judgment-debtor for stay or scaling down debt— There is no obligation on other agriculturist co-judgment-debtors to join in aforesaid application — They can move separately under S. 19 or S. 20.

There is nothing in S. 19 or S. 20 which compels all co-judgment-debtors who have claims as agriculturists to join in an application for stay or for scaling down filed by any other judgment-debtor. There is no obligation upon a judgment-debtor to file his application as part of the proceedings initiated by his co-judgment-debtors. His failure to do so does not preclude him from moving under S. 19 or S. 20 : ('39) 26 AIR 1939 Mad 500, *Disting.*

[P 556 C 2]

A. V. Narayanaswamy Iyer — for Appellant.

K. V. Sesha Ayyangar — for Respondent.

Wadsworth J. — In the light of the subsequent events this appeal is now only of importance so far as the question of costs is concerned. The appellant was defendant 2 in a suit on a mortgage. The mortgage was executed by an individual of whom the appellant is one of the heirs. After the decree there were two applications to scale down the decree under S. 19 of the Madras Act, 4 of 1938, one by defendant 9, a stranger, and the other by defendant 4 who is a co-heir with the appellant, but not a coparcener. There was a dispute as to whether the appellant was or was not duly served with notice of these applications. For the sake of argument we will assume that he was served. The lower Court has held, quoting the decision in 49 M L W 620,[1] that the appellant cannot move under S. 20 of the Act by reason of his failure to apply for scaling down at the time when the other co-defendants filed applications. It seems to us that this conclusion cannot be supported with reference to the terms of the Act. The decision quoted in 49 M L W 620[1] relates to quite different facts, viz., the case of successive applications by members of the same joint family which was the judgment-debtor. There is nothing in S. 19 or S. 20 which compels all co-judgment-debtors who have claims as agriculturists to join in an application for stay or for scaling down filed by any other judgment-debtor. It is quite possible that the case of the appellant may be totally different on the facts and evidence from the cases of defendants 4 and 10. There was, in our opinion, no obligation upon him to file his application as part of the proceedings initiated by his co-defendants. The decision of the lower Court is therefore erroneous. However, since that decision was passed the lower Court has entertained an application by the appellant for scaling down the decree under S. 19 and the decree has been scaled down in his favour. There is therefore no longer any necessity to stay the execution. In the result therefore the appeal is dismissed. But the respondent will pay the costs of the appellant here and in the Court below.

C.R.K./G.N. *Appeal dismissed.*

1. ('39) 26 AIR 1939 Mad 500 : 183 I C 865 : I L R (1939) Mad 530 : (1939) 1 M L J 888 : 49 M L W 620, Gajagopi Reddi v. Pullarami Reddi.

(28) A. I. R. 1941 Madras 557

KING AND PATANJALI SASTRI JJ.

Marina Ammayi — Petitioner

v.

Mirza Bakhar Beg Saheb and others — Respondents.

Civil Revn. Petns. Nos. 1330 and 1331 of 1939, Decided on 19th December 1940, to revise the orders of Sub-Judge, Rajahmundry, D/- 6th January 1939.

(a) Madras Agriculturists' Relief Act (4 of 1938), Ss. 19 and 8 — Mortgage — Redemption suit by agriculturist mortgagor—Purchasers of portions of hypotheca with whom portion of purchase price was reserved for payment to mortgagee impleaded as co-plaintiffs—Redemption decreed on payment of certain sum—S. 19 read with S. 8 applying—Satisfaction of decree as a whole can be entered notwithstanding that co-plaintiffs are non-agriculturists.

Where the agriculturist mortgagor in his suit to redeem the mortgage impleads the purchasers of the portions of the hypotheca as co-plaintiffs who hold the moneys reserved with them for payment to the mortgagee as mere custodians for the mortgagor and redemption is decreed on payment of a certain sum to which the provisions of S. 19 read with S. 8 apply, full satisfaction of the decree as a whole can be entered up notwithstanding the fact that some of the judgment-debtors, namely the purchasers of portions of hypotheca are non-agriculturists. The Court thereby would only be allowing full benefit of the Act to the mortgagor and not necessarily benefiting the non-agriculturists judgment-debtors inasmuch as the mortgagor can recover from them any portion of the purchase money which as a result of the scaling down of the decree they will not have to pay to the mortgagee: ('41) 28 AIR 1941 Mad 204, *Disting.*; 36 Mad 348, *Ref.* [P 557 C 2; P 558 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), Ss. 19 and 8 — Decree can be amended partially.

A decree can be partially amended under the Act: ('41) 28 A I R 1941 Mad 204, *Rel. on.* [P 558 C 1]

G. Chandrasekhara Sastri — for Petitioner.

T. Satyanarayana Rao and V. Govindarajachari — for Respondents.

Civil Revision Petition No. 1330 of 1939.

Patanjali Sastri J.—This revision petition arises out of an application under S. 19 of Madras Act 4 of 1938 to scale down a preliminary decree for redemption passed by the subordinate Judge of Rajahmundry. Plaintiffs 2, 3, 4 and 6 were the petitioners in the Court below and are respondents here. They had executed a mortgage in 1914 and in a suit to redeem the mortgage the Court has passed the preliminary decree declaring that the amount due to the mortgagee calculated up to 30th March 1937, the date fixed for redemption, was Rs. 16,245-6-3. On the application of the respondents to scale down the decree, the Court below has found that they are agriculturists and that the amount already paid to the decree-holder (petitioner herein) was more than twice the principal sum payable by the respondents under the mortgage. The Court has therefore ordered under S. 19 read with S. 8 of the Act that full satisfaction of the decree as a whole be entered, holding that there could be no question of any partial amendment of the decree. It is argued for the decree-holder that some of the other judgment-debtors who are purchasers of portions of the hypotheca are non-agriculturists and that the Court below ought not to have entered full satisfaction of the decree even as against them as they are not entitled to the benefits of the Act.

The case reported in (1940) 2 M L J 872[1] is relied on in support of this contention. That decision no doubt recognized that a decree could be scaled down in favour of a judgment-debtor who is an agriculturist and left intact as against a non-agriculturist judgment-debtor and it was accordingly held that a puisne mortgagee who was an agriculturist and a party to the decree on a prior mortgage should be given an opportunity to redeem on payment of the decree amount as scaled down but that on his failure to pay such amount within the time allowed, the decree-holder should be entitled to bring the whole of the mortgaged property including the puisne mortgagee's interest to sale. This procedure was indicated as appropriate in the circumstances of that case to give to the agriculturist judgment-debtor the full benefit of the relief to which the Act entitled him while safeguarding the right of the decree-holder as against the non-agriculturist mortgagor judgment-debtor. But that decision, it seems to us, is not applicable to the facts here. The respondents who are agriculturists brought the suit as mortgagors to redeem the mortgage impleading purchasers of portions of the hypotheca as co-plaintiffs and redemption has been decreed on payment of a certain sum which must now be deemed to have been paid. How then can redemption of the mortgage as a whole be denied to them? The Court below has found that the purchasers hold the moneys reserved with them for payment to the mortgagee as "mere custodians" for the mortgagors, and it may be that the respondents would be entitled to recover any portion of the purchase money which as a

1. ('41) 28 A I R 1941 Mad 204 : (1940) 2 M L J 872, C. S. Ramier v. Srinivasiah.

result of the scaling down of the decree, the purchasers will not have to pay to the mortgagee: *see* 36 Mad 348.[2] In such circumstances the Court by entering satisfaction of the decree as a whole would only be allowing to the agriculturist mortgagors the full benefits of the Act and not necessarily benefiting the non-agriculturist purchasers of portions of the hypotheca. It follows that the order of the Court below is correct though the view expressed by the learned Judge that there could not be any partial amendment of a decree under the Act must be held to be erroneous in view of the decision in (1940) 2 M L J 872.[1] The civil revision petition is dismissed with costs.

Civil Revision Petition No. 1331 of 1939.

This revision petition arises out of an application made by plaintiff 1 (mortgagor) to scale down the same decree so far as it relates to the mortgage under Ex. 3 dated 23rd November 1927. The Court below has found that the mortgagor, the respondent herein, is an agriculturist and scaled down the amount declared to be due under the decree for redemption to Rs. 18,000. For the reasons indicated in our judgment in Civil Revision Petition No. 1330 of 1939, this civil revision petition also fails but we make no order as to costs.

C.R.K./G.N. *Petitions dismissed.*

2. ('13) 36 Mad 348 : 12 I C 353 : 21 M L J 983, Raghunathachariar v. Sadagopachariar.

(28) A. I. R. 1941 Madras 558

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Kuniyil Chandu — Appellant

v.

Mathiledath Sankaran and another — Respondents.

Letters Patent Appeal No. 35 of 1939, Decided on 22nd October 1940, against judgment and decree of Patanjali Sastri J., *Reported in ('40) 27 A I R 1940 Mad 56.*

(a) Malabar Tenancy Act (24 of 1930), S. 20 —Effect of S. 20 is to supersede and nullify all contracts which recognized right of eviction contrary to the section, whether such contracts have been entered into before or after the Act.

The language employed in S. 20 is plain and peremptory and prohibits a suit for eviction being instituted except on one or more of the several grounds specified in the section. There are no words showing an intention on the part of the Legislature to save contracts entered into before or after the Act. Its effect is to supersede and nullify all contracts which recognized a right of eviction in the landowner contrary to the terms of the section: ('15) 2 A I R 1915 Mad 93, *Expl. and Disting.* [P 559 C 2; P 560 C 1]

(b) Interpretation of statutes — Primary rule is to ascertain ordinary meaning of words used — Only when they are ambiguous, scheme of Act may be looked into.

The primary rule by which the Court should be guided in the construction of statute is to consider first the words employed and ascertain their ordinary grammatical meaning. It is only where the words are ambiguous it is permissible to look at the scheme of the Act or the language used in other parts of the statute for gathering the intention. [P 559 C 2]

P. Govinda Menon — for Appellant.

Krishnaswami Ayyangar J. — This appeal arises out of a suit instituted by the appellant who is the owner of a paramba in South Malabar to evict the respondents from it. The paramba had been demised on kanom to respondent 1 on 31st May 1927. A kychit of even date was executed by him and evidences the terms of the contract. The demise was for a period of twelve years, but was terminable earlier at the option of the appellant, on the happening of one or other of certain conditions mentioned in the kychit. Those conditions are found stated in it in the following words:

> If I keep the rent in arrears, or do any acts prejudicial to you or if you are in need of the plot or if I quarry stones from the plot without your written consent thereto, I shall on demand by you surrender the plot to you without raising any dispute whatever, or any plea as to the terms . . . . .

On 3rd August 1931 the appellant served a notice on the respondents demanding surrender of the paramba on the ground that respondent 1 had allowed the rent to fall into arrears and had also without his consent quarried stones from the demised paramba in direct violation of the terms of the kychit. Respondent 1 answered by a reply notice dated 14th August 1931 in which he denied that he had quarried stones from the paramba as alleged by the appellant but admitted that the rents had not been duly paid. He however promised to pay the arrears in three monthly instalments and added that if the appellant wanted the paramba he was willing to surrender it after the monsoons, that is, at the end of six months, on payment to him of the kanom amount, and the value of the improvements effected by him. On 21st February 1934, the appellant instituted the suit out of which this appeal has arisen for recovery of the paramba on two grounds, namely (1) that respondent 1, the kanomdar, had failed to pay the rents in due time and (2) that he had quarried stones from the demised paramba without the appellant's consent. Respondent 2, the mother of the first, was added

as a party defendant on the ground that she was also residing on the paramba with respondent 1. The District Munsif who tried the suit found for the appellant on both points and accordingly granted a decree in his favour. Respondent 1 appealed to the Subordinate Judge of Calicut who reversed the decree of the District Munsif and dismissed the suit. He held that respondent 1 had before suit made a tender of the arrears of rent sufficient in amount to negative the first ground put forward by appellant. As regards the second ground, he concurred with the District Munsif in holding that respondent 1 had in fact quarried stones from the paramba without the consent of the appellant, but held that even this ground, good and valid though it might have been before the Malabar Tenancy Act, 1930 came into force, has since become inoperative as a result of the provisions contained in S. 20 of the Act. In the view which the Subordinate Judge took, there was no cause of action for the suit, and he therefore felt bound to reverse the decree of the District Munsif, and dismissed the suit. Against this decision a second appeal was preferred to this Court. Patanjali Sastri J. who heard it, concurred in the decision of the Subordinate Judge and the result was that this second appeal was also dismissed. The learned Judge, however, granted leave for an appeal being preferred under cl. 15, Letters Patent, and this appeal has accordingly been filed.

On a consideration of the relevant provisions of the Act, Patanjali Sastri J. has accepted the view of the subordinate Judge that a landlord in Malabar cannot maintain a suit for the eviction of a kanomdar except on one or more of the several grounds enumerated in S. 20 of the Act. In his opinion a contract between the parties which confers a right of eviction on grounds other than those enumerated in the section, has been rendered ineffectual as the Legislature intended that all stipulations between the parties whether made before or after the Act, should be superseded if they run counter to the provisions contained in the section. In other words, a contract between the parties cannot avail the landlord if he cannot bring himself within the section. Section 20, Malabar Tenancy Act, 1930, reads as follows:

> No suit for eviction of a customary verumpattamdar, kuzhikanomdar or kanomdar shall lie at the instance of his landholder except on the following grounds :

Six grounds are enumerated in the section of which it is only necessary to refer to one, viz., that mentioned in cl. (2), which confers a right of eviction if the tenant had intentionally and wilfully committed such acts of waste as would impair materially and permanently the value or utility of the holding for agricultural purposes. In the present case the Subordinate Judge has found as a fact—and this finding is binding on us that though the respondent did quarry stones from the paramba, his action was not such an act of waste as can be said to have materially or permanently impaired the value of the holding for agricultural purposes. That being so, the act complained of cannot be held to attack the provisions of the clause referred to, and furnish a ground of eviction. In fact the appellant concedes this position but only argues about his rights such as they were under the kychits should not be held to have been prejudicially affected by anything contained in an enactment of a later date, in the absence of express words to the contrary.

We are clearly of opinion that this contention cannot be supported. The language employed in S. 20 is plain and peremptory and prohibits a suit for eviction being instituted except on one or more of the several grounds specified in the section. There are no words showing an intention on the part of the Legislature to save contracts entered into before or after the Act. On behalf of the appellant our attention was called to the difference between the wording of S. 20, and that of Ss. 10, 22 and 32 of the Act in which the following words, "notwithstanding any contract to the contrary" occur at the commencement. The point sought to be made was that the omission of these words in S. 20, shows that it was not the intention of the Legislature to abrogate the contract of parties. It was argued that wherever the Legislature intended that the terms of such a contract should be nullified it has taken care to use apt language to express such an intention; whereas in S. 20, the section with which we are now concerned, such words are conspicuous by their absence. It is to be observed that the primary rule by which we should be guided in the construction of a statute is to consider first the words employed and ascertain their ordinary grammatical meaning. It is only where the words are ambiguous it is permissible to look at the scheme of the Act or the language used in other parts of the statute for gathering the intention. We are unable to see any ambiguity in the words of S. 20 and it is

therefore unnecessary to compare and consider the meaning of the language employed in other parts of the statute. Its effect in our judgment is to supersede and nullify all contracts which recognize a right of eviction in the landowner contrary to the terms of the section.

Learned counsel for the appellant relied in support of his argument on a decision of a Bench of this Court in 23 M L J 352,[1] which turned on the language of Ss. 9, 151 and 187, Madras Estates Land Act, 1908. That was a case where a landholder sued to evict a ryot on the ground that the ryot had used the land in a manner calculated to impair its value for agricultural purposes. It was found that there was a contract, or what amounted to it, between the parties which permitted the tenant to use the land in the way in which he did, though the result of such user was to produce the consequences mentioned. It was held that such a term conferring as it did, a benefit upon the tenant was not affected by anything contained in S. 151 or S. 187. The principle underlying this decision can have no application to a case such as the present. One of the objects, perhaps the main object of this Act, as it is of the Malabar Tenancy Act, was to secure a fixity of tenure for tenants, and to protect them against arbitrary evictions by the superior proprietor. Freedom of contract was interfered with not for the benefit of the landholder, but for the benefit of the tenant, because it was the tenant who was not in a position to contract on equal terms with the proprietor, and it was he who required protection and not the proprietor. The learned Judges who decided in 23 M L J 352[1] were therefore warranted in holding, as they did, that Ss. 151 and 187, Madras Estates Land Act, did not operate to the prejudice of rights conferred on a tenant by the landholder by a contract entered into between them. We do not see how this decision can help the appellant. We are not in this case concerned with a contract containing a term intending to operate for the benefit of the tenant as in the case quoted, but with one conferring privilege on the owner of the land. We are of opinion that the decision of the learned Judge who decided the second appeal is right. The appeal is accordingly dismissed with costs of respondent 1.

C.R.K./K.S. *Appeal dismissed.*

1. ('15) 2 A I R 1915 Mad 93 : 16 I C 220 : 37 Mad 482 : 23 M L J 352, Mura Kasim Rowther v. G. F. F. Foulkes.

(28) A. I. R. 1941 Madras 560

LAKSHMANA RAO J.

In re Marana Goundan — Prisoner Appellant.

Criminal Appeal No. 654 of 1940, Decided on 17th December 1940, against order of Addl. Sess. Judge, Coimbatore Division, in C. C. No. 100 of 1940.

Penal Code (1860), Ss. 323 and 304 (2) — Accused demanding money lent to deceased and on latter's answer that he would pay later, kicking him on abdomen—Deceased dying owing to shock of kicking — No external or internal injury—Conviction held could be only under S. 323 and not under S. 304 (2).

The deceased owed one anna to the accused and the latter demanded repayment. The deceased promised to pay later and the accused kicked him twice on the abdomen remarking "how long am I to wait." The deceased collapsed and died soon after. The cause of death was shock due to the kicking and there was no mark of injury external or internal :

***Held*, that it could not be held that accused intended or knew that by kicking on the abdomen, as he did, he was likely to endanger life. He therefore could be convicted only under S. 323 and not under section 304 (2).** [P 560 C 2]

K. Venkataraghavachari for Public Prosecutor — for the Crown.

Judgment.—The appellant has been convicted under S. 304 (2), I. P. C., for causing the death of one Karuppa Chuckli by kicking him on the abdomen and sentenced to rigorous imprisonment for seven years. The deceased owed one anna to the appellant and the latter demanded repayment. The deceased promised to pay later and the appellant is stated to have kicked him twice on the abdomen remarking "how long am I to wait." The deceased collapsed and died soon after. The cause of death was shock due to the kicking and P. W. 7 a disinterested witness not to mention, P. W. 4, the widow, speaks to the alleged kicking. P. W. 5 was informed about it soon after, and the story of the appellant that he merely pushed the deceased and went away is incredible. But there was no mark of injury external or internal, and it is difficult to hold that the appellant intended or knew that by kicking on the abdomen, as he did, he was likely to endanger life. The conviction under S. 304 (2), I. P. C., is therefore unsustainable and as rightly conceded the conviction can only be under S. 323, I. P. C. The conviction of the appellant is therefore altered to one under S. 323, I. P. C., and he is sentenced to rigorous imprisonment for one year.

C.R.K./D.S. *Conviction altered.*

(28) A. I. R. 1941 Madras 561

HORWILL J.

V. K. R. S. T. Narayanan Chettiar and others — Appellants

v.

Secretary of State and others — Respondents.

Second Appeal No. 351 of 1937, Decided on 8th March 1940, against decree of Sub-Judge, Devakottai, in A. S. No. 16 of 1936.

(a) Madras Revenue Recovery Act (2 of 1864), S. 38 (1) and (3)—Recovery of income-tax—Sale of property by Sub-Collector in exercise of authority delegated under Regn. 7 of 1828 — Collector's order setting aside Sub-Collector's order confirming sale falls under S. 38 (3) and not S. 38 (1).

Where the Sub-Collector brings a property to sale for the recovery of income-tax in exercise of the authority delegated to him under Regn. 7 of 1828, an order of the Collector setting aside the Sub-Collector's order confirming the sale falls under S. 38 (3) and not S. 38 (1). [P 562 C 1]

(b) Madras Revenue Recovery Act (2 of 1864), S. 38 (1) and (3)—S. 38 (3) is wider than S. 38 (1) —Collector under S. 38 (3) can set aside sale for any substantial reason—It is not necessary for him to find material irregularity or low price — Still less that low price was result of material irregularity — Vague description of property in sale proclamation is sufficient cause for setting aside sale.

The terms of S. 38 (3) are very much wider than those of S. 38 (1), and the sale can be set aside for very many more grounds than under S. 38 (1). All that is necessary under S. 38 (3) before setting aside the sale is that the Collector should have reason to think that the sale ought to be set aside; so that if the Collector gives any substantial reasons at all why a sale should be set aside, his order is good. It is not necessary that he should find there was a material irregularity; or that the price was unduly low. Still less is it necessary for him to come to the conclusion that the lowness of the price was a direct result of some material irregularity. An incomplete and vague description of the property sought to be sold constitutes a material irregularity in the proclamation and amounts to sufficient cause for setting aside the sale : 9 Cal 656 (P C), *Expl.*; 21 Cal 66 (P C), *Disting.* [P 562 C 1]

(c) Madras Revenue Recovery Act (2 of 1864), Ss. 59 and 38 — S. 59 is not intended to set up civil Courts as appellate authorities over lawful acts of executive authority — Civil Court can interfere only when executive authority acts arbitrarily *(Obiter)*.

The provisions of S. 59 are not intended to set up civil Courts as appellate authorities over the lawful acts of Government servants done in good faith. Where the executive authority acts in some illegal or improper or arbitrary manner, then and then only can a civil Court interfere with the order passed by that authority. Consequently where the Collector had ample evidence to justify the setting aside of a sale under S. 38 (1), the civil Court cannot set aside that order merely because the person seeking to have the sale set aside had failed to adduce the same evidence before it. [P 562 C 2]

1941 M/71 & 72

T. K. Sundararaman — for Appellants.
Government Pleader and K. Rajah Ayyar — for Respondents.

Judgment. — On 31st December 1932 the share of defendant 3 in a house and gardens was brought to sale by the revenue authorities because of his failure to pay income-tax. Defendant 3's share is said to be worth Rs. 17,000. It was actually sold for Rs. 800. On 23rd February 1933, the Sub-Collector, in the absence of any application to set aside the sale, confirmed it. Defendant 2, a creditor of defendant 3, had attached the same property in execution of a money decree on 31st March 1933 and on the same date he filed an application before the Collector under Regn. 7 of 1828. The Collector, exercising his powers of revision, set aside the order of the Sub-Collector of 23rd February 1933 confirming the sale. The Collector was of opinion that two material irregularities had been committed (1) an incomplete description of defendant 3's interest in the house and garden and (2) that the property had been sold in one lot instead of the garden and the portion of the house being sold separately. He also found that the property had fetched a very low price; but he did not say that the low price was a result of these material irregularities. The present appellant thereupon filed this suit on 2nd April 1934 under S. 59, Revenue Recovery Act, to have the Collector's order set aside and the sale confirmed. Both the trial Court and the lower appellate Court found that there was a material irregularity in the description of defendant 3's share of the garden and drew the conclusion, which they considered to be reasonable under the circumstances, that the low price was the direct result of the material irregularity.

It is here argued that there is no evidence that the low price resulted from the material irregularity and S. 38 (1), Revenue Recovery Act, has been referred to show that it is necessary before setting aside a sale that the Collector should be satisfied that a substantial injury resulted from the irregularity and that the lower Courts were not justified in coming to the conclusion which they did in the absence of direct evidence. 9 Cal 656[1] and 21 Cal 66,[2] decisions of the Privy Council, have been referred to as indicating that some direct evidence is necessary. In these cases, especially in the former, there was no

1. ('83) 9 Cal 656 : 10 I A 25 : 11 C L R 494 : 4 Sar 417 (P C), Macnaghten v. Mahabir Pershad Singh.
2. ('94) 21 Cal 66 : 20 I A 176 : 6 Sar 324 (P C), Tasadduk Rasul Khan v. Ahmad Hussain.

particular reason why the Court should have concluded that the irregularity was likely to lead to any substantial loss; but 21 Cal 66[2] contains a passage at p. 70 which supports the argument of the learned advocate for the appellant. It runs as follows:

> Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was had without full compliance with the provisions of S. 290. The section clearly contemplates direct evidence on the subject,

the words 'direct evidence' apparently being used in contra-distinction to circumstantial evidence. I do not however consider it necessary to decide whether the wording of S. 38 (1) prohibits the deduction of an inference, in the absence of direct evidence, that a low price was a direct result of the irregularity, for the order passed by the Collector was not one under S. 38 (1), Revenue Recovery Act. Under Regn. 7 of 1828, the Collector has power to delegate his authority in certain matters; and the Sub-Collector in bringing this property to sale under the Act, was exercising such a delegated authority. That regulation empowers the Collector to control the acts of the Sub-Collector in exercise of that delegated authority by revising the orders of the Sub-Collector. When the Collector acted on the petition of defendant 2, he was revising the order of the Sub-Collector confirming the sale. So that the position after the Collector had exercised his revisional power was that the sale had not been confirmed. If therefore the Collector was to set aside the sale at all, he could act only under S. 38 (3) for no application under S. 38 (1) had been filed. The terms of S. 38 (3) are very much wider than those of S. 38 (1) and the sale can be set aside for very many more grounds than under S. 38 (1). All that is necessary under S. 38 (3) before setting aside the sale is that the Collector should have reason to think that the sale ought to be set aside; so that if the Collector gives any substantial reasons at all why a sale should be set aside, his order is good. It is not necessary that he should find there was a material irregularity; it is not necessary that he should find that the price was unduly low. Still less is it necessary that the Collector should come to the conclusion that the lowness of the price was a direct result of some material irregularity.

In this view, it is unnecessary to consider the scope of a suit under S. 59. Section 59 is worded very widely and does afford some ground for an argument that the civil Courts have the same freedom in considering all the evidence relating to the conduct of the sale and the reasons for setting it aside as the Collector had in the first instance under S. 38. If this is so the civil Court sits in appeal over the decision of the Collector. It is however difficult to think that this is what was intended by the Legislature. There is no direct authority bearing on this question under the Revenue Recovery Act; but the general principle underlying such provisions found in such legislation is that members of the public should have some protection against illegal and arbitrary acts of executive officers. These provisions are not intended to set up civil Courts as appellate authorities over the lawful acts of Government servants done in good faith. Where it can be but a matter of opinion whether there were sufficient grounds for the act of the executive authority, there would be no reason for interfering with the executive order; for the opinion of the executive officer on the merits of the application before him would be entitled to as much weight as the opinion of a civil Court. Where the executive authority acts in some illegal or improper or arbitrary manner, then and then only, in my opinion, could a civil Court interfere with the order passed. Where, for example, there was ample evidence before the Collector to justify the setting aside of a sale under S. 38 (1), it is difficult to believe that the Legislature intended that the civil Court could set aside that order merely because the petitioner had failed to adduce the same evidence before it.

This point is only of academic interest in this case, however, for both the Courts have here found that there was a material irregularity in the proclamation by which the half share of defendant 3 in the house and gardens was to be sold. It is true that it did not say that the portion was undivided; but the description was so vague that intending purchasers might well have apprehended — even if they knew what defendant 3's share was — that if they had purchased the property and obtained a sale certificate in the terms of the proclamation, more litigation would have been necessary before they could secure peaceful enjoyment of the property. Defendant 3 actually owned the northern half of the house in question and the whole of one of three gardens; so that there was good ground for the finding of the Courts below that there was a material irregularity in the proclamation which amounted to a sufficient cause for setting

aside the sale. The appeal therefore fails and is dismissed with costs (two sets). The advocate's fees will be fixed at Rs. 35 each.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 563

KING J.

Sinnaswami Goundan — Appellant

v.

Rama Goundan and others — Respondents.

Second Appeal No. 173 of 1938 and Civil Misc. Petn. No. 1257 of 1941, Decided on 31st January 1941, against decree of Additional Sub-Judge, Coimbatore, in A. S. No. 311 of 1936.

Transfer of Property Act (1882), S. 92 — Mortgage paid off by more persons than one — All are entitled to right of subrogation and not merely person making final payment in point of time.

All that S. 92 requires is that when the right of subrogation is claimed the mortgage shall have been redeemed in full. Section 92 does not require that the person claiming subrogation should himself have paid the entire amount of the previous mortgage debt. There is nothing in S. 92 which lays down that when a mortgage is paid off by more than one person only the person making the final payment in point of time is entitled to the right of subrogation. Consequently, all persons making the payment can claim that right : ('37) 24 AIR 1937 All 588 (F B), *Rel. on.* [P 564 C 1, 2]

K. Subramaniam and R. Rangachariar — for Appellant.

A. C. Sampath Ayyangar — for Respondents.

Judgment. — This appeal raises the question of subrogation. There are three mortgages with which the appeal is concerned. The first was executed in 1917 and the mortgagee's rights in that mortgage were finally assigned to defendant 5 who filed a suit in 1933 and obtained a decree. That decree has been satisfied by means of two payments, one by defendant 1 of Rs. 350 made in 1934 and one by the plaintiff of Rs. 398 made in 1935. By the payment of that Rs. 398 by the plaintiff the decree was satisfied in full. The second mortgage was in favour of defendant 7 and was executed on 6th June 1918. The third was in favour of the plaintiff executed in September 1922. Plaintiff has obtained a decree on this third mortgage and the question is as to the order in which the money which will be realized by the sale of the mortgaged properties is to be distributed. Plaintiff claims that he is to be paid first the sum of Rs. 398 which he utilized to pay off the first mortgage, that defendant 7 should then be paid the amount due under his mortgage, and thirdly, that the balance should be paid in satisfaction of the plaintiff's own mortgage. Plaintiff's principal opponent is defendant 1. He claims that he is equally entitled to the right of subrogation and that the sums of both Rs. 398 to the plaintiff and Rs. 350 to himself must be paid before either the mortgage to defendant 7 or the mortgage to the plaintiff is paid off. Defendant 7, who is also represented before me, does not seriously contest the position that there is a priority coming before his mortgage. The real dispute is therefore between the plaintiff and defendant 1 and the question is whether the right of subrogation should be conceded to the plaintiff alone or to both the plaintiff and defendant 1. Section 92, T. P. Act, governs the decision of this point and it runs as follows :

> Any of the persons referred to in S. 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.
>
> The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.
>
> A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.
>
> Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

It is argued for the plaintiff, who is the appellant here, that there can be no right of subrogation unless a mortgage has been completely redeemed and therefore it is only by the act of some person which results in the complete redemption of the mortgage that any right of subrogation can be created. In the present case, as defendant 1 paid Rs. 350 on 20th August 1934 and the mortgage was still left outstanding in part after that payment he could by that payment acquire no right of subrogation. It was the plaintiff's payment alone which resulted in the redemption of the mortgage. It does not seem to me that such a position is in accordance with the equitable principles upon which the right of subrogation is based. Nor do I find anything within S. 92 itself which prohibits a claim made by defendant 1 in the circumstances of this case. The one essential proviso for the coming into existence of the right of subrogation is that a mortgage shall have been redeemed in full. When the present suit was filed the

mortgage of 1917 had been redeemed in full. There appears to me therefore nothing in the section itself to prevent any person who is qualified by the first portion of the section from claiming a right of subrogation.

It is not denied by any one before me that both the plaintiff and defendant 1 are qualified within cl. 1 of S. 92 and it is obviously a mere accident that the payment by defendant 1 happened to be prior in time to the payment by the plaintiff. If the situation be analysed as a whole it will be clear that this mortgage has been paid off by two persons, neither of whom would have been able to pay it off without the help of the other. I cannot see any principle upon which one of these persons should be granted and the other denied the right of subrogation. As I see it, all that the section required is that when the right is claimed the mortgage shall have been redeemed in full. I have not now to consider whether defendant 1 had or had not the right of subrogation during the twelve months or so which intervened between his payment and that of the plaintiff. What I have to decide is whether defendant 1 could claim the right of subrogation while the present suit was pending. There are no direct authorities dealing with a similar situation to which my attention has been called. But it seems to me that the discussion of the Full Bench of the Allahabad High Court at the conclusion of their judgment in I L R (1937) ALL 880[1] at p. 900 and the facts of that case, can be utilised in support of the position that both defendant 1 and the plaintiff in this appeal are entitled to the right of subrogation. It is pointed out by the learned Judges in that paragraph that the section does not require that the person claiming subrogation should himself have paid the entire amount of the previous mortgage debt.

The facts of the Allahabad case are that the mortgagor sold the mortgaged properties to three separate purchasers contracting with each of them that they should pay off a portion of the mortgage debt binding upon the property, and the mortgage debt was eventually paid off on the same day by all the three purchasers with the addition of a small sum paid by the mortgagor himself. Of course in one sense of the word the payments by the three vendees in this case could be called simultaneous. But if the situation be more closely analysed, it follows that one of the three vendors must have paid first, another must have paid second and third must have paid third even if there were only a few minutes interval between each of the payments. If the argument of the learned counsel for the appellant in this case were accepted it would follow that though the vendee who paid first and the vendee who paid second would get no right of subrogation, the vendee who paid last would have a right of subrogation for the full amount of the payment. Such a situation could never have been contemplated as possible by the Legislature; and as has already been indicated, there is nothing in S. 92 which lays it down that when a mortgage is paid off by more than one person only the person who makes the final payment in point of time is entitled to the right of subrogation. It seems to me therefore that the decree of the lower appellate Court in this matter, ordering that both defendant 1 and the plaintiff should be entitled to this right in the payment of the money realised by the sale of the mortgaged properties is the correct decree. This appeal fails and must be dismissed with costs. There is however an application on behalf of the appellant under the Agriculturists' Relief Act (Act 4 of 1938). This application will be remitted to the Court of first instance for disposal and the decree of this Court will be subject to its decision. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

1. ('37) 24 A I R 1937 All 588 : 171 I C 153 : I L R (1937) All 880 : 1937 A L J 840 (F B), Hira Singh v. Jai Singh.

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(28) A. I. R. 1941 Madras 564

KING J.

Bijjala Pedda Bali Reddi — *Appellant*

v.

Bathula Chinna Nagi Reddi and others — *Respondents.*

Appeal No. 57 of 1939, Decided on 9th September 1940, against appellate order of Sub-Judge, Kurnool, D/- 8th February 1939.

Civil P. C. (1908), Ss. 151 and 144—Order under S. 151 for restitution is appealable.

If a party is ordered under S. 151 to make restitution he must have a right of appeal: ('33) 20 A I R 1933 Mad 780, *Rel. on.* [P 565 C 1]

A. C. Sampath Ayyangar — for Appellant.

M. S. Ramachandra Row — for Respondents.

Judgment. — It is argued in second appeal that no appeal lay to the first appellate Court. For this argument authority can no doubt be cited, Lahore and Patna, but in Madras I am bound by 56 Mad 909.[1] This

1. ('33) 20 A I R 1933 Mad 780 : 145 I C 871 : 56 Mad 909 : 65 M L J 407, Ayyaswami Iyer v. Sivakki Ammal.

authority lays it down that when a Court calls upon a surety to carry out the terms of his bond—and does so not under the strict terms of S. 145, Civil P. C., but under the inherent powers given it by S. 151, Civil P. C., the right of appeal which the surety would have had under S. 145 is not lost to him under S. 151. The same principle clearly applies to an order under S. 151 read with S. 144. If a party is ordered under S. 151 to make restitution he must have a right of appeal. That the proceedings in the present case were analogous to proceedings under S. 144 cannot be doubted. The appeal to the first appellate Court was therefore competent. The first appellate Court reversed the Court of first instance on questions of fact which cannot now be challenged. This appeal accordingly fails and is dismissed with costs.

C.R.K./N.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 565

LEACH C. J. AND HAPPELL J.

P. P. Ramabhadran — Liquidator — Appellant

v.

T. S. Manickam and others — Respondents.

Appeal No. 39 of 1940, Decided on 19th December 1940, against order of Mockett J., in O. P. No. 34 of 1940, D/- 1st May 1940.

Companies Act (1913), Ss. 156 and 158 — Shareholder failing to pay for shares allotted— Company going into liquidation — Liquidator can make call for what is due irrespective of question of limitation — Court can enforce call without requiring liquidator to file suit.

Where a shareholder of a company has failed to pay for shares allotted to him as a signatory to the memorandum of association or on application he can, in the event of the company going into liquidation, be placed upon the list of contributories and the liquidator can make a call upon him for what is due, irrespective of any question of limitation, in which case the Court can enforce the call without requiring the liquidator to institute a suit: (1879) 9 Ch D 595; (1881) 15 Ch D 507; ('32) 19 A I R 1932 P C 240 and 31 Mad 66, *Rel. on;* (1900) 2 Ch 56; (1863) 4 Giff 314 and 4 C W N 369, *Disting.* [P 565 C 2; P 566 C 1; P 567 C 1]

S. Parthasarathy and V. K. Thiruvenkatachari — for Appellant.

V. Ramaswami Iyer, S. Nagaraja Iyer, A. K. Sriraman and N. G. Krishna Iyengar — for Respondents.

Leach C. J.—The appellant is the liquidator of the Mahalakshmi Studios, Ltd., which went into voluntary liquidation on 5th November 1939. The appellant, as it was his duty to do, settled a list of contributories, and, as nineteen of the persons on the list did not comply with the calls made upon them, he applied to this Court for an order under S. 216, Companies Act. Of the nineteen respondents, respondents 1 to 8 and the father of respondent 19 signed the memorandum of association in respect of the shares subscribed for by them, but had not paid for their shares. The other respondents to the petition were not signatories to the memorandum of association, but had not paid what was due by them on the allotment of their shares. The application was heard by Mockett J. who refused to make any order against the respondents and directed the liquidator to file suits to recover the amounts which he claimed. In dismissing the petition, the learned Judge held that the appellant was not entitled to make calls on the respondents and it is this part of the judgment which has really occasioned the present appeal, because if it stands this decision of the learned Judge will in an important respect govern the suits to be filed. The appellant contends that this finding is erroneous and he asks this Court to direct the respondents to pay the amounts claimed without requiring him to file suits.

In holding that the amounts due from the respondents could not be made the subject of calls, the learned Judge relied on (1900) 2 Ch 56,[1] (1863) 4 Giff 314=66 E R 726[2] and 4 C W N 369,[3] but all these cases concerned companies which were not in liquidation and this makes a vast difference. We agree with the learned Judge that the directors could not have made calls in respect of the amounts alleged to be due by the respondents and that until the company went into liquidation, these amounts could only be classified as debts due to the company. Directors can make calls only when shares have been issued as partly paid. In such circumstances they can make calls for what is due by shareholders, bearing of course in mind the conditions of the contract under which they were issued and the articles of association. But where a shareholder has failed to pay for shares allotted to him as a signatory to the memorandum of association or on application he can, in the event of the company going into liqui-

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1. (1900) 2 Ch 56 : 69 L J Ch 428 : 82 L T 400 : 48 W R 546 : 16 T L R 339, Alexander v. Automatic Telephone Co.
2. (1863) 4 Giff 314 : 66 E R 726 : 9 Jur (N S) 595 : 8 L T 301 : 141 R R 221, Croskey v. Bank of Wales.
3. (1900) 4 C W N 369, Mohun Lall v. Sri Gungaji Cotton Mills Co.

dation, be placed upon the list of contributories and the liquidator can make a call upon him for what is due, in which case the Court can enforce the call without requiring the liquidator to institute a suit. Section 156 (1), Companies Act, says:

In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following.

Then follow seven qualifications. We are only concerned with the fourth, which says:

In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member.

Therefore, a member can be required to pay the amount remaining unpaid on shares held by him whether it is the result of a failure to pay what he should have paid on the allotment of the shares or what is due in respect of shares issued to him as partly paid up. Section 158 defines the term "contributory" and it includes every person liable to contribute to the assets of a company in the event of its being wound up. Section 159 provides that the liability of a contributory shall create a debt payable at the time specified in the calls made upon him by the liquidator and S. 187 gives power to the Court to make calls in liquidations ordered by the Court. Section 212 gives a liquidator of a company in voluntary liquidation power to settle a list of contributories and states that the list of contributories settled by him shall be prima facie evidence of the liability of the persons named therein to be contributories. Section 216 empowers the liquidator in a voluntary winding up to apply to the Court to enforce calls made by him. Therefore so far as this appeal is concerned, there is no real difference between a company which is being compulsorily wound up and a company which is in voluntary liquidation.

It has been contended by Mr. Ramaswami Iyer that a debt which could not have been made the subject of a call by the directors cannot be made the subject of a call by the liquidator. But this contention ignores the plain wording of Ss. 156 and 158. If a person is rightly placed on the list of contributories, the liquidator can make a call upon him and we see nothing in the Act or in the authorities which lends the slightest support to the suggestion that the respondents here were not rightly placed on the list of contributories, subject of course to their answers which have not yet been the subject of inquiry. In Lindlay's Law of Companies (6th Edn. page 573) there is this passage:

There are two kinds of calls. First, there are those calls which are nothing more than the unpaid portions of the nominal capital of a company; and, secondly, there are those calls which are contributions required after that capital has been raised and exhausted. Calls of the first kind are payable by virtue of the agreement entered into by the subscribers and the shareholders to contribute the sums fixed upon as the capital; but calls of the last kind are payable in consequence of the liability of shareholders to discharge their debts. If this liability is unlimited, the amount of calls (of the second kind) which a shareholder may be compelled to pay, depends entirely on the amount of the debts to be liquidated, and upon the number of the solvent co-shareholders. But no shareholder can be required to pay calls of the first kind beyond his unpaid proportion of the capital of the company.

In (1879) 9 Ch D 595[4] at p. 599, Jessel, M. R. referring to S. 38, English Companies Act, 1862, which corresponds to S. 156 of the Indian Act, said:

First of all, it must be remembered that S. 38 of the Act, which directs what is to be paid in the case of a winding up by the shareholders of a limited company, creates new rights and rights which did not exist before the passing of the Companies Act, 1862, and rights which do not exist till there is a winding up. That point was decided by the House of Lords in (1873) L R 5 H L 711,[5] that it was in fact a new right, or rather a new liability as regards the shareholders; and that section alone, for this purpose, regulates their liability.

In (1881) 15 Ch D 507[6] at p. 511, which was decided two years later, Jessel, M. R. said:

Now, what is the position of the applicant? Taking it in the most favourable way for him, he has been induced to become a shareholder by fraudulent misrepresentation. Can he after winding up be relieved? I think he cannot. The first ground to be considered is this, that the winding up order entirely alters the positions of the parties, that is, it makes the shareholders contributories, and contributories in a totallly different way in some respects as regards the debts and liabilities of the concern from what they were before. It has been decided by a series of decisions in the House of Lords, commencing with (1873) L R 5 H L 711,[5] that S. 38, Companies Act, is not to be read otherwise than literally, and it is not to be read with reference to the previous liabilities of the shareholders or by analogy to the law of partnership whether of a limited or unlimited character, but it is to be read as imposing new liabilities on the members of the company—liabilities imposed and defined by that section.

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4. (1879) 9 Ch D 595: 47 L J Ch 801: 39 L T 415: 27 W R 181, In re Whitehouse & Co.
5. (1873) L R 5 H L 711: 42 L J Ch 161, Webb v. Whiffin.
6. (1881) 15 Ch D 507: 49 L J Ch 541: 43 L T 45: 28 W R 792, In re Hull & County Bank.

The Privy Council in 60 I A 1 at p. 11=54 ALL 827[7] at p. 839, an appeal from the Allahabad High Court, said :

On the winding up, S. 156, Companies Act, came into play. His liability under that section in respect of the shares was absolute and flowed from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been placed on the register in respect of the shares, but after the winding up his liability in respect of the shares arose *ex lege* and not *ex contractu*.

In view of the wording of the relevant sections and in the light of these very authoritative expressions of opinion, we hold that the learned Judge erred in saying that the demands made by the appellant for the amounts claimed were not "calls" at all. Assuming that the respondents were rightly placed on the list of contributories, the liquidator was entitled to make calls upon them and the amounts became payable irrespective of any question of limitation : *see* 31 Mad 66.[8] It remains to be considered whether the appellant is entitled to have an order from the Court under S. 216. The contesting respondents have raised several defences and after careful thought we see no reason why the decision of the learned Judge in directing the liquidator to file suits should be interfered with but these suits will be tried in the light of this judgment. The liquidator will have his costs of this appeal out of the assets of the company. The respondents will pay their own costs.

C.R.K./G.N. *Order accordingly.*

7. ('32) 19 AIR 1932 P C 240 : 139 I C 552 : 54 All 827 : 60 I A 1 (P C), Hansraj Gupta v. N. P. Asthana.

8. ('08) 31 Mad 66 : 3 M L T 250, Vaidiswara Iyer v. Sivasubramania Mudaliar.

(28) A. I. R. 1941 Madras 567

ABDUR RAHMAN J.

Syed Ghouse Sahib and others — *Appellants*

v.

G. Mohamood Khan Sahib and others — *Respondents.*

Second appeal No. 391 of 1935, Decided on 8th November 1940, against decree of Dist. Court, Salem, D/- 12th February 1935.

(a) Madras Estates Land Act (1 of 1908), S. 56 — Tender of patta to ryot is condition precedent — In case of joint holding tender of patta to all the ryots is necessary.

Under S. 56 the tender of patta is a condition precedent without which a suit under the section cannot be held to be maintainable. The right of suit arises to a party only after the patta has been tendered by him to his ryot and, if the holding is joint, to the several ryots who hold the same jointly. A service of patta on one of them cannot be in the absence of any allegation and proof of his agency on behalf of the others, regarded as sufficient : 1 Mad 45; 13 Mad 42 and 28 Mad 393, *Rel. on.* [P 568 C 1, 2]

(b) Practice — Suit—Maintainability—Objection as to — Court has to see whether plaint discloses cause of action — When condition precedent which gives rise to cause of action for suit is not complied with, objection goes to root of case and should be upheld — Court has no power to dispense with such compliance.

When an objection as to jurisdiction or as to the frame of a suit is raised by defendants or the Court has to see whether a plaint discloses any cause of action, it will have in order to determine these questions, to assume the correctness of the statements made by the plaintiff in his plaint and proceed to examine the objections on that basis. And when a certain act which is a condition precedent without alleging which a complete cause of action cannot be said to have accrued in favour of the plaintiff is not alleged, not because the plaintiff had omitted to say so by a mistake in which case the plaint could be amended but as the plaintiff had failed to comply with the condition which would have entitled him to maintain the action, the objection is not to the form merely but is more substantial and goes to the root of the case. The Court has no power to overlook the provisions of a statute the compliance of which alone could confer the right of suit on the plaintiff. It has no power to exempt the plaintiff from carrying out his statutory obligations. [P 568 C 2; P 569 C 1]

C. S. Venkatachariar and D. Ramaswami Ayyangar — for Appellants.

B. Pocker — for Respondents.

Judgment.—The only question to determine in this appeal relates to maintainability of the suit instituted under S. 56, Estates Land Act, when pattas were not tendered to all the ryots who were in possession of a joint holding. The facts which led to this appeal are simple and may be briefly stated. A patta was tendered on behalf of the plaintiff landholder to defendant 1; but he declined to accept the same. A suit S. S. No. 65 of 1931 was therefore brought by the landholder under S. 56 to enforce the acceptance of the patta against defendant 1 alone. The suit was defended on various grounds, one of which related to the maintainability of the suit. It was contended that the land in respect of which the patta was being attempted to be enforced was a joint holding held by defendant 1 along with certain other persons and that the suit could not proceed in their absence. This contention prevailed and the suit was dismissed by the Deputy Collector of Dharmapuri. An appeal was taken against that decree of dismissal to the District Judge of Salem. But before it was heard a compromise was arrived at and a joint memorandum was presented on behalf of the parties. This was accepted by the District Judge and the suit was order-

ed to be remanded. Paragraph 1 of the order of remand passed by that officer reads as follows :

> In S. S. No. 65 of 1931 the plaintiff should implead the other joint owners mentioned in the written statement and then proceed with the suit.

On the receipt of record by the trial Court, the "joint owners mentioned in the written statement" were impleaded by the plaintiff as defendants. On appearance before the Deputy Collector in obedience to the summons issued by him, the latter urged that the suit was not maintainable against them as the pattas were not tendered to them before the institution of the suit. This fact was admitted but both the lower Courts overruled the contention. The other objection raised on behalf of the defendants was that of jurisdiction of the revenue Courts to entertain a claim in regard to this holding. It was claimed to be a rent free service inam granted by Tippu Sultan for the upkeep of a mosque and as such not covered by the Estates Land Act. But, in view of the opinion that I have formed in regard to the first question, it is unnecessary for me to go into the second objection. Section 56, Estates Land Act, reads as follows :

> When a ryot for one month after tender fails to accept the patta tendered to him and to give a muchilika in exchange, the landholder may sue before the Collector to enforce acceptance of such patta.

A perusal of the section would show that the tender of patta is a condition precedent without which a suit under the section cannot be held to be maintainable. The right of suit arises to a party only after the patta has been tendered by him to his ryot and, if the holding is joint, to the several ryots who hold the same jointly. No case was brought to my notice under this section, but two decisions under S. 9, Rent Recovery Act, (Act 8 of 1865) which was the predecessor of the present Estates Land Act, were cited by learned counsel for the appellant : *see* 1 Mad 45[1] and 18 Mad 42.[2] The language of S. 9, Rent Recovery Act, is almost identical with the present S. 56, Estates Land Act, and these two decisions take the same view which I am inclined to take on a perusal of S. 56 of the Act. It must therefore be held that the plaintiff had no right of suit against the defendant on whom the patta was admittedly not served. What is the effect of this omission, then, on defendant 1? If the holding was a joint one, and the defendants were, as admitted in the joint memorandum presented to the District Judge, Salem, joint owners, a service of patta on one of them could not be, in the absence of any allegation and proof of his agency on behalf of the others, regarded as sufficient. The word 'ryot' although used in singular in S. 56 would cover all the ryots who were holding the land jointly as the singular according to the General Clauses Act, includes the plural. It was held in 28 Mad 393[3] that the tender of a patta to one of several joint pattadars is not a sufficient tender under S. 9 and one of the joint pattadars cannot be held to be the agent of the others. A feeble attempt was made before me to show that these defendants were not joint pattadars. But this was not seriously questioned before. Had they not been joint pattadars, the suit would not have been dismissed by the Deputy Collector on the ground in the very beginning. Moreover, the fact that these were joint owners was, as observed before, admitted by the plaintiff when he signed the joint memorandum and presented the same to the District Judge, Salem.

The next contention raised by Mr. Pocker, learned counsel for the respondents, was that in order to ascertain the maintainability of the suit it is not proper to travel beyond the allegations contained in the plaint. The proposition was somewhat broadly stated and it is not possible to accept it in the manner in which it was put. When an objection as to jurisdiction or as to the frame of a suit is raised by defendants or the Court has to see whether a plaint discloses any cause of action, it will have, in order to determine these questions, to assume the correctness of the statements made by the plaintiff in his plaint and proceed to examine the objections on that basis. And this is exactly what I am trying to do. A tender of patta in a suit under S. 56, Estates Land Act, like a notice for ejectment in a suit for eviction of a tenant by a landlord such as required by S. 106, T. P. Act, is a condition precedent, without alleging which, a complete cause of action cannot be said to have accrued in favour of the plaintiff; and when it is found that it was not alleged, not because the plaintiff had omitted to say so by mistake in which case the plaint could be amended, but as the plaintiff had failed to comply with the condition which would have entitled him to maintain the action, the objection is not to the form merely but is more substantial and goes to the root of the case.

1. ('76) 1 Mad 45, Sayud Chanda Miah v. Lakshmana Ayyangar.
2. ('90) 18 Mad 42, Saminatha v. Veeranna.
3. ('05) 28 Mad 393, Fisher v. Ramaswami U dayan.

The third contention raised by learned counsel for the respondent was that once a suit was instituted, the Court was seized of the whole procedure and the suit could not fail on a technical ground such as raised by the defendants. What learned counsel intended to urge was that once a person or persons is or are impleaded under the orders of a Court (although the order may have been passed in accordance with the request of one or both the parties to the litigation), the mandatory provisions of S. 56, Estates Land Act, and similarly of S. 106, T. P. Act, must be taken to have been dispensed with and can have no application to the parties so added. The contention is, in my opinion, wholly unsound. No Court has the power to overlook the provisions of a statute, the compliance of which alone could confer the right of suit on the plaintiff. Even if the Court had ordered the joint owners to be impleaded, suo motu, it would have been impossible to hold that its action had done away with the compliance of the provisions contained in S. 56, Estates Land Act. The Court did have the power to implead a party but had no power to exempt the plaintiff from carrying out his statutory obligations. These had to be performed in any case and the more so when certain defendants were added on his own application. For the above reasons, I must accept the appeal and setting aside the decision of both the Courts below dismiss the suit. But having regard to the technical nature of the plea, I would leave the parties to bear their own costs throughout. Leave refused.

C.R.K./K.S. *Appeal accepted.*

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(28) A. I. R. 1941 Madras 569

WADSWORTH J.

Sankhavaram Naligindla Venkata Rangacharyulu — Defendant — Petitioner

v.

Rangasubbe Akkappa Rao — Plaintiff — Respondent.

Civil Revn. Petn. No. 644 of 1939, Decided on 18th December 1940, to revise decree of District Court, Kurnool, D/- 20th October 1938.

(a) Evidence Act (1872), S. 43—Suit on pronote — Defendant claiming to be minor at date of execution of pronote as being under guardian appointed by Court—Opinion of Judges as to guardianship proceedings in judgments to which plaintiff was not party is inadmissible.

Where in a suit on a pronote the defendant claims to be a minor at the date of execution of the pronote as a guardian was appointed for him by the Court, the opinion of Judges as to the guardianship proceedings in the judgments to which the plaintiff was not a party is inadmissible in evidence. [P 570 C 1]

(b) Evidence Act (1872), Ss. 43 and 44 — Applicability of S. 44.

Section 44 applies only to judgments, etc., which are relevant under Ss. 40, 41 and 42. It does not apply to judgments admissible under S. 43 : 14 C L J 648, *Rel. on.* [P 570 C 2]

(c) Guardians and Wards Act (1890), S. 48—Judgment appointing guardian under Act—Section 48 bars contest of validity of judgment except by appeal or revision — S. 44, Evidence Act, does not apply—Nor can validity of judgment be questioned in collateral proceedings.

Section 48 bars any contest regarding the validity of the judgment appointing a guardian under the Act except by the procedure of appeal or revision. Section 44, Evidence Act, does not apply to the judgment nor can its validity be challenged in a collateral proceeding : 24 M L J 49, *Expl., and Disting.* [P 570 C 2; P 571 C 1]

(d) Pleadings—Amendment—Revision—Suit on pronote — Plea of minority established — Plaintiff cannot invoke S. 68, Contract Act, at revisional stage.

Where in a suit on a pronote the defendant establishes his plea of minority at the time of the execution of the pronote, the plaintiff cannot be allowed to invoke S. 68, Contract Act, at the revisional stage so as to alter the whole character of the suit. [P 571 C 1]

A. C. Sampath Ayyangar — for Petitioner.

A. V. Seshayya — for Respondent.

Order. — The petitioner was the defendant in a suit on a promissory note and he put forward the defence that on the date when the suit promissory note was executed he was a minor by reason of the fact that a guardian of his property was appointed in August 1930, so that by the force of S. 3, Majority Act, his minority was extended beyond the date on which the suit promissory note was executed. The Courts below permitted the plaintiff to meet this contention by showing that the appointment of the guardian was obtained by collusion between the minor's relatives and it has been held that this order is consequently void as against the plaintiff, so that the plaintiff can treat the defendant as still a major in spite of the Courts' order which has the effect of making him a minor. I may say at once that the basis for the finding of the Courts below that this guardianship order was obtained by a fraud on the Court seems to me of doubtful legality. The facts found are that the minor's property was being adequately managed by his mother, that the minor was not shown to have squandered that property, that the person appointed as his guardian was not a suitable person to control his property because he lived in another village, that the property

guardian did not actually function as such and subsequently became an insolvent, that notwithstanding the appointment of a guardian the minor borrowed money after his guardian was appointed and that there are indications that the motive which led the relatives to agree to the appointment of a guardian was to get rid of two debts contracted by the mother on behalf of the minor. Some of these findings of fact are not beyond challenge, but, for the purpose of these proceedings, they may be taken as conclusive.

But on these findings I doubt very much whether the Court would be justified in coming to the conclusion that this guardianship order was obtained by a fraud on the Court. There is no proof of fraud on any particular creditor. It does not appear that the persons who had advanced money to the mother of the minor were actually defrauded. It may well be that the relatives agreed that it was desirable to extend the minority of the minor in order to prevent him from wasting his property by borrowing, but I am unable to see that this motive is sinister as it appeared to the Courts below, and the fact that the minor subsequently did borrow money is just as much an indication of the necessity of the appointment of a guardian as it is an indication that the relatives wanted to facilitate fraudulent borrowing. The subsequent insolvency of the property guardian and his failure to perform his duties seem to me entirely irrelevant considerations for the purpose of deciding whether the guardianship order was or was not obtained by fraud. Taking all the findings of fact together, it seems to me that there were no proper materials upon which the Court could legally conclude that the order appointing the guardian was obtained by a fraud on the Court or by collusion with the object of defrauding other people. I may say that the admission into evidence of two previous judgments in which learned Judges express opinions as to the nature of these guardianship proceedings seems to me to have been improper. The plaintiff is not a party to these previous proceedings and it is difficult to see how the opinion of these Judges is relevant in the present proceedings.

In revision, however, I am not mainly concerned with the legality of the finding that this judgment was obtained by collusion. The main question is whether it is open to the plaintiff in order to enforce a debt contracted by a minor to show that the judgment which has the effect of making him a minor was obtained by collusion. In my opinion it is not. Both the Courts below have treated the case as one coming under S. 44, Evidence Act, which is clearly inapplicable. Section 44 applies only to judgments etc., which are relevant under Ss. 40, 41 and 42. This order appointing a guardian certainly does not come under S. 40 or S. 42. Though it may well be said that a judgment appointing a guardian and extending the minority of the ward is somewhat analogous to those judgments in rem enumerated in S. 41, it is quite clearly not a judgment in the exercise of the probate, matrimonial, admiralty or insolvency jurisdiction of the Court and it therefore does not fall under S. 41. The judgment in question is admissible under S. 43. Section 44 does not apply to judgments admissible under S. 43 : *vide* 14 C L J 648.[1] In the absence of an express power to attack this judgment under S. 44, Evidence Act, we have to consider whether it is open to attack on grounds of collusion under the general law. It seems to me that S. 48, Guardians and Wards Act, bars any contest regarding the validity of the judgment appointing the guardian except by the procedure of appeal or revision.

Counsel for the respondent has quoted the case in 24 M L J 49[2] in support of the argument that a guardianship order can be attacked in collateral proceedings merely by showing, when the order is tendered in evidence, that it was obtained by collusion. As I read the case referred to, all that was decided there was that, when in collateral proceedings it was sought to attack a finding of fact upon which an order for the discharge of a guardian was passed, though that order of discharge might not be amenable to attack with reference to S. 48, Guardians and Wards Act, the ward who is not a party to the fraud may allege that the Court gave a wrong finding of fact by reason of the fraud of the parties to the guardianship proceedings. The case was one in which the guardian had procured his discharge by fraudulently misrepresenting to the Court that the minor had come of age; and in the collateral proceeding it was held that the minor could show that this finding of fact was procured by fraud and that in fact he was still a minor. It seems to me that that decision does not provide authority for the

1. ('11) 14 C L J 648 : 10 I C 536, Biswanath Prosad Mahata v. Bhagwandin Pandey.
2. ('13) 24 M L J 49 : 16 I C 953 : 1913 M W N 365, Subramaniam Chetty v. Dorasinga Tevan.

view that in collateral proceedings it is open to a party who is seeking to escape the effect of an order against which no suit or other contest would lie under S. 48 to evade the effect of that order by showing that it was one which ought not to have been pronounced and which was in fact induced by fraud or collusion. Rightly or wrongly the District Court held that it was desirable to appoint a property guardian for this minor and made such an appointment. The effect of that appointment is to bring into operation S. 3, Majority Act, and to prolong the minority of the ward. It is not in my opinion open to the plaintiff to get round the provisions of S. 48, Guardians and Wards Act, by showing that the appointment of the guardian was procured by collusion and that the minority of the ward ought not to have been extended. His status has been established by an order which cannot be contested except by appeal or revision, and that status governs his legal relationships.

It has been suggested that the plaintiff can be allowed to support his claim by showing that money was in fact borrowed for the minor's necessaries so as to call in aid S. 68, Contract Act, and I have been asked to frame an issue on this question and remit the suit for trial of that issue. It is, however, contended by the petitioner with some force that this involves the trial of a fresh suit on a different cause of action raising questions of limitation etc., which have not been gone into and that if the plaintiff, when the defendant put forward his minority, desired to have a second line of resistance on the basis of S. 68, Contract Act, he should have got an issue framed in the trial Court and not have waited till revision. It seems to me that this objection must succeed and that it is now too late to change the whole character of this suit. In the result, therefore, the revision petition is allowed with costs throughout and the plaintiff's suit is dismissed.

C.R.K./G.N. *Revision allowed.*

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(28) A. I. R. 1941 Madras 571

WADSWORTH AND PATANJALI SASTRI JJ.

K. V. Ramaswami Aiyar — Petitioner

v.

Ramayya Sastrigal — Respondent.

Civil Revn. Petn. No. 1218 of 1938, Decided on 16th September 1940, to revise order of Sub-Judge, Tiruvarur, D/- 2nd September 1938.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 8, 9 and 19 — Decree on pronote — Judgment-debtor's property sold — Proceeds applied towards satisfaction of decree and pro tanto discharge given—Payment of sale proceeds is not payment towards decree debt generally kept in suspense and not appropriated — There is no presumption that it was appropriated towards principal — Sale proceeds more than sufficient to cover interest on debt and paid before 1st October 1937 — No interest can be said to be outstanding on 1st October 1937 so as to attract Ss. 8, 9 and 19.

Where in execution of a decree on a pronote the judgment-debtor's property is sold and the sale proceeds are actually applied towards the satisfaction of the decree and a pro tanto discharge is given, the payment of the sale proceeds cannot be regarded as payment to the debt generally kept in suspense and not appropriated. Even if the presumption that it was appropriated first towards interest cannot be drawn when principal and interest have merged in a single decree debt, there is certainly no presumption that it was first appropriated towards principal, and consequently when the payment of sale proceeds is made before 1st October 1937 and is more than sufficient to cover interest due on the debt no interest can be said to be outstanding on 1st October 1937 so as to attract the provisions of Ss. 8, 9 and 19. [P 571 C 2; P 572 C 1]

T. V. Ramiah — for Petitioner.

T. L. Venkatarama Iyer — for Respondent.

Order. — This is a petition raising a question under S. 19 of Act 4 of 1938. The decree arose out of a promissory note dated 27th June 1933 for Rs. 3000 (three thousand). When the decree was passed, the amount due for principal and interest was Rs. 3400 (three thousand four hundred) with Rs. 337 (three hundred and thirty seven) as costs. On 23rd February 1937 this respondent in execution purchased property of the petitioner (the judgment-debtor) for Rs. 3406 (three thousand four hundred and six) for which amount part satisfaction was entered on 17th July 1937. On 30th August 1937 a fresh execution petition was filed, claiming Rs. 662-7-6 (six hundred and sixty two, annas seven and pies six only) as the balance due under the decree. The question is what is the effect of this payment of Rs. 3406 (three thousand four hundred and six) towards the decree having regard to the provisions of Ss. 8, 9 and 19 of the Act.

It seems to us that this payment cannot be regarded as a payment to the debt generally kept in suspense and not appropriated. It was actually applied in satisfaction of the decree and a pro tanto discharge was given. Even if the presumption that it was appropriated first towards interest is not to be drawn when both principal and interest have become merged in a single decree debt, there is certainly no presumption that it was appropriated first towards principal. That being so, the payment being more than sufficient to cover all the interest

on the debt, the petitioner is not in a position to show that there was on 1st October 1937 any interest outstanding. He will not be benefited by any re-appropriation from principal to costs under the proviso to S. 19. The petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 572

LEACH C. J. AND HAPPELL J.

Ganta Bangarigadu and others — *Appellants*

v.

Paltheru Atchutaramayya and another — *Respondents.*

Letters Patent Appeal No. 6 of 1940, Decided on 21st November 1940, against judgment and decree of Wadsworth J., in S. A. No. 106 of 1934, D/- 19th September 1939.

Madras Estates Land Act (1 of 1908), S. 52 — Landlord leasing land forming part of estate for one year and granting unregistered patta to *P* on 16th September 1928 — Trespasser *D* in possession — Ejectment suit by lessee on 30th September 1929 after expiry of lease without impleading landholder — In pursuance of High Court's order on 31st March 1938 landholder made party to suit — Trespasser not in possession for twelve years before date of suit—*P* held entitled to possession against trespasser subject to plea of adverse possession as his claim was supported by landholder — Fact of landholder not having been made party at inception of suit held did not change effect of his acquiescence in *P's* claim—Fact that suit was not filed within year of lease did not alter *P's* title by reason of S. 52 (3), Madras Estate's Land Act — Lease being for one year, S. 17, Registration Act, held did not require it to be registered — Fact that S. 52, Madras Estates Land Act, permitted patta holder for a year to remain in occupation after expiry of period until fresh patta was issued did not turn lease into one for more than a year — Material date for calculating period of trespasser's possession held date of suit and not date on which landholder was made party since *P* claimed no relief against landholder.

On 16th September 1928 *P* was granted an unregistered patta for one year by the landlord for land forming part of an estate within the meaning of the Madras Estates Land Act. *D* was in possession of the land at the time, though as a trespasser. *P* did not take steps immediately to evict *D* and in fact allowed him to continue in possession of the land until 30th September 1929, when he filed a suit for his eviction without impleading the landlord. In pursuance of the decision of the High Court in *P's* second appeal against the dismissal of his suit by the lower Courts the landholder was actually made a party to the suit on 31st March 1938. The trespasser had not been in possession for twelve years on the date of suit. The lease had already expired before the date of the suit :

Held that since the landholder supported *P* in his claim, *P* was entitled to the possession of the land as against the trespasser subject to the plea of adverse possession and the fact that the landholder was not made a party at the inception of the suit did not change the effect of his acquiescence in *P* obtaining decree against the trespasser: ('14) 1 AIR 1914 Mad 296, *Rel. on.* [P 573 C 1]

The fact that the suit was not however filed within the year of the lease did not alter *P's* title by reason of S. 52 (3), Madras Estates Land Act; inasmuch as no fresh patta had been issued by landholder in respect of the land in suit, the patta issued to *P* on 16th September 1928 was valid on the date of the institution of the suit. [P 573 C 2]

Held further that since the lease was for one year S. 17, Registration Act, did not require it to be registered. The fact that S. 52, Madras Estates Land Act, permitted the holder of a patta for a year to remain in occupation of the land after the expiration of the period until a fresh patta was issued did not turn the document into a lease for more than a year within the meaning of S. 17, Registration Act. [P 573 C 2]

Held also that the material date for calculating how long the trespasser had been in adverse possession was the date of the suit and not the date on which the landholder was made a party to the suit since *P* asked for no relief against the landholder who on the contrary acquiesced in *P's* claim. [P 573 C 2]

V. Subramanyam and B. V. Subramaniam — for Appellants.

P. Satyanarayana Rao for P. Somasundaram and S. Ramamurthy — for Respondents.

Leach C. J. — On 16th September 1928, respondent 1 was granted a patta by respondent 2 for land situate within the jurisdiction of the District Munsif's Court of Parvatipur. The land covered by the patta admittedly forms part of an estate within the meaning of the Madras Estates Land Act, 1908. The appellants were in possession of the land at the time, but they were trespassers. Respondent 1 did not take steps immediately to evict them and in fact allowed them to continue in possession of the land until 30th September 1929, when he filed the present suit in the District Munsif's Court for their eviction. The defence of the appellants was successful. The District Munsif held that respondent 1 was not entitled to maintain the suit as his patta had expired when the plaint was filed and the landholder had not been made a party. On appeal by respondent 1 the Subordinate Judge of Vizagapatam concurred in the decision of the District Munsif. Respondent 1 then appealed to this Court. His appeal was heard by King J. who decided that respondent 2, as the landholder, should be made a party to the suit and passed an order to this effect. As the result, the case was remanded to the subordinate Court for a finding as to whether the appellants had been in adverse possession of the property for twelve years. The Subordinate Judge after considering

the evidence adduced by the parties on this question reported that the appellants had not been in possession for twelve years on the date of the filing of the suit. King J. was on leave when the report was received by this Court and therefore it had to be considered by another Judge. The case came before Wadsworth J., who on the finding of the Subordinate Judge, allowed the appeal and decreed the suit. A certificate having been given under Clause 15, Letters Patent, the respondents have preferred the present appeal.

In the opinion of King J., the case came within 37 Mad 281.[1] The appellants say that the learned Judge here erred. They also advance the contention that they must be deemed to have been in adverse possession up to the date when respondent 2 was made a party as the result of the order of King J. namely 31st March 1938 and not merely up to the date of the institution of the suit. If 31st March 1938 is the date which has to be taken, the appellants have, of course, been in adverse possession for over 12 years. The appellants have advanced the further argument that the patta cannot be relied upon by respondent 1 because it has not been registered. In 37 Mad 281[1] a lessee whose lease had expired before the date of the filing of his plaint sued for possession of the land leased to him, the defendant being a trespasser. The landholder was made a party and it was held that inasmuch as he had acquiesced in the plaintiff obtaining a decree the trespasser was not in a position to resist the suit. This decision is binding on us and we can see no difference in principle between that case and the present one. The fact that the landholder here was not made a party at the inception of the suit does not change the effect of her acquiescence. The landholder is respondent 2 and she supports respondent 1 in his claim. Therefore he is entitled to the possession of the land as against the appellants subject to the plea of adverse possession. We consider that King J. was fully justified in holding that the case falls within 37 Mad 281.[1]

But even if it did not, we still consider that respondent 1 could maintain the suit. He obtained a valid patta from the landholder by virtue of which he was entitled to the possession of the land. Mr. Subramanyam, on behalf of the appellants, admits that the respondent could have maintained the suit if it had been filed within the year. The fact that the suit was not however filed within the year does not alter respondent 1's title. By reason of S. 52, Madras Estates Land Act, his rights as the pattadar of the land continued after the expiry of the year. Clause (3) of that section states that a patta shall remain in force until the commencement of the new year for which a fresh patta is accepted. No fresh patta has been issued by the landholder in respect of the land in suit and therefore the patta which was issued to respondent 1 on 16th September 1928 was a valid patta on the date of the institution of the suit. Nor do we see any substance in the argument that the patta required registration if it was to be enforced after the expiration of the twelve months. On the face of the patta it is a lease for one year and S. 17, Registration Act, does not require such a lease to be registered. The fact that S. 52, Madras Estates Land Act, permits the holder of a patta for a year to remain in occupation of the land after the expiration of the period until a fresh patta is issued does not turn the document into a lease for more than a year within the meaning of S. 17, Registration Act. If the term mentioned in the patta had been for a longer period than a year registration would have been necessary, but not otherwise.

We are also unable to accept Mr. Subramanyam's contention that for the purpose of calculating how long the appellants have been in adverse possession the date on which respondent 2 was made a party to the suit must be taken. The adding of respondent 2 as a party did not alter the position between respondent 1 and the appellant. Of course, if respondent 1 was asking for relief against respondent 2, 31st March 1938 would have been the material date against her, but respondent 1 is asking for no relief against her. As we have already mentioned she is acquiescing in the demands of respondent 1 for possession of the land in suit. The evidence shows that the appellants only came into possession of the land some six years before the patta was granted. Therefore respondent 1 was entitled by reason of his patta to oust them. For these reasons the appeal fails and must be dismissed with costs in favour of respondent 1.

C.R.K./G.N. *Appeal dismissed.*

1. ('14) 1 AIR 1914 Mad 296 : 22 I C 789: 37 Mad 281, Venkayya v. Sateyya.

(28) A. I. R. 1941 Madras 574

MOCKETT J.

S. Kuppuswamy Chettiar — Appellant

v.

Subbaraya Chettiar — Respondent.

Appeal No. 240 of 1940, Decided on 10th February 1941, against order of District Court, North Arcot, dated 25th March 1940.

(a) Criminal P. C. (1898), S. 195 (1) (b) — Matters to be considered in sanctioning prosecution stated—Mere delay in making complaint is no ground for refusing prosecution—Accused prosecuted under Ss. 199, 209, 210 and 420, Penal Code, for obtaining payment from Official Receiver by making false claim — Accused admitting fraud on Court which he endeavoured to put right at earliest moment by returning money to Official Receiver— Court sanctioning prosecution describing accused as self-confessed criminal — Complaint against accused filed late—In all circumstances of case prosecution held should not proceed as being against interests of justice.

In sanctioning a prosecution the Court should consider not only whether there is a prima facie case but also whether it is in or against the public interest to allow criminal proceedings to be instituted : ('22) 9 A I R 1922 Mad 495 (F B), *Rel. on.* [P 574 C 2]

As a matter of law the delay in making a complaint does not stand in the way of prosecution though the element of delay may be considered along with all the other circumstances of the case in arriving at a decision. [P 574 C 2]

Between 30th January and 20th April 1937, the accused obtained payment from the Official Receiver by making a false claim and practising fraud on the Court. The accused admitted the offence against the Court which he endeavoured to set right by returning the money obtained by him to the Official Receiver at the earliest possible moment. Not until the 10th September 1937 was an application made to prosecute the accused who was then charged with offences under Ss. 199, 209, 210 and 420, I. P. C. The Court sanctioning the prosecution described the accused as a self-confessed criminal who had contrived and perpetrated a serious fraud on the Court :

Held that in view of all the circumstances and especially the manner in which the case was dealt with in the lower Court it was not in the interests of justice but rather contrary to them that the prosecution should proceed. [P 575 C 2]

(b) Criminal P. C. (1898), S. 476 — Civil Court's order under S. 476—Appeal—Civil Procedure Code applies — Notice of appeal should go to Public Prosecutor rather than to Government pleader.

A civil Court's order under S. 476, Criminal P. C., is governed by the Civil Procedure Code. In appeals from such orders it is desirable that notice should go to Public Prosecutor rather than to the Government Pleader as he is the appropriate law officer to deal with questions relating to prosecutions, e. g. perjury and similar offences : ('40) 27 A I R 1940 Mad 465 (F B), *Ref.* [P 575 C 1, 2]

K. S. Jayarama Ayyar and G. Gopalaswami — for Appellant.

K. V. Ramachandra Aiyar — for Respondent.

Public Prosecutor — for the Crown.

Judgment. — This is an appeal against the order of the learned District Judge of North Arcot, directing that a complaint should be laid in the Court of the Magistrate having jurisdiction charging the petitioner with offences under Ss. 199, 209, 210 and 420, I. P. C. I think it is clear from the decision in 45 Mad 928[1] that in sanctioning a prosecution the Court should consider not only whether there is a prima facie case but also whether it is in the words of Coutts-Trotter J., in the above case, "against the public interest to allow criminal proceedings to be instituted," but which I respectfully suggest must also imply the consideration as to whether it is in the public interests they should be instituted. In this case the offence on which these complaints are based was committed between 30th January 1937 and 7th April 1937. On 9th April 1937 the money said to have been obtained on 7th April by means of the offences alleged was returned voluntarily by the petitioner to the Official Receiver. 8th April was a holiday. No action was taken by the present respondent until June when an application is said to have been made for papers. Not until the 10th September 1937 was an application made to prosecute. The case has had a chequered career. It came before a Subordinate Judge who in considering the matter stated that 'the respondent stands self-condemned. He admittedly made a false claim before the Official Receiver and obtained payment.' The Subordinate Judge considered that the long delay in making the complaint by the respondent stood in the way of prosecuting the present appellant. If he considered this was a matter of law, he was wrong. If he considered that it was an ingredient assisting him to arrive at his decision, he might have considered the element of delay with all the other circumstances. The District Judge set aside that order and directed the matter should be reconsidered on grounds with which I am not wholly in agreement. They amount to this: Who is the worse offender—the petitioner in this case or the respondent ? I. A. No. 702 of 1937 was heard on 25th March 1940 and a long judgment was delivered by the District Judge, the result of which in my opinion is most unfortunate. He should have considered whether there should be a prosecution on the lines laid down in 45 Mad 928[1]

1. ('22) 9 A I R 1922 Mad 495 : 71 I C 126 : 24 Cr L J 78 : 45 Mad 928 : 43 M L J 375 (F B), Muniswami Mudaliar v. Rajaratnam Pillai.

and said very little regarding the merits and nothing about the expected result. He described the man whose prosecution he was directing as 'self-confessed criminal who on his own admission is responsible for contriving and perpetrating a serious fraud on the Court.' This entirely prejudices the case. He then goes on to use the following words: "I have no doubt that that matter"—referring to a contention of the petitioner — "will be taken into consideration by the trial Court in awarding punishment in the case." This presumes a conviction. He does not consider at all the long delay in this case in making the complaint.

In my view this case has reached a stage when it is not definitely in the public interest that a prosecution should proceed. This is a good example of the maxim now so well known that not only should justice be done but should be seem to be done and I consider for me to allow a case to proceed in which the District Judge has referred to a man to be prosecuted as a self-confessed criminal who had contrived and perpetrated a serious fraud on the Court would not be in accordance with the last of the two conditions in the maxim. There might be such a case but this does not seem to me to be that case. It does seem unquestioned that the petitioner admitted an offence against the Court which he endeavoured to put right at the earliest possible moment. That was in 1937. On the face of it, it does not seem to be necessarily a very grave case but it has been magnified and embellished with extravagant epithets in a manner wholly out of proportion to its importance and I consider that now it is not in the public interests that the prosecution should proceed in this atmosphere of pre-trial comment. I shall therefore allow the appeal and the lower Court is directed to withdraw the complaint. There will be no order with regard to costs.

In this case the question has arisen as to whether notice should go to the Public Prosecutor or Government Pleader in appeals such as this. The decision in I L R (1940) Mad 762[2] makes it clear that this is a civil matter from the point of view of whether the Civil Procedure Code applies. I think however that owing to the nature of the proceedings it is desirable that notice should go to the Public Prosecutor rather than to the Government Pleader as he is the appropriate law officer to deal with questions relating to prosecutions, e. g., perjury and similar offences. I may add that I think this case has shown how necessary it is that notice should go to a law officer who can bring an impartial eye to bear upon this question and thereby assist the Court. The respondent has pressed most strongly for this prosecution to continue although I do not suggest that his learned counsel went further than he properly could. His instructions are the instructions of the lay client. But the Public Prosecutor suggests the view which I have now held, namely that having regard to all the circumstances and especially the manner in which this case was dealt with in the lower Court, it is not in the interests of justice but rather contrary to them that this prosecution should proceed.

C.R.K./G.N. *Appeal allowed.*

2. ('40) 27 A I R 1940 Mad 465 : 189 I C 630 : 41 Cr L J 769 : I L R (1940) Mad 762 : (1940) 1 M L J 719 (F B), Kumaravel v. Shanmugha.

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(28) A. I. R. 1941 Madras 575

PATANJALI SASTRI J.

Jooluri Guruvayya — Petitioner

v.

Official Receiver, Guntur—Respondent.

Civil Revn. Petn. No. 1133 of 1939, Decided on 30th August 1940, to revise order of Sub-Judge, Guntur, D/- 3rd March 1939.

Provincial Insolvency Act (1920), S. 51 — Insolvency petition filed — Assets realised in execution against insolvent's property before admission of petition—Official Receiver cannot claim assets.

The Official Receiver's title to the insolvent's property does not extend to the assets realised in the course of execution levied against the property before the date of the admission of the insolvency petition : ('35) 22 AIR 1935 Lah 690, *Rel. on.* [P 576 C 1]

N. Vasudeva Rao — for Petitioner.

Order.—The petitioner obtained a decree against certain persons who were subsequently adjudicated insolvents. Before the insolvency petition was admitted, the judgment-debtors' properties were sold in execution of the decree and a sum of about Rs. 666 was realised. The respondent who is the Official Receiver applied to the Court below for payment of this amount to him and the Court ordered payment accordingly. The petitioner assails the validity of this order as being contrary to S. 51 (1), Provincial Insolvency Act. Prima facie, that section entitles the petitioner to the amount realised in execution of his decree, as it does not appear that the petitioner's allegation in the counter petition filed in the

lower Court that the amount was realised before the admission of the insolvency petition was controverted. But the respondent's contention which has found favour with the Court below is that by virtue of S. 28 (7), the order of adjudication should be regarded as taking effect from the date of the presentation of the insolvency petition and that therefore the respondent's title to that sum should prevail.

No direct decision of this Court dealing with this point has been brought to my notice and it has to be decided with reference to the relevant provisions of the Act. It is true that there are no words in S. 28 (7) making the operation of that provision subject to the other provisions of the Act, but the Official Receiver's title to the property of the insolvent as on the date of the presentation of the insolvency petition rests on the combined operation of the provisions of S. 28 (2) and (7), and sub-s. (2) excepts from its operation the other provisions of the Act including S. 51. It is therefore quite clear that the Official Receiver's title to the property of the insolvent does not extend to the assets realised in the course of execution levied against the property of the insolvent before the date of the admission of the insolvency petition. To hold otherwise would be to nullify the provisions of S. 51. The Lahore High Court has taken the same view in A I R 1935 Lah 690.[1] The civil revision petition is allowed with costs here and below.

C.R.K./G.N. *Revision allowed.*

1. ('35) 22 AIR 1935 Lah 690 : 160 I C 493, Charanjit Singh v. Sardar Mohammad.

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(28) A. I. R. 1941 Madras 576

WADSWORTH J.

In re Papellugari Veera Reddi and others — Petitioners.

Civil Revn. Petn. No. 1939 of 1940, Decided on 18th December 1940, to revise order of Dist. Court, Cuddapah, D/- 6th November 1940.

Criminal P. C. (1898), Ss. 195 (1) (b) and 476 — Case falling under S. 195 (1) (b) — Accused need not be party to proceeding—Offence under S. 193, Penal Code—Complaint under S. 476 is necessary—Fact that facts establish offences to which S. 476 does not apply is no ground for cancelling complaint under S. 476 in respect of offence under S. 193, Penal Code — Offences falling outside S. 476 should not be included in complaint under S. 476 — Court should make separate complaints in executive capacity.

In cases falling under S. 195 (1) (b) the accused need not be a party to the proceeding: ('19) 6 A I R 1919 Mad 7 (FB), *Expl., and Disting.* [P 576 C 2]

An offence under S. 193, Penal Code, in connexion with a proceeding before a Court clearly falls under S. 195 (1) (b), Criminal P. C., and a complaint under S. 476, Criminal P. C., is necessary. The fact that the facts constituting offence under S. 193, Penal Code, establish offences under other sections of the Penal Code to which S. 476, Criminal P. C., does not apply, is not a ground for cancelling the complaint which is valid and necessary so far as the offence under S. 193, Penal Code, is concerned. The Court should not include offences not falling under S. 476 in a complaint under that section but should make separate complaints in respect thereof in its executive capacity. [P 576 C 2]

A. Narasimha Iyer — for Petitioners.

Public Prosecutor — for the Crown.

Order. — The basis of this revision petition is the assertion that the petitioners are not parties to any suit and that they cannot therefore be prosecuted by means of a complaint under S. 476, Criminal P. C. The petitioners rely on the Full Bench ruling in 42 Mad 540[1] which has a rather misleading headnote. The decision really related to a case falling under S. 195 (1) (c), Criminal P. C., and had nothing to do with cases falling under S. 195 (1) (b) in which the accused need not be a party. Here one of the offences alleged is an offence under S. 193, Penal Code, in connexion with a proceeding before the District Munsif. Such an offence clearly falls under S. 195 (1) (b), Criminal P. C., and a complaint under S. 476, Criminal P. C., was necessary. The fact that the District Munsif has also complained that the facts establish offences under other sections to which S. 476, Criminal P. C., has no application, is not a ground for cancelling the complaint which was valid and necessary so far as the offence under S. 193, Penal Code, was concerned. Certainly, it would have been better had the District Munsif filed a separate complaint, in his executive capacity of the offences of theft etc., instead of including them in his complaint under S. 476, Criminal P. C. But the accused have not been damnified, more especially as there is a police charge sheet in respect of those offences upon which the prosecution can be based. I decline to interfere in revision and dismiss this petition with costs of the Public Prosecutor.

C.R.K./G.N. *Petition dismissed.*

1. ('19) 6 A I R 1919 Mad 7 : 50 I C 824 : 20 Cr L J 344 : 42 Mad 540 : 36 M L J 448 (F B), Govinda Iyer v. Emperor.

(28) A. I. R. 1941 Madras 577

ABDUR RAHMAN J.

S. Kasi Chettiar — Appellant

v.

Secretary of State and others — Respondents.

Second Appeal No. 1035 of 1937 and Civil Misc. Petn. No. 5779 of 1940, Decided on 5th November 1940, against decree of Dist. Court, Ramnad at Madura, in A. S. No. 63 of 1934.

(a) Appeal — Right of, is not mere matter of procedure but substantive right created by statute — It can be exercised only by those in whom power vests expressly or by necessary implication.

A right of appeal is not a mere matter of procedure. It is a substantive right and is primarily a creature of statute. As such, it can be exercised only by those in whom the power vests either expressly or by necessary implication. [P 577 C 2; P 578 C 1]

(b) Civil P. C. (1908), O. 41, R. 4 — Right of appeal can be deduced from O. 41, R. 4.

The right to prefer an appeal by parties to a suit can be safely deduced from O. 41, R. 4, although the object of its enactment was different. [P 578 C 1]

(c) Civil P. C. (1908), S. 96 and O. 22, R. 10 — Failure or refusal by Official Receiver to file appeal—Creditor not party to litigation—Official Receiver is neither representative of, nor trustee for creditors—Creditor cannot file appeal — Nor can S. 75, Provincial Insolvency Act, be invoked to confer right of appeal on creditor by analogy — Official Receiver in litigation appears in his individual capacity — Proper procedure to be followed by creditor stated.

The Official Receiver being neither a representative of nor a trustee for the creditors it is not open to the creditors to ignore him or act independently of him and to file an appeal on the Official Receiver's failure or refusal to do so in a litigation to which they were not parties. The creditor does not fulfil the requirements of O. 22, R. 10. Nor can S. 75, Provincial Insolvency Act, be invoked to confer a right of appeal on the creditor by analogy: ('34) 21 A I R 1934 Mad 360, *Foll.* [P 578 C 1, 2]

The Official Receiver in a litigation appears in his individual capacity although he is entitled to be reimbursed by the insolvent's estate later ; ('29) 16 A I R 1929 Mad 105, *Rel. on.* [P 579 C 1]

The proper procedure for the creditor in the case of a refusal by the Official Receiver to prefer an appeal is to apply to the Insolvency Court under S. 68, Provincial Insolvency Act, for a reversal of the refusal by the Official Receiver and either for a direction to him to appeal against the decree or in the alternative for a permission to appeal himself in the name of the Official Receiver. [P 579 C 1, 2]

(d) Provincial Insolvency Act (1920), S. 28 (2) — Order granting leave under S. 28 (2) passed without notice to other party — Order does not prejudice interests of other party.

An order granting leave under S. 28 (2) passed without notice to the other party must be regarded to have been passed without prejudice to the interests of those against whom it was passed. [P 579 C 1]

K. S. Champakesa Ayyangar — for Appellant.

Government Pleader, K. Rajah Ayyar and R. Rangaswami Ayyangar — for Respondents.

Judgment. — Ramaswami Chettiar applied to the Subordinate Judge, Devakottai, on 2nd November 1931 to be declared an insolvent (I. P. No. 33 of 1931). He was adjudicated on 7th July 1932. While this application was pending, a property of his was sold for arrears of income-tax and purchased by defendant 2 on 25th April 1932. The sale was confirmed on 4th June of that year. The Official Receiver of the Ramnad District brought a suit in the Court of the Subordinate Judge, Devakottai for the cancellation of the sale (O. S. No. 27 of 1933) on 6th February 1933. The suit was dismissed and the decree passed by him was confirmed on appeal by the District Judge of Ramnad on 13th February 1937. The Official Receiver refused to prefer an appeal against that decree. One of the creditors, who is the present appellant in this Court, applied to this Court for leave to present an appeal. This was granted on 25th October 1937 but without issuing a notice to the opposite party. A preliminary objection has been taken on behalf of defendant 2 as well as on behalf of the Secretary of State that the appellant, not having been a party to the litigation, was not competent to prefer this appeal. The question to decide is if he was entitled so to do.

Learned counsel for the appellant urged in the first instance that the Official Receiver represented him and other creditors of Ramasami Chettiar in O. S. N. 27 of 1933 and on the Official Receiver's failure to prefer an appeal, his client, who was one of the creditors, was competent to do so. The second contention advanced by him was that even if S. 75, Provincial Insolvency Act, has no application, his client should be held entitled to prefer an appeal on the analogy of that section. The third contention was that the relationship between his client and other creditors on the one side and the Official Receiver on the other was that of a cestui que trust and a trustee and in so far as the latter's failure to prefer an appeal against the decree would affect him and other creditors of Ramaswami adversely he — or they — should be held competent to bring the litigation, which was carried up to a certain stage by the Official Receiver, to the highest Court of the Presidency and to get a final adjudication in regard to that matter from that Court. A right of appeal is not a mere matter of procedure. It is a

substantive right and is primarily a creature of statute. As such, it can be exercised only by those in whom the power vests either expressly or by necessary implication.

The question to decide is if the appellant can be held to have this right in the absence of any specific provision either in the Civil Procedure Code or in other enactment for the time being in force. Order 41, R. 1, Civil P. C., does not specify the person who is entitled to prefer an appeal. This led Mr. Champakesa Iyengar, learned counsel for the appellant, to argue that the omission was deliberate and was obviously made with the object of conferring a right of appeal on persons who were not parties to the suit originally. This may be to a certain extent correct but it cannot possibly lead one to infer that a person, who does not fall within the purview of the provisions of the Code of Civil Procedure or of any other statute conferring that right on him either expressly or impliedly, would be entitled to prefer an appeal from the decision of a suit or other proceeding to which he was not a party. The right to prefer an appeal by parties to a suit can be safely deduced from O. 41, R. 4, Civil P. C., although the object of its enactment was different. The only other provisions of the Code of Civil Procedure to which a reference can be made for this purpose are contained in S. 96, O. 22, R. 10. The appellant does not fulfil the requirements of O. 22, R. 10, Civil P. C. The interests of the Official Receiver cannot be said to have devolved on him during the pendency of the suit. Nor can any interest be said to have been created in his favour or assigned to him during the pendency of the suit which would have entitled him to continue the suit or prefer an appeal.

The contention that the Official Receiver represented the creditors when he figures as a plaintiff is not correct. He is a creature of statute in whom the whole estate of the debtor vests for certain purposes. As those purposes are, speaking generally, to liquidate the whole of the debtor's estate, to divide it amongst his creditors to the extent of the debts due to them and to pay the balance, if any, to the debtor himself, he would be representing the interests of the creditors and of the debtor to a very large extent. But to contend that he represents the interests of creditors only is not quite correct. In trying to defend or save the estate for the benefit of the creditors and that of the debtor he has to come into conflict sometimes with the one or sometimes with the other and at times both with the debtor and some of the creditors. It would be therefore incorrect to argue that he represents the interest of all the creditors of an estate at all times. But even if he does so, it would not follow that any creditor can of his own choice replace or cast him as a shadow and usurp the power which the law has conferred on him. He is not an agent of the creditors and cannot for that reason be done away with at the sweet will of one or even of the whole band of creditors. He represents larger interests than those of creditors alone and cannot be said to be functioning on their behalf merely. Even if the whole body of creditors of an insolvent estate joined hands and decided to take an action against or on behalf of the estate they would not be able so to do. For the above reasons, I must hold that the Official Receiver is not a representative of the creditors and it is not possible for the creditors to ignore him or act independently of him in the manner in which they have done in this appeal.

It is equally impossible to accept the contention in regard to S. 75, Provincial Insolvency Act, or the extension of the principle underlying that section and its application to a case like the present by way of an analogy. The considerations which led the legislature to confer a right of appeal not only on the debtors, creditors or on receivers but also on any other person aggrieved by a decision given or an order made in the exercise of insolvency jurisdiction were totally different and have no application when we are dealing with a suit which, being an action in personam, determines the rights of the parties who are either actually or in case such as those where leave is taken or given to sue or be sued or to defend on behalf of or benefit of all persons so interested, constructively, before the Court. In the absence of a provision similar to what is contained in S. 75, Provincial Insolvency Act, it is not possible to confer a right of appeal by analogy.

As for the contention that the Official Receiver is a trustee on behalf of all the creditors, it may be true that in his dealings with the affairs of the estate he may be accountable as a trustee, but having regard to the facts that he is an officer appointed by the Local Government and no suit could lie against him for a dividend (S. 65) it is difficult to see how he can be said to be a trustee on behalf of the creditors. It cannot be denied that he would be accountable to

the Court and any executive act of his or any decision by him is liable to be reversed or modified by the Court; but to say that every creditor and debtor is competent to maintain an action and can compel him to render accounts to each individual would make his situation hopeless and the Act unworkable. No authority has been shown to me by learned counsel for the appellant that he was ever held to be accountable in that manner. Nor has any authority been brought to my notice that if a trustee brought a suit, a cestui que trust would be in the absence of an assignment as contemplated by O. 22, R. 10, Civil P. C., entitled to prefer an appeal if the trustee fails or refuses to do so. The decision in 52 Mad 263[1] was cited by learned counsel for the appellant for a different purpose. But it goes to show that when he comes or is brought to Court, he does so in his personal capacity. He was held by a Division Bench of this Court in that case to be personally liable for costs in the absence of any other direction to the contrary. This would point to the conclusion that the Official Receiver appears in his individual capacity although he may be entitled to be reimbursed by the insolvent's estate later.

I have examined the contentions raised on behalf of the appellant and found them to be devoid of any force. There is a direct decision of a Division Bench of this Court in 57 Mad 670,[2] which is on all fours, or almost so, with the facts of this case and it is quite sufficient to say that in spite of my request to distinguish it on any material fact, learned counsel for the appellant was unable so to do. Even if I were of a contrary opinion, this would have been binding on me, but now that I find myself of the same opinion I respectfully follow it. The only question then is whether any difference could be made on account of the leave granted to the appellant by this Court in October 1937. No notice was issued to the respondents and the order by this Court must be regarded to have been passed without prejudice to the interests of those against whom it was passed. It remains for me to point out that the action taken by the appellant in this case was misconceived. He would have been well advised to go to the Insolvency Court under S. 68 of the Act and to apply for a reversal of the refusal by the Official Receiver to prefer an appeal to this Court and either for a direction to him to appeal against the decree passed by the District Judge of Ramnad or in the alternative for a permission to appeal himself in the name of the Official Receiver. For the above reason the appeal fails and is dismissed with costs — one set of costs to be divided between respondents 1 and 2. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

1. ('29) 16 A I R 1929 Mad 105 : 114 I C 825 : 52 Mad 263 : 55 M L J 873, Balakrishna Menon v. Manakkal Uma.
2. ('34) 21 A I R 1934 Mad 360 : 150 I C 538 : 57 Mad 670 : 66 M L J 532, Indian Bank v. Bansiram Jashmal.

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(28) A. I. R. 1941 Madras 579

LAKSHMANA RAO J.

Public Prosecutor, Madras — Petitioner

v.

Salma Beevi — Respondent.

Criminal Revn. Case No. 979 and Petn. No. 923 of 1939, Decided on 9th February 1940, to revise order of Asst. Sess. Judge, Tinnevelly Division, D/- 3rd August 1939.

Criminal P. C. (1898), Ss. 195 (1) and 439—Accused's complaint to Magistrate against five persons of dacoity referred as false by police—Notice to that effect served on accused who failed to appear before Magistrate—Accused charged under S. 211, Penal Code, and committed to Sessions—In Sessions Court before charge accused objecting to committal as void for want of complaint under S. 195 (1)—Objection upheld and accused discharged—Complaint by Magistrate under S. 195 (1) for prosecuting accused held not necessary—Revision against order of discharge held competent.

The complaint to the Magistrate by the accused against five persons of dacoity was referred as false by the police. A notice to that effect was served on the accused who did not appear before the Magistrate. The accused was charged under S. 211, Penal Code, and committed to Sessions where before the charge it was contended that the committal was void for want of complaint under S. 195 (1) by Magistrate before whom false complaint was filed by the accused. The contention was upheld and accused discharged :

Held that a complaint by the Magistrate for the prosecution of the accused was not necessary inasmuch as there was no proceeding in any Court. [P 580 C 1]

Held further that revision against the order of discharge was competent. [P 580 C 1]

Petitioner in person.

G. Gopalaswamy — for Respondent.

FACTS.—The accused *S* complained against one *A* and four others to the Village Magistrate of forcibly pushing her out of her house when she was alone and when her husband was absent, frightening her with gun and removing articles worth Rs. 200, an offence of dacoity. The police investigated the complaint made by the accused and referred it as false and notice was served on the accused to that effect. The Sub-divisional Magistrate

framed a charge under S. 211, Penal Code, and committed *S* to Sessions for trial. The accused contended before the Assistant Sessions Judge that no complaint having been filed by the Village Magistrate under S. 195 (1), Criminal P. C., the Sub-divisional Magistrate should not have taken cognizance of the offence. The Assistant Sessions Judge upholding the contention of the accused discharged her.

Order. — The trial in the Sessions Court commences only after the charge is read over and the accused claims to be tried, and the preliminary objection that the proper remedy is an appeal against the order of the Assistant Sessions Judge cannot be upheld. On the merits, the complaint of the respondent was referred by the police and she did not appear before the Magistrate. There was no proceeding in any Court and the view of the Assistant Sessions Judge that a complaint by the Magistrate is necessary for the prosecution of the respondent under S. 211, Penal Code, in respect of a cognizable offence is untenable. The order of discharge is therefore set aside and the Assistant Sessions Judge will proceed with the case in accordance with law.

C.R.K./G.N. *Revision allowed.*

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(28) A. I. R. 1941 Madras 580

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

N. A. R. Rm. Raman Chettiar — *Appellant*

v.

P. N. Muthupalaniappa Chettiar — *Respondent.*

Letters Patent Appeal No. 47 of 1939, Decided on 28th October 1940, against judgment and order of Wadsworth J., *Reported in ('41) 28 A I R 1941 Mad 75.*

Provincial Insolvency Act (1920), Ss. 4 and 77 —District Court of Amherst, Burma, requesting under S. 77, District Court of Ramnad to sell insolvent's property alleged to be situated in Ramnad District — Person claiming title in property sold making application under S. 4 in Amherst Court — Amherst Court returning it for presentation to Ramnad Court — Applicant filing fresh application in Ramnad Court — Ramnad Court held proper Court to decide question of title to property: 1940 M W N 905 =('41) 28 A I R 1941 Mad 75=52 M L W 377, *REVERSED.*

A person was adjudicated an insolvent by the District Court of Amherst, Burma. The insolvent's estate was said to include certain immovable property in the Ramnad district, and in consequence the District Court of Amherst requested the District Court of Ramnad to aid it under S. 77, Provincial Insolvency Act, in the sale of the property. The District Court of Ramnad sold the property. Subsequently, the transferee from the insolvent's daughter filed an application under S. 4 in the Amherst Court claiming title to the property by reason of a conveyance in his favour executed by the insolvent's daughter. The District Judge of Amherst considered that the proper Court to deal with this application was the Ramnad Court inasmuch as the proceedings with regard to this particular property had been transferred from Amherst to Ramnad. Accordingly, he returned the petition to the applicant in order that he might file it in the District Court of Ramnad. The applicant filed a petition in the District Court of Ramnad in which he asked that possession of the property be redelivered to him. Instead of making the application under S. 4, Provincial Insolvency Act, he purported to make it under S. 5 of that Act and under O. 21, Rr. 100 and 101, Civil P. C.:

Held that the fact that the applicant in error invoked S. 5 of the Act and the Civil Procedure Code did not preclude the Court from treating the petition as being filed under the appropriate section, namely S. 4: [P 581 C 2]

Held further that the proper Court to decide question of title in the circumstances was the District Court of Ramnad: 1940 M W N 905= ('41) 28 A I R 1941 Mad 75 = 52 M L W 377, *REVERSED.* [P 581 C 2]

T. Nallasivam Pillai — for Appellant.

K. Ramaswami Chettiar — for Respondent.

Judgment.—In 1931 a Nattukottai Chettiar named V. P. L. Palaniappa Chettiar, was adjudicated an insolvent by the District Court of Amherst, Burma. The insolvent's estate was said to include certain immovable property in the Ramnad District, and in consequence the District Court of Amherst requested the District Court of Ramnad to aid it under S. 77, Provincial Insolvency Act in the sale of the property. The District Court of Ramnad, as it was bound to do acted on the request of the Amherst Court and on 29th August 1934 sold the property through the Official Receiver, the purchaser being the respondent. A month later, the appellant filed an application in the Amherst Court under S. 4 of the Act, in which he claimed that the property which had been sold by the Ramnad Court belonged, not to the insolvent, but to his daughter by virtue of an arbitration award made in the year 1916. The appellant claimed title to the property by reason of a conveyance in his favour executed by the insolvent's daughter on 14th March 1934. The District Judge of Amherst considered that the proper Court to deal with this application was the Ramnad Court inasmuch as the proceedings with regard to this particular property had been transferred from Amherst to Ramnad. Accordingly, he returned the petition to the appellant in order that he might file it in the District Court of Ramnad. The appellant accepted this decision and in due course represented the petition to the District Court of Ramnad. For some reason which has not

been disclosed the appellant did not proceed any further in the matter and the petition was dismissed for default. The result was that on 12th February 1936 the Official Receiver executed a conveyance of the property in favour of the respondent.

On 7th December 1936 the appellant filed a petition in the District Court of Ramnad in which he asked that possession of the property be re-delivered to him, and in his affidavit in support of the petition he set up the title which he had claimed in the earlier petition. Instead of making the application under S. 4, Provincial Insolvency Act, the appellant purported to make it under S. 5 of that Act and under O. 21, Rr. 100 and 101, Civil P. C. Neither S. 5, Provincial Insolvency Act, nor O. 21, Civil P. C., applied, but the District Judge proceeded with the hearing of the application and by an order dated 19th July 1937 directed that the property should be re-delivered to the appellant who, in his opinion, had established a prima facie title and had been in possession on his own account from 25th November 1936. The respondent then appealed to this Court. When the case was in the District Court the respondent raised the question whether that Court had jurisdiction to entertain the application. His contention was that the proper Court to deal with the matter was the Amherst Court, but the objection was overruled. The respondent raised the question again in his appeal to this Court and his objection was accepted by Wadsworth J. from whose judgment this appeal has been preferred. The District Court of Amherst had asked the District Court of Ramnad to act in its aid in deciding the question of the title to this property, and having left the matter to the decision of the Ramnad Court, that Court had full jurisdiction by reason of S. 77 of the Act. That section says that all Courts having jurisdiction in insolvency shall severally act in aid of and be auxiliary to each other in all matters of insolvency and an order of a Court seeking aid with a request to another Court shall be deemed sufficient to enable the other Court to exercise jurisdiction. It is true that when the District Judge of Amherst decided that the Ramnad District Court was the proper Court to deal with the earlier petition, there was no special letter of request, but in our opinion, there was no necessity for this. The request had been made at an earlier stage and in directing the appellant to file in the District Court of Ramnad his petition asking for adjudication on the question of title the District Court of Amherst acknowledged that it had left the District of Ramnad to decide all matters relating to this particular property.

Mr. Rajah Ayyar on behalf of the respondent has conceded that the fact that the earlier petition was dismissed for default does not preclude the appellant from filing a fresh application under S. 4, Provincial Insolvency Act, although naturally he has pointed out that this application is not one under that section. The Court must however treat it as being made under S. 4. The fact that the appellant in error invoked S. 5 of the Act and the Civil Procedure Code does not preclude the Court from treating the petition as being filed under the appropriate section, namely S. 4, and that is what we propose to do in this case. If this course were not adopted, it would only lead to further delay and unnecessary expense. It is convenient to both parties to regard the petition as being under the proper section. Treating it as an application under S. 4, the question of title falls to be decided, and we consider that the proper Court to decide this question in the circumstances is the District Court of Ramnad. The Court which adjudicated the insolvent has recognized that the District Court of Ramnad had full jurisdiction in the matter as the result of the request made under S. 77 and the District Court of Ramnad has accepted jurisdiction. In these circumstances, the case will be remanded to the District Court of Ramnad for decision on the question of title. Each side will of course be entitled to adduce further evidence, if so desired.

The District Judge of Ramnad will be directed to intimate to the District Court of Amherst that the question of title to this property is still being debated and to request the Amherst Court not to distribute the money which the respondent has paid for the property until the question has been finally decided. If the appellant succeeds, the respondents, of course, will be entitled to the return of his money. If the appellant fails, the property will be re-delivered to the respondent and the sale will stand. The appellant has only himself to blame for the present position. In the first place he ought not to have allowed the earlier petition to go by default and in the second place he ought to have framed his present petition properly. As he is to blame in both these respects, we consider that there should be no order for costs in his favour.

C.R.K./D.S. *Order accordingly.*

(28) A. I. R. 1941 Madras 582

ABDUR RAHMAN J.

Kachi Muhaidin Tharaganar —
Defendant — Appellant
v.
Sainambu Ammal and others —
Plaintiffs—Respondents.

Second Appeal No. 94 of 1938, Decided on 24th January 1941, against decree of Sub-Judge, Tinnevelly, in A. S. No. 180 of 1937.

(a) Mahomedan law — Guardianship — Shafei sect — Mother is entitled to custody of her daughter until she is married.

There is a distinction in regard to the law as to the custody of a daughter between the Hanafis on the one hand and the Maliks, Shafeis and Hanbalis on the other. According to Hanafis, the mother is entitled to the custody of her daughter until she attains puberty while according to the latter she is entitled to her custody until she is married. [P 583 C 1]

(b) Mahomedan law — Maintenance — Maintenance of children is obligatory on father as long as he is in position to provide for them and they have no independent means of their own —Right of children to receive maintenance cannot be linked with right of father to have them in custody.

The maintenance of children is obligatory on the father and as long as he is in a position to do so and the children have no independent means of their own, it remains his duty to provide for them. In a suit for recovery of maintenance, the rules of maintenance, so far as the children are concerned, have got really nothing to do with the father's right of custody. If the father has any right of custody of his children, he is entitled to enforce that right but the fact that he has not done so or that his children are residing elsewhere does not deprive them of their right to claim or recover maintenance from their father. [P 583 C 2]

T. P. Gopalakrishna Iyer — for Appellant.

N. R. Sesha Iyer — for Respondents.

Judgment. — This appeal arises out of a suit brought by one Sainambu Ammal (plaintiff 1) in the Court of the District Munsif of Ambasamudram for the recovery of Rs. 402-8-0 in regard to expenses alleged to have been incurred by her on behalf of her minor daughters (plaintiffs 2 and 3) from 7th November 1933 to 2nd February 1936 and for their future maintenance at Rs. 15 per mensem. The suit was instituted against the minors' father who is said to have divorced plaintiff 1 some years ago. The parties were described in the plaint as Mahomedans belonging to the Shafei sect. The expenses before 7th November 1933 were recovered by another suit (O. S. No. 355 of 1933) brought by and on behalf of the same plaintiffs in the same Court. It was pleaded inter alia by the father in the present litigation that plaintiff 1 could not recover any maintenance on behalf of plaintiffs 2 and 3 and as they had attained puberty and were being unlawfully detained by her in spite of the defendant's demand for their custody. These allegations were denied on behalf of the plaintiffs although, in the absence of the statements of the counsel for the parties before the issues were framed, legal positions for which they contended were not brought out clearly at that stage.

After considering the evidence adduced on behalf of the parties the District Munsif found that plaintiff 2 was 15 years of age towards the end of 1934 and that plaintiff 3 attained the age in or about February 1936 when the suit was instituted. In view of that finding and in the absence of any direct evidence as to puberty, he presumed plaintiff 2, in accordance with the rule of Mahomedan law, to have attained puberty towards the end of 1934 and plaintiff 3 at or about the time when the suit was instituted in February 1936. He further held that inasmuch as the defendant was entitled to the custody of his daughters after they had attained puberty and they could not legitimately reside with their mother after that period, he was only liable for their maintenance upto such time that they had not attained puberty. A decree for Rs. 74-4-8 was therefore passed in favour of the plaintiffs and the rest of the claim including the claim for future maintenance was dismissed. It might be stated here that plaintiff 2 was found to have been a major at the time when the suit was brought and plaintiff 1's name as a next friend was deleted by the Court suo motu as a surplusage. This was obviously the right course to adopt and no exception was taken to this procedure by the defendant subsequently. An appeal against this decree was taken on behalf of the plaintiffs to the Principal Subordinate Judge of Tinnevelly who pointed to the fact that the parties to the suit were Mahomedans of the Shafei sect and it was, therefore, incorrect for the District Munsif to hold that the mother was entitled to the custody of the daughters upto the time of puberty. He held that according to the Shafei law, to which the parties admittedly belonged, the mother was entitled to retain custody of her daughters upto the time of their marriage. Finding therefore that the daughters were justified in residing with their mother even after they had attained puberty, he enhanced the amount of the decree to Rs. 134-3-3 for past maintenance and decreed a sum of Rs. 5 per mensem for both plain-

tiffs 2 and 3 by way of future maintenance until they were married. The defendant appeals and the only important point that has been argued before me is whether the claim for the daughters' maintenance both past and future, was in the circumstances, rightly allowed by the lower appellate Court for the period after they had attained their puberty.

It is urged that inasmuch as the father is the legal guardian of his children and his right to give his daughters in marriage cannot be questioned according to the Shafei law, (which in fact clothes him with larger powers in this respect than the law prevailing amongst the Hanafis) the mother's custody should be held to be illegal and the defendant should not, for that reason be held liable for any maintenance. There is as pointed out by Saiyid Ameer Ali in his well known work on Mahomedan law, a distinction in regard to the law as to the custody of a daughter between the Hanafis on the one hand and the Malikis, Shafeis and Hanbalis on the other. According to Hanafis, the mother is entitled to the custody of her daughter until she attains puberty while according to the latter she is entitled to her custody until she is married. He says at p. 294 (Vol. II, Edn. 4) that,

> according to the judgment of the Courts of Algiers, it appears that in several notable instances, the Hanafi Kazis have followed the Maliki doctrines and decided that the mother is entitled to the custody of her daughters until they were married.

He has referred to the opinion of several jurists given in Fatwa Alamgiri which point to the conclusion that the right of Hizanat (custody) terminates when the girl is marriageable although as pointed above, the Malikas and Shafeis hold that it should continue until she was actually married. Since according to the Mahomedan practice and tradition, a girl was expected to be married as soon after she attained puberty as possible, the difference between the doctrine of the two sects was pointed out by the learned author to be not so great or marked as would at first sight appear. But with the growth of Western civilization in India, and having regard to the variation in the angle of vision from which the matter is now generally looked at, particularly amongst those who have imbibed Western thought and ideals, supported as it is to some extent by new legislation, when the marriageable age and puberty do not usually coincide, the distinction between the Hanafi and the Shafei doctrines has to be regarded as real. Luckily, however, even the Hanafi jurists in other Mahomedan countries, as referred to by Mr. Ameer Ali, are inclined to accept and act according to the Maliki and the Shafei doctrine on this point and to permit a mother to retain the custody of her daughter upto the time that she is married. Since a girl needs the guidance of her mother more and not less between the time after the attainment of puberty and her marriage, the preference given by the Hanafi jurists to the Shafei view can be well understood and appreciated.

If, therefore, the right of custody by the mother were any test in this case, I would have no hesitation in holding, particularly when the parties belonged to the Shafei sect, that the mother was competent to retain her daughters' custody in spite of their having attained puberty up to the time that they were actually married. But the contention put forward on behalf of the defendant has in my opinion no bearing on the question that I have been called upon to decide in this appeal. This was a suit for recovery of maintenance and the rules of maintenance, so far as the children are concerned, have got really nothing to do with the father's right of custody. If the father has any right of custody of his children, he is entitled to enforce that right but the fact that he has not done so or that his children are residing elsewhere does not, in my opinion, deprive them of their right to claim or recover maintenance from their father. The prophet of Islam declared the maintenance of children to be obligatory on the father and as long as he is in a position to do so and the children have no independent means of their own, it remains his duty to provide for them. That is why even according to the Hanafi jurists, although the father was entitled to the custody of his daughters after puberty, he was held to be liable for the maintenance of his daughters upto the time that they were married. This would also show that the right of the daughters to recover their maintenance cannot be legitimately linked with the right of the father to have them in his custody. There is no divergence of opinion between the Hanafis and the Shafeis on this point and Baillie in his Mahomedan law while describing the ordinary Hanafi rule in regard to maintenance refers at p. 462 (Edn. 2) to the father's absolute duty to maintain his daughters upto the time that they were married. (See also Mullah's Mahomedan Law at p. 264, para. 269, Edn. 11).

The contention that the father has been held by their Lordships of the Privy Council in 45 Cal 878[1] to be the legal guardian of his children is also beside the point. It cannot be denied that he is so, but if a minor has certain rights against his legal guardian, there appears to be no justification for holding that the former cannot enforce them against the latter. It was admitted at the bar that the defendant had married again and has no less than seven children by his second wife. In the absence of any genuine attempt on his part to recover the custody of his daughters, a formal demand by him calling upon them to come and live with him gives some room to doubt his bona fides. It appears to be more for the purpose of terminating his liability to pay for their maintenance rather than to enforce his desire to keep them with him on account of the natural tie that binds them together. Nor is the refusal on the part of his daughters to leave their natural mother and to start living with their step-mother and step-brothers and sisters, in the circumstances, unnatural. Considerations of these questions in a suit for maintenance of the daughters before their marriage are however irrelevant. The father's liability to maintain his children is absolute subject of course to his being in a position to bear that burden and to the children not having any independent means of their own. And in this case it is not denied that he has means to do so and the small income which these plaintiffs are making by working for themselves has been duly taken into account. The maintenance awarded is, in spite of its enhancement by the first Court of appeal, extremely meagre and it is impossible to give effect to the contention that this increase was not justified. Had it been possible for me to do so now, I should have enhanced it still further. But unfortunately it is not. There is no cross appeal on behalf of the plaintiffs. For these reasons, the appeal fails and is dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

1. ('18) 5 A I R 1918 P C 11 : 47 I C 513 : 45 Cal 878 : 45 I A 73 (P C), Imambandi v. Mutsaddi.

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(28) A. I. R. 1941 Madras 584

KING AND PATANJALI SASTRI JJ.

Arunachalam Pillai — Appellant

v.

Seetharam Naidu and others — Respondents.

Appeal No. 47 of 1939, Decided on 23rd January 1941, against decree of Sub-Judge, Madura, D/- 31st August 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 8 — Non-agriculturist court-auction purchaser of equity of redemption from agriculturist-mortgagor is entitled to benefit of S. 8.

When the non-agriculturist purchaser of equity of redemption purchases the properties in court-auction he takes them subject to the burden of the mortgagee's mortgage and if the burden is by reason of the provision of S. 8 of the Act reduced without payment, the purchase proves to that extent an advantageous one, and there is nothing in the Act to deprive him of the fruits of his lucky purchase, even though he is not an agriculturist. He gets the benefit not because the provisions of the Act apply to him, for obviously they do not, but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it : ('41) 28 A I R 1941 Mad 204, *Disting.* [P 585 C 2 ; P 586 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 3 (iii) — Relinquishment by mortgagee of personal liability of agriculturist mortgagor does not change mortgage into "debt" payable solely by non-agriculturist purchaser of equity of redemption.

It is difficult to see how the mortgagee's relinquishment of his right to a personal decree against the mortgagor after the Act had come into force and the mortgagor had in fact applied for relief under it, can affect the position which arises with reference to a date long prior to such relinquishment. The relinquishment of the claim for a personal decree against the mortgagors cannot hence have the effect of converting the mortgage into a "debt" payable solely by the non-agriculturist purchaser of equity of redemption: ('39) 26 A I R 1939 Mad 186, *Ref.* [P 586 C 1]

K. V. Sesha Ayyangar and R. Subramania Ayyar — for Appellant.

T. M. Krishnaswami Ayyar and K. Venkateswaran — for Respondents.

Patanjali Sastri J. — The question raised in this appeal is whether a mortgagee who sues to enforce his mortgage is entitled to a decree for the whole amount due under the mortgage against a non-agriculturist court auction-purchaser of the equity of redemption when the agriculturist mortgagor claims to have the debt scaled down under the provisions of the Madras Agriculturists' Relief Act. The appellant brought the suit out of which this appeal arises in August 1937 for recovery of Rs. 8500 by the sale of the mortgaged properties on foot of a mort-

gage executed by the managers of the joint family of respondents 1 to 8 (hereinafter referred to as the mortgagors) for Rs. 5000 on 29th October 1931. Respondents 9 to 11 are subsequent encumbrancers in respect of one of the properties comprised in the mortgage, and respondent 12 is the purchaser of all the properties subject to the mortgage in execution of a decree for money obtained by a third party against the mortgagors. While the suit was pending, the Madras Agriculturists' Relief Act came into force on 22nd March 1938 and the mortgagors were allowed to file an additional written statement on 4th August 1938 raising the plea that they were agriculturists as defined by the said Act and that the debt was liable to be scaled down in accordance with the provisions thereof. The appellant filed on 12th August 1938 a reply statement whereby he relinquished his personal remedy against the mortgagors, confining the relief sought in the suit to a decree for sale of the properties in the hands of respondent 12. There is no dispute that all the respondents except respondent 12 are agriculturists within the meaning of the Act and that the amount due as scaled down under S. 8 is Rs. 3050. The learned Subordinate Judge of Madura who tried the suit overruled the contention of the appellant that the debt should not be scaled down under the Act so far as respondent 12 was concerned and passed a preliminary decree for sale for the sum of Rs. 3050 with interest thereon from 1st October 1937 against all the respondents.

It is argued for the appellant that inasmuch as all the mortgaged properties are now in the hands of respondent 12 who is not an agriculturist and a decree is sought only against such properties, the Act has no application and a decree for sale for the full amount due under the mortgage ought to be passed against respondent 12. In support of this contention, reliance is placed by learned counsel upon the decision reported in 52 M L W 842 = (1940) 2 M L J 872[1] where it was accepted as a general proposition that the right of an agriculturist judgment-debtor to scale down a decree should not be allowed to enure for the benefit of a non-agriculturist judgment-debtor. That was a case where the mortgagor was not an agriculturist and the puisne mortgagee who claimed the benefit of the Act was an agriculturist and it was held, in view of an earlier decision, that the puisne mortgagee must be regarded as a debtor within the meaning of the Act and, being an agriculturist, was entitled to have the debt scaled down so far as his interest in the hypotheca was concerned, notwithstanding that it was payable in full by the non-agriculturist mortgagor. It is undoubtedly true that agriculturist debtors alone are entitled to the relief provided in the Act which does not contemplate any scaling down of debts due by others, but it does not follow that a non-agriculturist debtor can in no circumstances be benefited by the scaling down of a debt under the provisions of the Act. The properties now held by respondent 12 are liable only as security for the debt due by the mortgagors, and if as a result of the Act there is a statutory discharge or reduction of the debt, the properties cannot, it seems to us, be proceeded against for anything more than the scaled down amount of the debt. Section 8 of the Act, so far as it is material, here, says:

> Debts incurred before 1st October 1932 shall be scaled down in the manner mentioned hereunder, namely: (1) All interest outstanding on 1st October 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of the Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date.

It cannot be denied that the appellant was on the material date, viz., the 1st October 1937, a creditor of the mortgagors who are agriculturists in respect of a debt incurred before 1st October 1932, and the plain consequence of this provision is that all interest outstanding on that date is wiped out and the principal amount then outstanding is repayable. The appellant whose only right as a simple mortgagee is,

> in the event of his (mortgagor's) failing to pay according to his contract, to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money (*see* S. 58 (b), T. P. Act),

cannot claim to proceed against the properties in the hands of respondent 12 for anything in excess of what is repayable under the mortgage. When respondent 12 purchased the properties in court-auction, he took them subject to the burden of the appellant's mortgage and if the burden is by reason of the provisions of S. 8 referred to above reduced without payment, the purchase proves to that extent an advantageous one, and there is nothing in the Act to deprive

1. ('41) 28 A I R 1941 Mad 204 : (1940) 2 M L J 872: 52 M L W 842, Ramier v. Srinivasiah.

him of the fruits of his lucky purchase, even though he is not an agriculturist. He gets the benefit of the scaling down not because the provisions of the Act apply to him, for obviously they do not, but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it.

The appellant laid stress on his relinquishment of the claim for a personal decree against the mortgagors and urged that it had the effect of converting the mortgage into a "debt" payable solely by respondent 12 as that expression has been understood in ILR (1939) Mad 218.[2] It is however difficult to see how the appellant's relinquishment of his right to a personal decree against the mortgagors after the Act had come into force and the mortgagors had in fact applied for relief under it, can affect the position which arises under the Act with reference to a date long prior to such relinquishment. It is unnecessary to consider what the consequence would be if the appellant had agreed to exonerate the mortgagors from all personal liability before the Act came into force. The appellant's learned counsel pointed out that according to the decisions in I L R 1939 Mad 218[2] and 52 M L W 842[1] a purchaser of property subject to a mortgage is entitled to the benefit of the Act if he is an agriculturist though the mortgagor is not, and submitted that it would be anomalous to hold that he gets the same benefit when he is not an agriculturist and the mortgagor is. We fail to see the anomaly. The Act entitles him to such benefit in the one case while, as already observed, it is the consequence of his purchase under the general law in the other. The appeal is dismissed with costs of respondent 12.

C.R.K./N.K. *Appeal dismissed.*

2. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : ILR (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.

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(28) A. I. R. 1941 Madras 586

LEACH C. J. AND HAPPELL J.

C. D. Parthasarathy — Appellant

v.

Madras Publishing House Ltd. and others — Respondents.

Original Side Appeal No. 59 of 1940, Decided on 10th February 1941, from order of Gentle J., in Appln. No. 241 of 1940, D/- 25th July 1940.

Companies Act (1913), S. 230 — Company mortgaging its immovable properties and also giving mortgagee floating charge over its book debts — S. 230 applies—Debts mentioned in S. 230 (1) must have priority over floating charge on book debts of company.

Where a company creates a fixed charge by mortgaging its immovable properties and also gives the mortgagee a floating charge over its book debts, S. 230 applies to the floating charge. Consequently, the debts mentioned in S. 230 (1) must be given priority and paid first out of the book debts before floating charge over the same can be enforced: (1929) 1 Ch 498, *Rel. on.* [P 587 C 1, 2]

P. S. Narayanaswami Ayyar — for Appellant.

T. T. Vijayaraghavan — for Official Liquidator.

C. R. Rajagopalachariar —for Debenture holder.

S. V. Shenoy — for Petitioning Creditor.

Leach C. J.—This appeal raises a question of priority in the distribution of the assets of the Madras Publishing House Limited, which by an order of this Court went into compulsory liquidation on 12th January 1940. The assets of the company were mortgaged or charged to respondent 3 under a registered deed dated 31st August 1937. By that deed all the immovable properties, the machinery, plant, stock-in-trade, fixtures, fittings and other chattels were mortgaged to respondent 3 and he was given a floating charge over the book debts of the company. The properties which were subject to the mortgage were described in separate paragraphs and there was a separate paragraph with reference to the floating charge over the book debts. The properties which were subject to the mortgage were by an order of the Court sold to the mortgagee for Rs. 1,89,000 which amount was set against the mortgage debt. At a later stage the book debts of the undertaking were sold to him for Rs. 20,994 and this was also set off against the mortgage debt. The appellant says that by virtue of S. 230, Companies Act, the Court had no power to sell the book debts to the mortgagee without providing for the priorities provided for in that section. The appellant was the secretary of the company and he says that at the date of the liquidation there was due to him by way of salary a sum of Rs. 2400.

Section 230 (1) (b) says that in a winding up there shall be paid in priority to all other debts, the wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the date of the winding up, not exceeding Rs. 1000 for each clerk or servant. Sub-section 2 (b) provides that the debts in respect of which priority is given by subs. (1) shall so far as the assets of the company available for the payment of general creditors are insufficient to meet them, have priority over the claims of holders of deben-

tures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to the charge. In other words, a person or a company entitled to a floating charge created by a debenture is postponed to a clerk or servant to the extent stated in sub-s. (1).

The appellant's case is that as respondent 3 has only a floating charge over the book debts he is entitled to have the book debts realised and out of proceeds to be paid Rs. 1000 before respondent 3 receives anything from this source. This was not the claim advanced before Gentle J. who heard the appellant's petition. Before the learned Judge the appellant boldly asserted that he was entitled by virtue of S. 230 to priority over respondent 3 in respect of all assets of the company, including those assets which are admittedly subject to the registered mortgage. The learned Judge rightly rejected this contention, but he did not consider whether the appellant's case with regard to the book debts stood on a different basis. He did not consider this question as it was not raised before him. It has been raised in the memorandum of appeal and the Court must consider it.

Section 230 makes it quite clear that where there is a floating charge created by a debenture the debenture-holder does not get priority over the debts contemplated in sub-s. (1). In the past there has been a great deal of discussion as to what the word "debenture" implies, but it is not necessary to decide on a definition here because it is accepted by all parties to this appeal that the deed created by the company in favour of respondent 3 is a debenture within the meaning of the section. In (1929) 1 Ch. 498,[1] the Court of Appeal had to consider the effect of a debenture which created a fixed first charge on certain assets of the company and a floating charge on other assets. It was held that the priority given by S. 107, Companies (Consolidation) Act, 1908, is, in such a case, given in respect of assets subject to the floating charge but not in respect of assets which are subject to the fixed charge. The fixed charge and the floating charge are separable. In the present case, we have certain fixed charges and we haye a floating charge in respect of the book debts of the company and as that charge was still a floating charge at the date of the winding up the provisions of S. 230 apply. In these circumstances the Court had no power to sell the debts to respondent 3, ignoring the provisions of S. 230.

The appellant's claim is not admitted and therefore the question whether he is entitled to rank as a creditor for Rs. 2400 or for any part of that sum remains to be decided. In view of our decision the case will be remanded to the original side for the determination of this question. If the appellant succeeds in establishing his claim he will be entitled to be paid out of the proceeds of the book debts to the extent of Rs. 1000, or any lesser sum proved will stand on the same basis. If necessary, there will be a re-sale of those assets. The question how the appellant's claim should be satisfied, supposing he establishes it, will be left to the original side to be decided in the light of this judgment. The appellant's rights, whatever they may be, will, of course, be subject to the rights of the liquidator under sub-s. (3) of S. 230. The appellant has succeeded but we do not think that he is entitled to an order for costs. If he had raised before Gentle J., the question which he has raised now, this appeal would have been avoided. The costs allowed in the Court below will stand.

C.R.K./G.N. *Appeal allowed.*

1. (1929) 1 Ch 498: 98 L J Ch 353: (1929) B & C R 6: (1929) W C & I Rep 261: 140 L T 321: 73 S J 27, In re Lewis Merthyr Consolidated Collieries Ltd.; Lloyds Bank Ltd. v. The Company.

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(28) A. I. R. 1941 Madras 587

WADSWORTH J.

Mavarakkandy Achuthan Nayar — *Petitioner*

v.

Thanniyatuthil Achuthan Nayar — *Respondent.*

Civil Revn. Petn. No. 1315 of 1938, Decided on 5th December 1940, to revise decree of Dist. Munsif, Payyoli in S. C. S. No. 249 of 1937.

Limitation Act (1908), S. 25—S. 25 creates no presumption as to date of document — Document bearing English and non-English dates —Which of them is correct should be decided according to S. 96, Evidence Act.

Section 25 creates no presumption as to the date of a document but merely provides that periods of limitation shall be worked out according to Gregorian calendar. The question which of the two dates English or non-English is correct is after all a simple question of fact to be decided by evidence and probabilities according to S. 96, Evidence Act. [P 588 C 1]

A. Achuthan Nambiar — for Petitioner.

K. S. Sundaram — for Respondent.

Order. — The suit promissory note bore two dates. The first was the Malayalam date corresponding to 15th November 1934. The

second was the English date 16th November 1934. The suit was filed on the last day of limitation reckoned from the former date and it has been held to be barred. It is contended that S. 25, Limitation Act, applies and that only the English date can be looked into. As I read S. 25 it creates no presumption as to the date of a document but merely provides that periods of limitation shall be worked out according to the Gregorian calendar. The question is after all a simple question of fact to be decided by evidence and probabilities according to S. 96, Evidence Act. Clearly there has been a mistake in the document and one of these two dates must be wrong. The only question is which date is wrong and there is no legal presumption in favour of either. The lower Court has come to the conclusion that it is more likely that the Malayalam date was right. That seems to be a reasonable decision and in any case it is one with which I cannot interfere in revision. The petition is therefore dismissed with costs.

C.R.K./D.S. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 588

PATANJALI SASTRI J.

Chidella Veerayya — Petitioner

v.

Kallam Kotireddi and another — Respondents.

Civil Revn. Petn. No. 26 of 1938, Decided on 8th November 1940, to revise order of Dist. Court, Guntur, D/- 1st October 1937.

(a) Provincial Insolvency Act (1920), S. 75— Scope—S. 75 overrides O. 47, R. 7, Civil P. C., so far as it bars right of appeal from order rejecting application for review and appeal against such order is competent.

Section 5 of the Act, makes the Civil Procedure Code applicable only subject to the provisions of the Act, that is to say, whenever any provision of the Civil Procedure Code is in conflict with an express provision in the Insolvency Act, the latter provision will prevail. Section 75 of the Act clearly provides for a right of appeal to the District Court from an order made in the exercise of insolvency jurisdiction by a Court subordinate to it, and this provision must be taken to override O. 47, R. 7 in so far as it bars a right of appeal from an order rejecting an application for review : ('35) 22 A I R 1935 Pat 177, *Dissent.* [P 589 C 1]

(b) Provincial Insolvency Act (1920), S. 37— Scope—Adjudication annulled — Vesting order not made and no conditions declared by Court —Creditor of debtor realizing his amount under decree by attachment of properties of debtor— Such realization cannot be affected by any vesting order subsequently made.

There is no provision in S. 37 that the vesting of the debtor's property when ordered later should relate back to the date of annulment. Hence when no vesting order is made when the adjudication is annulled and no conditions declared by the Court, the properties of the debtor must be deemed to have reverted to him, and the amount realized by the creditor of the debtor by attachment of such property cannot be affected by any vesting order subsequently made : ('38) 25 A I R 1938 Mad 752, *Ref.* [P 589 C 2]

K. Krishnamurthy — for Petitioner.

B. V. Ramanarasu — for Respondents.

Order. — This is a petition to revise an order of the District Court, Guntur, whereby it modified on appeal the order of the Subordinate Judge, Bapatla rejecting an application for review. The petitioner obtained a decree for Rs. 700 against certain persons who were subsequently adjudicated insolvent by the Subordinate Judge. As the insolvents did not apply for their discharge within the period specified by the Court in that behalf, the adjudication was annulled on 31st August 1936. On 1st October 1936, respondent 1 herein claiming to be of the creditors of the insolvents applied for a review of the order of annulment with a view to have the properties of the debtors revested in the Official Receiver under S. 37, Provincial Insolvency Act. The learned Subordinate Judge on objection by the petitioner rejected the application holding that the circumstances of the case did not justify the vesting of the properties in the Official Receiver at that stage. Thereupon, respondent 1 preferred an appeal to the Court below and the learned District Judge allowed the appeal and passed an order vesting the properties of the debtors in the Official Receiver. The petitioner has challenged the validity of this order on two grounds; firstly, that the appeal to the Court below was incompetent, and, secondly, that, in any case, the amount realized by the petitioner in execution of his decree against the debtors after the annulment of their adjudication and before the order of the Court below revesting their properties in the Official Receiver, could not be affected by such order and should have been excluded from its scope.

As regards the first point, petitioner's learned counsel relies upon the provisions of O. 47, R. 7, Civil P. C., which provides that an order of the Court rejecting the application for a review shall not be appealable, and argues that, inasmuch as the provisions of the Civil Procedure Code are made applicable under S. 5, Provincial Insolvency Act, to proceedings under that Act, the rule referred to above bars an appeal from the order of the learned Subordinate

Judge. But it is to be observed that S. 5 makes the Civil Procedure Code applicable only subject to the provisions of the Provincial Insolvency Act, that is to say, whenever any provision of the Civil Procedure Code is in conflict with an express provision in the Provincial Insolvency Act, the latter provision will prevail. Now, S. 75, Provincial Insolvency Act, clearly provides for a right of appeal to the District Court from an order made in the exercise of insolvency jurisdiction by a Court subordinate to it, and this provision must be taken to override O. 47, R. 7 in so far as it bars a right of appeal from an order rejecting an application for review. It follows that the appeal to the lower Court was competent. The learned Counsel for the petitioner however called my attention to the decision in A I R 1935 Pat 177[1] which no doubt supports his contention. The learned Judges there have taken the view that inasmuch as the power of the Insolvency Court to review its own order is derived only under the provisions of O. 47, R. 1, Civil P. C., read with S. 5 of the Act. Rule 7 of that order must necessarily govern the exercise of that power. With all respect, I am unable to agree with this reasoning. While it may be true to say that the power of review derived from the provisions of the Code of Civil Procedure could be exercised only subject to the limitations or restrictions imposed by the Code on the exercise of such power, it does not follow that the right of appeal from an order made in the exercise of such power is governed by the provisions of the Code when there is a specific provision in the Provincial Insolvency Act itself governing rights of appeal from orders passed by Courts exercising insolvency jurisdiction, and there is clear indication in the Act, that the latter should prevail over the former in case of conflict.

The question next arises whether the order made by the lower Court revesting the debtor's properties in the Official Receiver ought to have excluded from its operation the amounts realised by the petitioner after the annulment of adjudication and before the date of such vesting order. Prima facie, the order revesting the properties of the insolvents in the Official Receiver under S. 37 could only operate in respect of properties which belonged to the insolvents on the date of that order. Section 37 (1), Provincial Insolvency Act, says :

> Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver, shall be valid; but, subject aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare.

It has been held in this Court in (1938) 1 M L J 824[2] that an order appointing a person and vesting the debtor's property in such person under S. 37 need not necessarily be made simultaneously with the order of annulment, and can be made even subsequently. But it is clear from that section that unless the Court at the time of the annulment vests the property in a person appointed by it, the property shall revert to the debtor on such conditions as the Court may deem fit to declare. No such vesting order having been made in this case when the adjudication was annulled on 31st August 1936 and no conditions having been declared by the Court, the properties of the debtor must be deemed to have reverted to him, and the amount realized by the petitioner by attachment of such property could not be affected by any vesting order subsequently made. It is worthy of note that there is no provision in S. 37 that the vesting of the debtor's property when ordered later should relate back to the date of annulment : *cf.* S. 28 (5). I hold therefore that the petitioner is entitled to a declaration that amounts realized by him by executing the decree against the debtor's properties after they reverted to him are not affected by the order of the lower Court vesting the debtor's properties in the Official Receiver. The order will be modified accordingly. Each party will bear his own costs of this revision petition.

C.R.K./N.K. *Application allowed.*

1. ('35) 22 AIR 1935 Pat 177 : 162 I C 490 : 17 PLT 475, Nanak Ram Moti Lal v. Jugal Kishore.

2. ('38) 25 AIR 1938 Mad 752 : 179 I C 564 : (1938) 1 M L J 824, Balusami Naidu v. Official Receiver of Madura.

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(28) A. I. R. 1941 Madras 589

KRISHNASWAMI AYYANGAR J.

Standard Type Foundry, by A. Thiruvengada Mudaliar — Petitioner

v.

Chebolu Venkataramaniah —

Respondent.

Civil Revision Petn. No. 706 of 1938, Decided on 22nd November 1940, to revise order of Dist. Munsif, Rajahmundry, D/- 6th December 1937.

(a) Limitation Act (1908), S. 12 (2) — Appeal — Petition under S. 73, Madras Village Courts Act, is appeal for purpose of S. 12 (2).

As it is difficult to say that the remedy by way of revision is essentially different from the remedy by way of appeal, though in the former case, the grounds of interference may be less wide, a liberal construction should be applied to the term, appeal, occurring in S. 12 (2), Limitation Act, and the petition under S. 73, Madras Village Courts Act, should be treated as an appeal for the purpose of S. 12 (2): ('37) 24 A I R 1937 Mad 385 (F B), *Rel. on.* [P 590 C 2]

(b) **Limitation Act (1908), S. 12 (2) — Applicability—S. 12 (2) applies even to a case where copy is not necessary.**

Section 12 (2) is applicable even to a case where the appeal or application need not be accompanied by a copy of the decree objected to : ('28) 15 A I R 1928 P C 103, *Rel. on.* [P 591 C 1]

K. R. Krishnaswami Aiyar for S. Panchapagesa Sastriar and V. Srinivasan — for Petitioner.

P. V. Rajamannar — for Respondent.

Order. — This is a petition to revise the order of the District Munsif of Rajahmundry made on 6th December 1937 in I. A. No. 934 of 1937 in O. P. No. 33 of 1937. The petitioner was the defendant in a suit, No. 1103 of 1936 on the file of Second Panchayat Court, Rajahmundry governed with respect to its jurisdiction and procedure by the provisions of the Madras Village Courts Act, 1888. The respondent instituted the suit for the recovery of a sum of Rs. 24-10-6 alleged to be due to him on dealings. The petitioner entered a defence alleging, firstly, that the Panchayat Court had no jurisdiction, and, secondly, that the money claimed was not due. He however failed to appear on the date of the hearing with the result that an ex parte decree was passed against him on 4th February 1937. On 3rd August 1937, the petitioner moved the District Munsif, Rajahmundry in O. P. No. 33 of 1937, for an order setting aside the decree passed by the Panchayat Court on the ground that he was not a resident within the jurisdiction and that the Panchayat Court had therefore no right to entertain the suit against him. This petition was filed under S. 73, Madras Village Courts Act. By that section, an application should be presented within 60 days from the date of the decree or order of the Village Court sought to be questioned. Holding that the petition was filed after the expiry of the period of 60 days limited by the section, the District Munsif dismissed the petition. The order of dismissal was passed on 5th August 1937. The petitioner then filed an application for review of the order on 12th August 1937. He pointed out that he was entitled to have the time taken in applying for and obtaining a copy of the decree of the Panchayat Court excluded under S. 12, Limitation Act. If the time so taken is excluded, the petition was admittedly within time. The learned District Munsif refused to exclude the time taken in obtaining the copy of the decree on the ground that the petition did not fall within S. 12 (2), Limitation Act, which is the only provision on which the petitioner relied. Section 12 (2) is as follows :

> In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

In the view of the learned District Munsif, a petition under S. 73, Madras Village Courts Act, cannot be regarded as being comprehended within the term "appeal" occurring in the section. It cannot certainly be regarded as being covered by the other heads mentioned in the section. He was of the opinion that the District Munsif is not a Court of appeal from a decision of the Village Court within the meaning of the Act and that the marginal note to the section made it further plain that the petition was of the nature of a revision petition rather than an appeal. In taking this view, the learned District Munsif appears to my mind to have attached a too narrow meaning to the word appeal in the section. It has been held in a Full Bench decision of this Court reported in I L R (1937) Mad 616[1] that the term appeal occurring in Art. 182 (2), Limitation Act, is not used in a restricted sense so as to exclude revision petitions and the expression, appellate Court in the said article is not confined to a Court exercising appellate as opposed to revisional powers. The learned Judges support this view by the decisions of the Privy Council referred to at p. 625 of the report. It is difficult to say that the remedy by way of revision is essentially different from the remedy by way of appeal, though in the former case, the grounds of interference may be less wide. I am not able to see any reason why the same liberal construction should not be applied in the present case and the petition to the District Munsif treated as an appeal for the purpose of S. 12 (2).

A subsidiary point may also be noticed. Section 73 does not require an applicant to produce along with his petition a certified copy of the decree to which he takes exception. There is possibly some reason for the

1. ('37) 24 AIR 1937 Mad 385 : 168 I C 561 : ILR (1937) Mad 616 : (1937) 1 M L J 453 (F B), Chidambara Nadar v. Rama Nadar.

view that a party is not to be permitted to exclude the time taken in obtaining a certified copy of an order or decree wholly unnecessary for the purpose of an application under S. 73 but this argument is rendered untenable by the decision of the Privy Council in 6 Rang 302,[2] where the question has been fully discussed and the rule laid down that S. 12 (2) is applicable even to a case where the appeal or application need not be accompanied by a copy of the decree objected to. In the result, the revision petition is allowed with costs and the District Munsif is directed to restore O. P. No. 33 of 1937 on his file and dispose of it according to law.

C.R.K./N.K. *Application allowed.*

2. ('28) 15 AIR 1928 P C 103 : 109 I C 1 : 6 Rang 302 : 55 I A 161 (P C), J. N. Surty v. T. S. Chettiar Firm.

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(28) A. I. R. 1941 Madras 591

LEACH C. J. AND HORWILL J.

M. Thiruvengadamudayanaiya — *Appellant*

v.

R. Narasimhaswamiaiya and others — *Respondents.*

City Civil Court Appeal No. 54 of 1939, Decided on 22nd August 1940, against decree of City Civil Court, Madras, D/- 14th August 1939.

Will—Construction—Residuary legatee held took property subject to charge in favour of religious charities.

A will by a testatrix provided that the residuary legatee should reside in a portion of the house and the remaining portion of the property which was not to be occupied by the residuary legatee should be let and the rents utilized for specific charitable purposes, but later the testatrix provided that the surplus should go to the residuary legatee. The amount of the surplus was far greater than what was required to comply with the directions of the testatrix with regard to religious charities. The testatrix had no children of her own and she had brought up the residuary legatee as her daughter. As a matter of fact she described her in the will as her "daughter by affection":

Held that the property was taken by the residuary legatee subject to a charge in favour of the charities : ('21) 8 A I R 1921 P C 20 and 5 Cal 438 (P C), *Rel. on.* [P 592 C 2]

Suryanarayaniah — for Appellant.

R. Kesava Ayyangar — for Respondents.

Leach C. J.—The sole question involved in this appeal is whether under the will of one Ramanujakootam Mangamma who died on 8th August 1914, there was a dedication to charity of certain immovable property or whether the property was merely charged to charitable uses. Paragraph 3 of the will reads as follows :

I having upto now treated as daughter by affection and brought up Manchukonda Nanugannama alias Alamelumangathayaramma, daughter of my deceased younger sister Dachepalli Andalamma; she and her descendants shall take possession of and reside free of rent in one kitchen downstairs and the two rooms upstairs on the eastern side and the halls attached thereto in house No. 25, Venkatachalla Mudali Street. The remaining portion of the said house shall be let on rents and the rents realized shall be utilized for services in the manner described below : (a) for the Brahmotsavam festival of Sri Venkateswara on the hills in the Tirupati Devasthanam, Rs. 100 per year ; (b) feeding 25 Vaishnavas on every Dwadasi day in the Bairagimatam or otherwise known as Thiruvengadamudayan temple, Madras, and (c) Dosaipadi service on every Ekadasi and Amavasi days (eleventh day of the fortnight and New Moon days) in Sri Chenna Kesava Perumal temple, Devarajamudali Street, Madras.

The property in suit is the property referred to in this paragraph and what the Court has to decide is whether Nanugannamma, who has been referred to in this appeal as the residuary legatee, takes the whole property subject to a charge in favour of the charities set out in the paragraph or whether there is a complete dedication to charity of that portion of the house which was not set apart for the residence of Nanugannamma. Having made these provisions, the testatrix goes on to direct her executors to sell another property owned by her, namely, No. 16, Varadayya Street, Madras, and after paying her debts to give one-half of the balance to the residuary legatee and the other half to the head of the Tirupati Jeer Matam in Tinnanore for the purpose of 'daily feeding' in the Mutt. After disposing of her jewels and household articles the testatrix provides that the remainder left after deducting the charity expenses 'as detailed below' shall be given to the residuary legatee. The charity expenses 'detailed above' admittedly refer to the charity expenses set out in cl. 3 of the will. Another clause of the will which has been referred to in the arguments is cl. 7, which reads as follows :

Neither my gnatis nor the executors nor any other kind of relations have any right or title whatever to make gift, etc., or sale or to create mortgage in respect of the aforementioned house No. 25, Venkatachala Mudali Street, so long as Sun and Moon may last.

The suit was tried by the Additional Judge of the City Civil Court; who came to the conclusion that there was no dedication of the proparty No. 25, Venkatachala Mudali Street to charitable uses, but only of the

income. It is common ground that the rents accruing from that property will provide far more than is necessary to meet the expenses of the charities. According to the appellant, the gross income is Rs. 1200; according to the respondent it is Rs. 1400; but they are both agreed that not more than Rs. 350 will be required to comply with the directions with respect to charity contained in para. 3 of the will. In 43 ALL 291[1] the Privy Council had to consider a case where a testator directed that his property should be considered to be the property of a certain idol, but went on to provide that,

whatever may be saved after defraying the expenses of the temple and the pay of the servants shall be used by our legal heirs to meet their own expenses.

Lord Shaw in delivering the judgment of the Judicial Committee observed:

In such cases no fixed and absolute rule can be set up, derived alone from the use of particular terms in one portion of the will. The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will.

In that case, as in the present one, the income of the property was considerably in excess of what was required for the worship and maintenance of the temple. Lord Shaw quoted a passage from the judgment of Turner L. J. in 8 M I A 66[2] where Turner L. J. said that

although the will purports to begin with an absolute gift in favour of the idol, it is plain that the testator contemplated that there was to be some distribution of the property according as events might turn out and that he did not intend to give this property absolutely to the idol seems to their Lordships to be clear from the directions which are contained in various clauses of the will.

On this line of reasoning the Board held in 43 ALL 291,[1] that the intention was that the heirs should take the property subject to a charge for the performance of the religious purposes named. In 5 Cal 438,[3] the Privy Council had to consider a Hindu will which has much in common with the will now under consideration. The operative parts of the will opened as follows:

I dedicate the auction-purchased property No. 3496 Lot Panchgatchia, Pargana Baligori, Zilla Hooghly, standing in my name, to the Thakur Ishwar Raj Rajeshwar that is in my house. And the Sarodia Puja and other ceremonies that are being performed in the house will be performed as hitherto. After all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits then the family will be supported therefrom.

After appointing the executors the testatrix said:

After your death he who is my heir for the time being will be the executor of this will. Beyond performing the aforesaid worship of the deb and the ceremonies and pujas, none of my heirs shall have any interest in or profit from my property. And they will have no power of gift or sale over it. And it will not be attached or sold on account of their debts.

It was held that there was here a bequest of the surplus to the members of the family for their own use and benefit and that each of the sons of the testatrix took a share in the property after satisfying the religious and ceremonial trusts. With regard to the prohibition against gift or sale, Sir Barnes Peacock, who delivered the judgment of the Board, pointed out that this direction being inconsistent with the interest given was beyond the power of the testatrix and must be rejected as having no operation. Now, what is the position here? The will provides that a portion of the property which was not to be occupied by the residuary legatee should be let and the rents utilized for specific purposes, but later the testatrix provides that the surplus shall go to the residuary legatee. The amount of the surplus was and is far greater than what is required to comply with the directions of the testatrix with regard to religious charities. It is also to be observed that the testatrix had no children of her own and she had brought up the residuary legatee as her daughter. As a matter of fact she described her in the will as her "daughter by affection" and the prohibition against alienation must be ignored as the Privy Council indicated in 5 Cal 438.[3] In these circumstances we are of opinion that the learned trial Judge came to the correct conclusion in holding that the property was taken by the residuary legatee subject to a charge. Consequently the appeal will be dismissed with costs.

C.R.K./D.S. *Appeal dismissed.*

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1. ('21) 8 A I R 1921 P C 20 : 63 I C 34 : 43 All 291 : 48 I A 143 (P C), Harnarayan v. Sarjakunwari.
2. (1859) 8 M I A 66 : 2 Suther 37 : 1 Sar 721 (P C), Sonatun Bysack v. Sreemuty Juggutsoondree Dossee.
3. ('80) 5 Cal 438 : 6 I A 182 : 5 C L R 296 : 4 Sar 58 (P C), Ashutosh Dutt v. Doorga Churn.

*(28) A. I. R. 1941 Madras 593

KING AND PATANJALI SASTRI JJ.

R. M. G. Subramania Ayyar — *Appellant*

v.

Ulagalumperumal Sethurayar and others — *Respondents.*

Appeal No. 243 of 1934, Decided on 20th December 1940, against decree of Sub-Judge, Tinnevelly, in O. S. No. 33 of 1933.

* Receiver—Creditor lending money to Court receiver for payment of peishkush in respect of estate in possession of receiver — No charge created on such estate—Creditor is not entitled to be paid out of assets of such estate irrespective of receiver's right of indemnity.

Where a creditor lends money to a Court receiver for payment of peishkush in respect of the estate in the management of the receiver and the money is so utilized but no charge has been created on the estate for such loan, the creditor is entitled to a decree personally against the receiver and against the assets of the estate only to the extent to which the receiver has a right of indemnity as receiver against that estate. He cannot claim to be paid out of the assets of such estate irrespective of the receiver's right of indemnity; nor can he, from the mere fact that the estate belongs to a Hindu, invoke the principle of Hindu law under which a debt incurred by a manager for the benefit of the estate is binding on the estate: *Case law discussed.*

[P 593 C 2; P 594 C 1, 2; P 596 C 1, 2]

T. M. Krishnaswami Ayyar and P. N. Appuswami Ayyar — for Appellant.

S. Venkataraman, A. Swaminatha Ayyar and N. Rajagopala Ayyangar — for Respondents.

Patanjali Sastri J.—The only question for determination in this appeal is whether the appellant is entitled to a decree against the estate of Urkad to which respondent 3 has been held entitled to succeed. The appellant advanced a loan of Rs. 5000 to respondent 1 who executed a promissory note (EX. A) for the amount. The sum was borrowed for the purpose of paying the peishcush which fell due in respect of the zamindari when it was under the management of respondent 1 as receiver appointed by the Court during the pendency of a succession suit relating to the zamindari. That suit (O. S. No. 93 of 1929 in the lower Court) was instituted by respondent 3 as the widow of the late zamindar for recovery of the estate from respondent 1 who had taken possession thereof asserting title thereto as the step-brother of the deceased. The suit ended in a decree in favour of respondent 3 and respondent 1 preferred an appeal to this Court. During the pendency of the appeal, respondent 2 was appointed as receiver to manage the estate and he continued in such management until respondent 3 having finally succeeded in the litigation took possession of the zamindari. The appellant brought the suit out of which this appeal arises for recovery of the amount of principal and interest due under the promissory note from respondent 1 personally and from the assets of the estate in the hands of respondent 2 who was the receiver at the time. The latter having since been discharged from the receivership and the widow having taken possession of the zamindari as the successful claimant as aforesaid she was brought on record as respondent 3 in this appeal and a decree is now sought against the estate in her hands. The Court below passed a decree against respondent 1 personally and against the assets of the estate to the extent to which he (respondent 1) has a right of indemnity as receiver against that estate. Not satisfied with a decree in this form, the appellant has brought this appeal claiming payment out of the estate irrespective of respondent 1's indemnity and the question is whether the claim is sustainable. The promissory note which has been marked as EX. A is in the following terms :

Promissory note executed on 3rd June 1930, corresponding to 21st Vaikasi 1105 Andu in favour of R. M. K. Subramania Ayyar Avergal, son of R. M. Ganapathi Ayyar Avergal, who is keeping hundiyal shop at Tinnevelly Bridge Rail Station, Tinnevelly taluk, by the son of Zamindar Avergal, Kotilinga Sethu Rayar, and the Zamindar of Oorkadu and the present receiver of the said zamin, viz., U. K. Alagalum Perumal Sethu Rayar Avergal, Kshathrapathi Avergal, residing in Oorkadu cusba, Oorkadu zamin, Ambasamudram taluk, is as follows : For payment of zamin peishcush urgently due to the Government, the sum borrowed on this date in cash from you is Rs. 5000. I shall on demand pay you or order in cash the same together with interest thereon at 1 per cent. per mensem, and get back this note.

U. K. C. Sethu Rayar,
Kshatrapathy, 3-6-1930.

Now, respondent 1 has preferred no appeal challenging the personal decree passed against him by the Court below and the question whether the terms of the instrument are such as to exclude his personal liability does not arise and was not argued before us. Mr. T. M. Krishnaswami Ayyar's contention on behalf of the appellant was that in addition to the personal liability of respondent 1, the assets of the estate of which he was the receiver at the time of the borrowing, into whosoever's hands they might have passed on the termination of the litigation, were liable for the amount due on the note as the debt was one properly incurred by the receiver in the course of his management for a necessary purpose, namely

the payment of the peishcush due to the Government on the zamindari. Mr. Krishnaswami Ayyar based the appellant's right to such relief on three grounds. First, he argued that the principle of the Full Bench decision in 42 Mad 185,[1] which has been followed in later decisions such as ILR (1939) Mad 891,[2] should be applied to the facts of the present case. That was a case where a guardian of a Hindu minor entered into a contract for a necessary purpose such as under the Hindu law would support an alienation of the minor's estate, and a Full Bench of this Court while recognizing that a guardian cannot bind his ward by a personal covenant to pay held that under the personal law applicable to the minor, namely the Hindu law, a decree could be passed against the minor's estate in the hands of the guardian. It is difficult to see how this principle can be invoked in the case of a debt incurred by a receiver appointed by a Court although such debt was incurred for the benefit of the estate in his management and such estate belongs to a Hindu. It was suggested that the principle in 6 M I A 393[3] on which the Full Bench decision was based having been applied to cases of debts incurred by widows, managers of temple, mathathipathis and such other limited proprietors, might appropriately be extended to a case like the present of a debt incurred by a Court receiver in management. We are unable to appreciate this argument. What was held in 6 M I A 393[3] was that a guardian of a Hindu minor has the power to raise money by mortgaging or selling the estate of the minor for purposes which the Hindu law recognizes as necessary or beneficial for the minor, and the same test has been applied in judging the binding character of alienations effected by limited owners like a Hindu widow, mathathipathi, etc. It is difficult to see how these decisions lend any support to the argument that a creditor who lends moneys to a Court receiver without a charge on the estate in his hands is entitled, nevertheless, to a decree against such estate to whomsoever it may ultimately be adjudged to belong. Even in the case before the Full Bench, we may observe that considerable difficulty was felt in discovering the true legal basis on which a decree against a minor's estate could be passed on his guardian's covenant to pay. Wallis C. J. inclined to the view that no basis for such a decree existed apart from the guardian's right of indemnity against the estate which could in an appropriate case be made available to a creditor. The majority (Ayling and Seshagiri Iyer JJ.) however were of opinion that such a basis could be found in the Hindu law which was the personal law applicable to the minor in that case. The case bears no analogy to the present and we are wholly unable to appreciate the argument that the principle is applicable to a loan contracted by a receiver merely because the estate for the benefit of which it was borrowed belongs to a Hindu.

Mr. Krishnaswami Iyer then broadly contended that a loan contracted by a receiver for purposes sanctioned by the Court whether before or after the borrowing is binding on the estate which has been benefited by it, and on the principles of justice, equity and good conscience, the creditor should be given a decree against the estate into whosoever hands it may ultimately have passed. Reliance was placed upon the decision of Sale J. in 30 Cal 937[4] which no doubt supports the contention. The learned Judge observed :

> I do not think that it is necessary to resort to the doctrine of the creditor's right to the benefit of the receiver's indemnity as a foundation for the right to sue the estate for a debt incurred by the receiver. A right to maintain such a suit is, in my opinion, founded on the just and equitable principle that as the acts of a receiver so long as they fall within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them.

No authority is quoted in support of this broad proposition but the learned Judge refers to an observation of Rigby L. J. in (1895) 1 Q B 276[5]:

> The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years, and then, owing to failure of the assets, all the creditors should go without payment.

With all respect, we are unable to see how this observation supports in any way the proposition enunciated by the learned Judge. The observation was intended, as a reference to the context clearly shows, to

1. ('19) 6 AIR 1919 Mad 641 : 49 I C 872: 42 Mad 185 : 36 M L J 29 (F B), Ramajogayya v. Jagannadham.
2. ('39) 26 AIR 1939 Mad 538 : 189 I C 364 : ILR (1939) Mad 891 : (1939) 1 M L J 792, Annamalai Chetty v. Muthuswami Maniagaran.
3. (1854-57) 6 M I A 393 : 18 W R 81 F N : 1 Sar 552 : 2 Suther 29 (P C), Hunooman Pershad v. Mt. Babooee Munraj Koonweree.
4. ('03) 30 Cal 937: 7 C W N 799, Mohari Bibi v. Shyama Bibi.
5. (1895) 1 Q B 276: 64 L J Q B 232: 14 R 65: 71 L T 810: 43 W R 180: 2 Manson 94, Burt Boulton and Hayward v. Bull.

support the inference that in such circumstances the receiver intended to pledge and the creditors to trust the receiver's personal credit. For the learned Judge (Rigby L. J.) said :

> The intention is that the receiver and manager so appointed should appear to the world as the person carrying on the business in the usual way, making himself personally liable on all contracts, except in cases where there might be a special stipulation to the contrary, and looking for indemnity to the assets of the persons for whose benefit ultimately the business was carried on. It would be impossible for a tradesman in the ordinary course of business to ascertain for whose benefit the business was carried on, or what funds might be available and I do not think that the Court can be supposed to have intended by their action to place people in such a predicament.

In the same case, Lord Esher, M. R. explained the position of a receiver thus :

> The incidents of his relation to the Court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person but it is of course impossible to suppose that the relation of agent and principal exists between him and the Court. What is the inference that necessarily arises? It must be that the intention is that he shall act in pursuance of his appointment on his own responsibility and not as an agent, because otherwise nobody will be responsible for his acts. The company cannot be liable, for he is not their agent, and the Court clearly cannot be liable. Therefore any orders which he may give under such circumstances as manager must prima facie be taken to be orders given on his own responsibility and credit.

Sale J. draws distinction between a creditor's dealing with executors and trustees carrying on business for the benefit of the estate in their hands and his dealings with a receiver acting under orders of the Court but no such distinction was recognized by Rigby L. J. who observed :

> I think that the notion upon which the Court has always proceeded, in exercising its jurisdiction to appoint a manager of a business, is not that he is to be in the position of an agent, although there is no principal, but that he is to be in a position similar to that of persons who in a fiduciary capacity carry on a business, in the course of which contracts have to be entered into, e. g., executors or trustees, who, by the terms of the instrument appointing them are directed to carry on a business for the benefit of others. The rule has always been that such persons are prima facie themselves personally liable, and they cannot get rid of liability on the contracts made by them merely by describing themselves in the contract as executors or trustees.

The doctrine that a creditor has only a right of indirect recourse to the estate through the right of indemnity of the person who contracted the liability for the purposes of such estate in the course of its management, which Mr. Krishnaswami Aiyar concedes is well established in the case of trustees and executors, has been applied in England also to loans borrowed by receivers. In (1910) 2 Ch 470[6] Swinfen Eady J. after quoting from the judgment of Jessel, M. R. in (1880) 15 Ch D 548[7] at page 555, the passage :

> If the right of the creditors is, as is stated by Turner L. J. the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right,

went on to say "reading 'receiver and manager in lieu of trustee', the passage is exactly in point," and held that creditor of a receiver who was in default could not claim against the assets of the estate anything beyond the extent of the receiver's net indemnity. Another case brought to our notice by Mr. Krishnaswami Aiyar is the one reported in 89 I C 32,[8] decided by the Patna High Court. In a suit for specific performance of an agreement to assign a mortgage right, the defendant was appointed receiver to sue on the mortgage as it was about to become time-barred, and he borrowed moneys for the purpose of prosecuting the mortgage suit charging the mortgage interest, the subject-matter of the suit, under express orders of the Court. The latter suit was however eventually allowed to be dismissed, specific performance having been decreed and the assignee himself having in the meanwhile purchased the equity of redemption in the mortgaged properties and the assignor drew the money deposited in Court by the assignee as a condition of his obtaining specific performance. Thereupon the lender sued the assignee and the legal representatives of the assignor for recovery of the amount lent. It was found that the receiver could not be made personally liable and that a decree on his bond hypothecating the mortgage interest would be barred as no suit could then be brought to enforce the mortgage.

In these circumstances, the Court referred to 30 Cal 937,[4] and held that the assets of the assignor in the hands of his representatives were liable. The ground of decision, as we read the judgment, appears to have been this : The money deposited in Court by the assignee for obtaining specific

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6. (1910) 2 Ch 470 : 79 L J Ch 666 : 103 L T 451: 54 S J 749, In re British Power Traction & Lighting Co. Ltd.
7. (1880) 15 Ch D 548 : 49 L J Ch 745 : 43 L T 372 : 29 W R 168, In re Johnson Shearman v. Robinson.
8. ('25) 12 AIR 1925 Pat 602 : 89 I C 32: 7 P L T 129, Debi Prashad Dhandhania v. Mahesh Lal.

performance although it was not specifically charged with the amount borrowed by the assignor as receiver, represented the assignor's interest in the mortgage bond which was the interest charged and so, on the principle relating to substitution of securities, became charged with the repayment of the loan; and such money having been drawn by the assignor, his representatives were bound to repay the loan out of it. This decision can have no application to a case like the present where the receiver borrowed the money without creating any charge on the estate in his management. Mr. Krishnaswami Ayyar also placed reliance upon the observations of Neville J. in (1907) 2 Ch 511.[9] That was a case where a receiver appointed by the Court in a debenture holder's action having become bankrupt, the question arose whether the assets of the company realised by the receiver should go to the debenture holders or to the trustee in bankruptcy for distribution among the creditors to whom the receiver incurred liability in the course of his management. The sureties of the receiver had made good his default and the estate therefore had not suffered any loss on that account. In those circumstances Neville J. held that the creditors' liability should first be discharged out of the assets, observing :

> In my opinion, where the Court has appointed a receiver who has incurred liabilities in the proper management of the estate which was given to him to manage the Court will see that those creditors are satisfied, either by the receiver, or, in case the receiver should become bankrupt or there should be any other reason making it advisable, by payment direct to the creditors out of the funds in Court. . . . . The Court will see that those who properly gave credit to the receiver, who was managing under the authority of the Court, have their debts discharged so far as the Court has funds in its hands.

As could be seen from the arguments of counsel for the trustee in bankruptcy, the claim for payment out of the assets of the estate for discharging the liabilities incurred by the receiver in the course of his management was based upon the receiver's right to indemnity against the estate, and the sureties, as already observed, having paid into Court the amount due by him to the estate, he was treated as not in default and the creditors were given the benefit of his full right of indemnity against the estate. The decision is therefore no authority for the proposition that the creditors who advance loans to a receiver are entitled to be paid out of the assets of the estate irrespective of the receiver's right of indemnity and we consider that the observations of the learned Judge must be understood in the light of the facts of that case ; *see also* Kerr on Receiver, Edn. 10, p. 302, where it is pointed out that this decision is not in conflict with the principle enunciated in (1910) 2 Ch 476.[6]

Lastly, Mr. Krishnaswami Iyer argued that the money advanced for the appellant having been admittedly utilised for payment of the peishcush due to the Government on the estate, the appellant is entitled to be subrogated to the statutory first charge which the Government held on the estate in respect of the peishcush due. He cited A I R 1936 Mad 752[10] in support of this contention. That was a case where a purchaser of one of the villages in a zamindari paid the peishcush due to the Government on the zamindari to set aside a revenue sale of all the villages and claimed the amount from the zamindar and others interested in the rest of the villages with a charge on such villages for the amount claimed. The case has no application to the facts here as the appellant advanced the loan on the personal credit of the receiver and even assuming that the statutory charge for revenue payable to Government could enure for the benefit of a person who pays the revenue the appellant cannot claim the benefit of it because he did not make the payment to the Government. For the reasons indicated, we are of opinion that the decree of the Court below has awarded to the appellant all the relief to which he is entitled under the law and this appeal should be dismissed with costs of the contesting respondents 2 and 3. One set.

C.R.K./K.S. *Appeal dismissed.*

9. (1907) 2 Ch 511: 76 L J Ch 612: 97 L T 541: 14 Manson 250, In re London United Breveries Ltd., Smith v. London United Breveries Ltd.

10. ('36) 23 A I R 1936 Mad 752 : 167 I C 980 : 71 M L J Sup 1, Chengalroya Reddi v. Udai Kavour.

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(28) A. I. R. 1941 Madras 596

WADSWORTH J.

Mettu Subba Reddi — Petitioner

v.

Challa Venkatappa Reddi—Respondent.

Civil Revn. Petn. No. 1956 of 1939, Decided on 19th December 1940, to revise order of Sub-Judge, Guntur, D/- 11th April 1939.

Madras Agriculturists' Relief Act (4 of 1938), S. 4 (h)—Decree obtained by man on promissory note debt standing since 1935 in name of men—Decree-holder cannot adduce evidence to show that debt is really owed to woman.

A deceee was obtained by a man on a promissory note debt which at least since 1935 had stood in the name of men :

Held that it was not permissible in such circumstances for the decree-holder to adduce evidence that the debt was really owed to a woman in order to invoke S. 4 (h). [P 597 C 1]

P. Chandra Reddi and R. Ramalinga Reddi — for Petitioner.

Kasturi Seshagiri Rao — for Respondent.

Order. — The decree was obtained by a man on a promissory note debt which at least since 1935 has stood in the name of men. It is not permissible in such circumstances for the decree-holder to adduce evidence that the debt is really owed to a woman in order to invoke S. 4 (h) of Act 4 of 1938. Possibly the decree-holder may himself be liable to pay the realizations to a woman, but the liability of the judgment-debtor is to the decree-holder and to no one else. The revision petition is allowed with costs and the application is remitted to the trial Court for fresh disposal in the light of this judgment.

C.R.K./D.S. *Revision allowed.*

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(28) A. I. R. 1941 Madras 597

HORWILL J.

In re V. S. Somasundaram
Petitioner.

Criminal Revn. No. 967 and Revn. Petn. No. 920 of 1940, Decided on 5th February 1941, to revise judgment of Chief Presidency Magistrate, Egmore, Madras, D/- 14th October 1940.

Defence of India Rules, R. 34 (6), cls. (b), (c) and (d) — Speech held did not fall under clauses (b), (c) or (d).

In a speech which consisted of a tirade against the police, the accused said that although they were poorly paid men of no status, yet they gave themselves airs and strut about doing no work. He suggested that they were acting against the workers in the interests of the capitalists. The speech also contained threats of what might be done to the police if they continued as they were at that time:

Held that the speech of the accused did make him guilty of an offence under S. 124A, Penal Code, for sedition; but the speech did not fall under cls. (b), (c) or (d) of R. 34 (6) of Defence of India Rules. [P 597 C 2]

S. Suryaprakasam — for Petitioner.

Crown Prosecutor — for the Crown.

Order. — The petitioner has been convicted under R. 38 of the Defence of India Rules for having done a prejudicial act and sentenced to imprisonment till the rising of the Court and to a fine of Rs. 50. "Prejudicial act" is defined in R. 34 (6). Many groups of prejudicial acts are described in this rule; but the learned Crown Prosecutor relies on sub-cls. (b) (c), (d) and (l). The learned Magistrate has not referred in particular to any of these sub-clauses; but has merely said that the speech of the petitioner is a prejudicial act which is punishable under R. 38 (5). The speech of the petitioner consisted of a tirade against the police. He said that although they are poorly paid men of no status, yet they give themselves airs and strut about doing no work. He suggests that they are acting against the workers in the interests of the capitalists. The speech also contains threats of what might be done to the police if they continue as they are at present. Clause (b) of R. 34 (6) is,

> to cause disaffection among or to prejudice, prevent or interfere with the discipline, health or training of, or the performance of their duties by members of His Majesty's forces or public servants.

This speech was certainly not intended nor was it likely to cause disaffection among the members of the police force, although it might cause disaffection among the public against the police force. It seems to me that the speech of the petitioner did make him guilty of an offence under S. 124A, Penal Code, for sedition; but it was not a prejudicial act within the meaning of R. 34 (6) (b). Clause (c) is

> to render any member of His Majesty's forces or any public servant incapable of efficiently performing his duties as such or to induce any member of His Majesty's forces or any public servant to fail in the performance of his duties as such.

It would need a great stretch of imagination to make the speech or the remarks of the petitioner fit into this clause. Clause (d) is

> to prejudice the recruiting of, or the attendance of persons for service in any of His Majesty's forces or any police force or fire brigade or any other body of persons entered, enrolled or engaged as public servants.

All that can be said with regard to the application of this clause is that the members of the public might possibly be inspired by fear of what the workers would do to them if they joined the police force if they came to know what was said and took it seriously; but the speech was not likely to have that effect because it was addressed to the workers who presumably had no intention of becoming constables. Sub-clause (l) applies more nearly than any of the others and runs

> to instigate directly or indirectly the use of criminal force against public servants generally or any class of public servants or any individual public servant.

Although the speech is a strongly worded one, I do not think that it can be said that the petitioner intended to instigate the use of criminal force against public servants,

nor do I think that what he said was likely to have that immediate effect. The speech was not an incitement to personal violence but rather an exposition of the part that the police were playing as agents and tools of capitalists in preventing the workers from expressing their grievances and securing their rights. If the speech is read as a whole it is difficult to spell out any incitement to attack or to use force against the police, although it might cause disaffection against them. In fact the learned Crown Prosecutor does not rely very strongly on this sub-clause, but rests the case for the Crown rather on sub-cls. (b), (c) and (d). The learned Magistrate while saying that there was a prejudicial act does not say why. The petition is allowed and the conviction and sentence set aside. The fine is said to have been paid and there will be an order that it should be refunded.

C.R.K./D.S. *Petition allowed.*

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(28) A. I. R. 1941 Madras 598

HORWILL J.

In re Bhumireddi Venkata Reddy and others — Appellants.

Criminal Appeal No. 557 of 1940, Decided on 21st January 1941, against order of Court of Session, Cuddapah Division, in C.C. No. 16 of 1940.

Penal Code (1860), Ss. 149 and 34 — Accused jointly charged of offence by virtue of Ss. 149 and 34 — Accused must also be charged individually for specific acts done by them—Omission to so charge does not render trial invalid provided no miscarriage of justice has resulted therefrom.

Where the accused are charged jointly for the offence for which they might be liable by virtue of Ss. 149 and 34 the accused should also be individually charged for the acts specifically done by them. Omission to so charge does not render the trial invalid provided there has not been any miscarriage of justice on that account. [P 600 C 1]

V. T. Rangaswami Ayyangar and K. Srinivasa Rao — for Appellants.

K. Venkataraghavachariar for Public Prosecutor — for the Crown.

Judgment. — The four appellants and seven others were charged in the lower Court with rioting and murder by virtue of the provisions of both S. 34 and S. 149, Penal Code. The learned Sessions Judge referred to the tendency in cases of faction for one party to implicate all the leaders of the opposite faction; and he came to the conclusion that a case had been made out against the four appellants but that he was not quite satisfied that there were any more than the four persons present. The charges of rioting and of constructive murder therefore failed. He came to the conclusion that the nature of the injuries to the deceased person were not such as to indicate beyond all doubt that those who attacked him intended to kill him. He found appellants 1 and 2 (accused 1 and 4) guilty under S. 324, Penal Code, and appellants 3 and 4 (accused 7 and 8) guilty under S. 325, Penal Code, both these convictions presumably being by virtue of S. 34, Penal Code.

The prosecution story, as told by P. W. 1, the wife of the deceased, and others, is to the effect that the eleven accused jumped over the wall of the thrashing floor and fell on her husband crying "Kobali." She then narrated the parts that the various accused played. Her husband was severely injured and he was taken to the hospital, where he died 24 hours later of the injuries that he had received at the hands of those who attacked him. The learned Sessions Judge divides the evidence into three classes: (1) the evidence of the eye-witnesses, P. Ws. 1 to 3, 5 and 6; (2) the evidence of P. Ws. 7, 8 and 9 who were said to have been told by the deceased immediately after the attack of what had been done to him; and (3) the evidence of the dying statement made by the deceased to which his thumb impression had been affixed. With regard to the first class of evidence he found that P. W. 1 was probably the only eye-witness. The second class of evidence he rejected on the ground that Ex. F, the dying declaration, showed that he was unconscious until he reached the hospital, and if so, he could not have told P. Ws. 7, 8 and 9 of the offence. He accepted Ex. F as being a correct statement given by the deceased an hour or two after he was admitted into the hospital and he used Ex. F as a measure by which to test the evidence of P. W. 1. In so far as Ex. F and the deposition of P. W. 1 were in agreement, he accepted P. W. 1's story. That is why he has convicted the four appellants and acquitted all the others.

With regard to Ex. F, the learned Sessions Judge had to decide between the evidence of the Doctor, P. W. 4 and the Sub-Inspector, P. W. 17; for P. W. 4 stated that the deceased was unconscious throughout the period he was detained in the hospital and did not recover consciousness before his death. This, of course, cannot be completely true even according to P. W. 4's evidence; for this witness has sent a report to the police, Ex. B, on the morning after the offence to the effect that the deceased

had received injuries at the hands of accused 1 and 2 and others. This he gathered from something that was said by the deceased himself; although he deposes that he could not understand what was being said by the deceased and that those who had gathered round him told him what the deceased was saying. It is clear from the evidence of P. W. 4 that he did not realize fully the serious nature of the injuries caused and that he had no suspicion that the deceased was going to die. The Sub-Inspector, in a part of his evidence that rings very true, spoke to the surprise with which he learnt of the death of the deceased; because he had met P. W. 4 at the club and had been told by him that the dislocated joints of the deceased had been set and that the man was doing well. Certain interpolations in red ink in the accident register, EX. D, are, as the learned Sessions Judge says, not the sort of entries one would make in an accident register; and it is clear that these entries were made for the purpose of affording some sort of explanation for his apparently negligent conduct.

I think therefore that the learned Sessions Judge was right in holding that the deceased was not unconscious when first admitted to the hospital. That does not however mean that the deceased was in a condition to make the rather full statement found in EX. F. He must have been in severe pain, and it is possible that he was not in a condition to make such a full report. Moreover, the thumb impression affixed to the statement has been proved by an officer of the Finger Print Bureau not to be that of the deceased. There is therefore some ground for suspecting that EX. F was not the statement of the deceased. A statement was however recorded—as some remarks of P. W. 4 would show—and EX. F was almost certainly not fabricated for the purpose of affording evidence against the accused; for, it was not taken to any official but produced two days later at the village when the Sub-Inspector went there to investigate.

If the other findings of the learned Sessions Judge are correct, almost the only evidence against the appellants is the oral evidence of P. W. 1. The learned Sessions Judge was, however, impressed with the evidence of P. W. 1 and after going through her deposition one cannot but feel that she was an eye-witness and has given an approximately correct account of what she saw. She stood cross-examination very well and there was nothing that she said which in any way suggests that she was concealing or adding to the truth. The learned Sessions Judge has accepted her evidence, however, only where it agrees with EX. F and has consequently acquitted seven of the accused.

As P. W. 1's evidence is almost uncorroborated, it is necessary to view it with caution. Appellant 1 is apparently the leader of his faction; but against him there is the corroborating evidence afforded by EX. B in which the deceased gave his name to the doctor as being one of his assailants. I cannot believe that the deceased was then in a fit state to fabricate evidence. He must have given that statement soon after he recovered consciousness—if we are going to rule out the evidence of his telling the other witnesses of the attack on account of his statement that he remained unconscious until he reached the hospital. The part given to accused 7 and 8 (appellants 3 and 4 here) was probably not considered very important by the persons of the deceased's faction, because they were said to have been holding his legs and twisting them. Though actually result of their acts probably contributed to the death of the deceased more than any other injury did, it is not likely that the members of the faction thought so, because there were no external injuries corresponding to the acts done. I can see no reason why accused 7 and 8 should have been said by P. W. 1 to have done this if in fact it was some other persons who were responsible for the twisting of the legs of the deceased. There remains accused 4 who is said to have had a battle axe and to have caused the injury on the back of the right leg from which most of the hæmorrhage took place. This wound was actually not very serious; but the villagers must have been impressed by the fact that this was a gaping incised wound caused by an axe. The father of accused 4 had been engaged in a bitter and recent litigation with the deceased and it is to him that the injury that was thought the most serious was attributed. There were two dangerous weapons possessed by those who attacked the deceased and the more lethal of the two was said to have been held by accused 4. I think therefore in the absence of corroborative evidence and in view of the bitterness which must have been felt towards accused 4 and his father the evidence against this accused should be viewed with more

caution than against the others and that he should be given the benefit of the doubt.

Mr. V. T. Rangaswami Ayyangar has pointed out that the learned Sessions Judge has departed from a salutary practice in cases of this kind and has charged the accused only for rioting and for murder by virtue of Ss. 149 and 34, Penal Code. It is usual in such cases to charge the accused individually also for the acts that they are said to have committed. This draws the attention of the accused in particular to the acts which they are said to have committed. If that is not done, the accused may have cause for argument that when the main charge of rioting and acting in concert in pursuance of a common intention has failed they ought not to be convicted for the particular acts committed by them. In this particular case I do not think that there has been any miscarriage of justice on account of this omission: for the evidence that was given in the Sessions Court was also given in the Court of the committing Magistrate and so the accused knew exactly what acts they were said to have done. I am not therefore disposed to set aside the convictions on this ground; but would point out to the learned Sessions Judge the desirability of adhering to the practice current in most other Courts of charging the accused individually for the acts specifically done by them as well as jointly for the offence for which they might be liable by virtue of Ss. 149 and 34, Penal Code. In the result, the conviction of accused 4 is set aside and his bail bond cancelled. The learned Sessions Judge has viewed the case against the other appellants very leniently and I find no reason to interfere with the sentences imposed on these three appellants or to doubt the correctness of their convictions. The convictions and sentences on these three appellants are therefore affirmed and their appeal dismissed.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 600

VENKATARAMANA RAO J.

Sri Rajah Vyricherla Narayana Gajapati Raju Bahadur — Appellant

v.

Konathala Jaggayya and others — Respondents.

Second Appeal No. 1091 of 1937, Decided on 4th October 1940, against decree of District Court, Vizagapatam, in A. S. No. 187 of 1936.

(a) Madras Estates Land Act (1 of 1908), Ss. 3 (4) (d), 151 and 152—Object of S. 151 stated —S. 151 confers upon Court certain discretion even in cases where tenant is liable to ejectment —Relief to be given should be moulded according to circumstances of each case—Tenant erecting compound wall in place of fence necessary to prevent cattle from trespassing into field — Erection of wall being improvement within meaning of S. 3 (4) (d) of Act landlord cannot maintain action under S. 151.

The object of S. 151 is that the value of land as agricultural land should be strictly maintained and that any attempt made by the tenant to divert the land for non-agricultural purposes should be prohibited. The landlord is really hurt within the meaning of the statute when the land is diverted for non-agricultural purposes. Section 151 confers upon the Court a certain amount of discretion even in cases where the tenant is found liable to ejectment to award compensation and the relief to be given should be moulded according to the circumstances of each case. The erection of a compound wall over the place where previously there were trees and fence which was necessary to prevent cattle from trespassing into the field and destroying the crop raised, being an improvement within the meaning of S. 3 (4) (d) of the Act, it cannot be made a ground of complaint by the landlord for maintaining an action under S.151. [P 601 C 1, 2]

(b) Madras Estates Land Act (1 of 1908), S. 151 — Tenant laying foundation on 4¼ cents over land of 64 cents for raising superstructure for storing grain—Compensation held adequate relief provided structure was used only for storing crops raised on holding.

Out of an entire land of 64 cents the tenant laid foundation over 4¼ cents for raising a superstructure for the purpose of storing grain therein :

Held that compensation was an adequate relief provided the structure raised was not a pucca building and was used only for storing crops raised on the holding and not for any other purpose.

[P 601 C 2]

K. Umamaheswaran — for Appellant.

M. Appa Rao — for Respondents.

Judgment. — This second appeal arises out of a suit in ejectment filed by the plaintiff who is the proprietor of the Anakapalli Estate against the defendants who are his tenants in possession of the suit land covered by Patta No. 223 of Anakapalli village on the ground that they have diverted a portion of the holding for non-agricultural purposes by digging up the land and laying foundations for constructing superstructure thereon and also by enclosing another portion of the holding with a compound wall the result of which according to the plaintiff was that 14 cents of land would become unfit for use for agricultural purposes. The defendants pleaded that their intention was to erect a farm house for storing the grain harvested on the holding and for other agricultural purposes. The learned Deputy Collector was of the opinion that the intention of the defendants was not to store the grains

raised on the land but to store articles in respect whereof they were carrying on a business. He was however of the opinion that the compound wall was raised on a portion of the land which was formerly covered by a koradi and which was never under cultivation before and that the said wall was in a line and served as protection from the trespass of the cattle passing along the adjoining road. He came to the conclusion that the defendants laid the foundations and built the compound wall without the permission of the landlord and they were not bona fide in doing so. He however thought in the circumstances of the case that compensation would be an adequate relief to the plaintiff and awarded Rs. 109-6-0 as damages. On appeal the learned District Judge thought that as the defendants had laid foundations at a cost of Rs. 700 and there was only "a breach of a technical provision of law" the plaintiff could be compensated in money for his damages. This is how he remarks in the judgment :

> It is unreasonable not to make a liberal use of the provisions of S. 152, Estates Land Act, and of the general rules of equity when no injury is caused to the landlord. In these days of rural reconstruction, especially, every facility possible under the law should be given to ryots to improve the storing of their agricultural produce or even the agricultural produce bought from others and for preventing them from the senseless waste involved by destroying foundations worth Rs. 700 by spending another Rs. 50.

Taking this view of the law, he gave leave to the defendants to erect pucca granaries on the suit lands for the sole purpose of storing agricultural produce like grains, gingely and other oil seeds, onions, cotton, jaggery, etc., whether grown on the suit land or other holdings of theirs or even bought by them from other ryots. He further directed the defendants to keep the compound wall intact and also the 14 cents enclosed within the compound wall without any cultivation. I think the learned District Judge's view of Ss. 151 and 152, Estates Land Act, is not correct. The Courts have nothing to do with the policy of rural reconstruction in construing a statutory provision. The object of S. 151 is that the value of land as agricultural land should be strictly maintained and that any attempt made by the tenant to divert the land for non-agricultural purposes should be prohibited. He is only allowed to make such improvements as are necessary for the beneficial enjoyment of the holding. The tenant cannot be allowed to take the law into his own hands and plead nor should the Court take the view that it is enough that the landlord is given compensation. I do not know what the learned Judge means when he says that the landlord is not hurt. In my opinion, the landlord is really hurt within the meaning of the statute when the land is diverted for non-agricultural purposes. Of course, the Court is given a certain amount of discretion under S. 151 even in cases where the tenant is found liable to ejectment to award compensation and the relief to be given will have to be moulded according to the circumstances of each case. The question in this case is whether the discretion exercised by the lower Court in awarding compensation is proper and should be interfered with. So far as the erection of the compound wall is concerned, it seems to me that it cannot be said that the use of the land for that purpose was a diversion for non-agricultural purposes. P. W. 1 in his evidence states that the compound wall occupies the place where previously there were trees and fence and that the fence was necessary to prevent cattle from trespassing into the field and destroying the crop raised. He also says that there is a vacant space of 10 cents between the foundation and the compound wall which can be cultivated. Thus the compound wall will be an improvement within the meaning of S. 3 (4) (d) of the Act because it is necessary for the convenient enjoyment of the holding by preventing the trespass of cattle into the field. So far therefore as the compound wall is concerned, the erection of the same cannot be made a ground of complaint by the plaintiff landlord for maintaining an action under S. 151.

The next question is whether the laying of foundations on 4 1/4 cents of land by the defendants would entitle the plaintiff to have them evicted or whether compensation would not be an adequate relief. The entire extent of land is 64 cents. Having regard to the extent of land on which the foundations were laid, if restrictions were placed on the defendants in regard to the kind of superstructure that they should build thereon and the use that should be made of it, I think that compensation would be an adequate relief. It seems to me that the defendants can be given leave to erect a structure on this piece of land for the purpose of storing crops which are raised on the holding and not for the purpose of storing grain purchased from others or for using the same for any business which is being carried on by them. The defendants

can therefore, if they like, build a superstructure on the 4 1/4 cents and use it for the purposes of storing the crops raised on the holding, but if they use it for any other purpose they will be liable to be evicted and it is open to the landlord (plaintiff-appellant) to institute proceedings under S. 151 of the Act. Of course, if the defendants at any time want to build a farmhouse, there could be no objection at all because they are entitled to do so. The order of the learned District Judge giving the defendants leave to erect a pucca building on the holding for the purposes mentioned by him in his judgment ought to be vacated. The order requiring the defendants to keep the area enclosed within the compound wall without any cultivation must also be vacated. As I have found that the compound wall is necessary for the beneficial enjoyment of the holding, and as I have vacated the order of the learned District Judge giving the defendants leave to construct a pucca building for the purposes mentioned by him, I think the compensation awarded by the lower appellate Court should be reduced, and it is accordingly reduced to Rs. 125, irrespective of the use the defendants are going to make of the land on which foundations are laid; they must continue to pay rent for the entire holding. In the circumstances I direct each party to bear his own costs in the second appeal. Leave to appeal is refused.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 602

WADSWORTH J.

B. Nagaraja Rao and others — *Petitioners*

v.

Koothappan s/o Tippurahalli Goundan and others — *Respondents.*

Civil Revn. Petn. No. 1280 of 1939, Decided on 20th December 1940, to revise order of Sub-Judge, Salem, D/- 17th October 1938.

(a) Evidence Act (1872), S. 32 (2) — Scope.

Section 32 (2) relates only to the relevancy of evidence; not to the manner of its proof. [P 603 C 1]

(b) Evidence Act (1872), S. 90—Old document not purporting to be in any known person's handwriting or signed by any known person — S. 90 does not apply.

Before a relevant statement is admitted into evidence, its authorship has to be proved. For that purpose, S. 90 is commonly relied upon in the case of old documents the authorship of which cannot be proved by persons who knew the handwriting or can recognize the signature of the maker, but this section cannot be relied upon for the proof of a document which does not purport to be in any known person's handwriting or to be signed by any known person : ('18) 5 A I R 1918 Mad 932 and ('39) 26 AIR 1939 Mad 926, *Rel. on.* [P 603 C 1]

(c) Deed — Unregistered — Admissibility for collateral purpose — Limit should not be overstepped *(Obiter).*

Where a Court holds that certain documents (lease deeds) are inadmissible as not being registered, it cannot, under the guise of treating these documents as admissible to show the character of the possession, in fact use them to prove the transaction itself—the letting and the terms upon which that letting took place : ('28) 15 A I R 1928 Mad 1113, *Rel. on.* [P 603 C 2]

(d) Madras Rent Recovery Act (8 of 1865), Ss. 3 and 4 — "Patta" — Scope.

A first patta or a patta which provides for a permanent tenure is a patta within the terms of Ss. 3 and 4 of the Act. [P 603 C 2]

(e) Registration Act (1908), Ss. 17, 49—Document not requiring registration when executed under law then prevailing — Subsequent law making registration necessary for such document—Document is admissible even subsequent to new law.

Section 17 (1), Registration Act, when read along with S. 6, General Clauses Act, does not destroy the validity or the admissibility in evidence of a document which complied with all the necessary formalities as they existed at the time of its execution. Hence a document which did not require to be registered under the terms of the Registration Act of 1866 is admissible subsequent to the Act of 1908 even though such document is to be registered under the Act of 1908 : 18 Bom 92; 9 Cal 68 and 8 A L J 609, *Rel. on.* [P 604 C 1]

(f) Madras Estates Land Act (1 of 1908), Ss. 3, 8—Person being landlord and also transferee of ryoti interest in part of land at time of passing of Act is not ryot.

A person who is a landlord and also transferee of the ryoti interest in part of the land at the time of the coming into force of the Estates Land Act is a landlord and not a ryot and a suit by him for the rent against a person who has been in possession of the land and has acquired occupancy rights therein when the Act came into force lies only in the Revenue Court and not in the Civil Court. [P 604 C 2]

C. S. Venkatachariar and D. Ramaswami Ayyangar — for Petitioners.

T. L. Venkatarama Ayyar — for Respondents.

Order. — This civil revision petition arises out of an appellate judgment confirming the decision of the District Munsif that a suit filed for rent on certain land situate within an estate under the Madras Estates Land Act is one of which the civil Courts cannot take cognizance. The appellants who are the plaintiffs held the estate as successors to an ijaradar or lessee from the original landholder. The lands in question have for many years been held under a rather curious tenure known as arakandacharam the feature of which is that in addition

to the ordinary rent which has to be paid by an ordinary ryot, the tenant is also required to pay a quarter of the produce to the landholder. The plaintiffs' case was that this tenure is an indication that the land is not ryoti land, but homefarm land belonging to the zamindar and that a suit for the rent thereof accordingly lies in a civil Court and not in the revenue Court. Under S. 185, Estates Land Act, the burden lies upon the plaintiff to show that the land is not ryoti land. He adduced very little in the way of documentary evidence to indicate the nature and origin of the tenure. There was oral evidence which the trial Court accepts that in some cases, but not invariably, homefarm land in the estate is in fact enjoyed on a tenure similar to that of the defendants. The accounts showing the actual history of the payments of rent in respect of this land before 1898 were excluded from evidence on the ground that they do not purport to be signed by any one or to be in any particular person's handwriting, and that therefore no presumption can be drawn regarding them under S. 90, Evidence Act. It has been suggested by Mr. Venkatachariar that this difficulty with reference to S. 90, Evidence Act, can be got over by calling in aid S. 32 (2). But the latter provision relates only to the relevancy of evidence, not to the manner of its proof. Before a relevant statement is admitted into evidence, its authorship has to be proved. For that purpose, S. 90 is commonly relied upon in the case of old documents the authorship of which cannot be proved by persons who knew the handwriting or can recognize the signature of the maker. It has been held in 33 M L J 84[1] and (1939) 2 M L J 593[2] that this section cannot be relied upon for the proof of a document which does not purport to be in any known person's handwriting or to be signed by any known person. I hold that these early accounts were rightly rejected by the lower appellate Court.

The two Courts below have held that though the rent paid by the defendants may differ from that due on other lands in the village known to be held on ryoti tenure, the plaintiffs have not established that the peculiar tenure necessarily indicates that the land is homefarm land. It is pointed out that there is no evidence that the land was ever cultivated by the landholder and that there appears to be no document in which the land is described as kambattam or homefarm land. It is argued for the appellant that the findings of the lower Courts have been vitiated by their reliance upon Exs. 1 and 2, which were not admissible in evidence. These are two old pattas of the year 1867 which have been put forward by the defendants as explaining the origin of this anomalous rent. The defendants' theory was that his predecessors were originally co-tenants along with one Rama Rao, but that they took a sub-lease of Rama Rao's share and that Rama Rao's share was eventually acquired by the landholder and so passed to the possession of the plaintiffs. Now, it cannot be contended that the defendants have proved completely this theory as to the origin of the payment in kind which is part of the rent now payable; but the demonstration that there was originally a co-tenant called Rama Rao does go some way to make this theory probable.

Both the Courts below have held that Exs. 1 and 2 are inadmissible as proof of the letting to Rama Rao because they were not registered, one of the documents being a patta which provides for an annual rent and the other being a patta which provides for a perpetual lease. Having come to this conclusion, both the Courts below, under the guise of treating these documents as admissible to show the character of the possession, have in fact really used them to prove the transaction itself, the letting to Rama Rao and the terms upon which that letting took place. As I am of opinion that the finding that these documents require registration is unsustainable, I need only refer to the decision in 51 Mad 977,[3] to indicate the extent to which the collateral use of a document which should have been registered can be permitted. Clearly the Courts below, on their own findings, have overstepped these limits. But I doubt very much the correctness of the findings of the Courts below that these two documents required to be registered. In my opinion, they are both pattas within the terms of Ss. 3 and 4, Rent Recovery Act, 8 of 1865, and I am unable to accept Mr. Venkatachariar's contention that a first patta is not a patta or that a patta which provides for a permanent tenure cannot be a patta within that Act. When once it is conceded that these two documents are pattas under the Rent Recovery Act, they

1. ('18) 5 AIR 1918 Mad 932 : 41 I C 788 : 33 M L J 84, Naina Pillai v. Ramanathan Chetti.
2. ('39) 26 AIR 1939 Mad 926 : (1939) 2 M L J 593, Chandukutty Nambiar v. Rama Varma Raja.
3. ('28) 15 AIR 1928 Mad 1113 : 117 I C 113 : 51 Mad 977 : 55 M L J 733, Mahalakshmamma v. Suryanarayana.

do not require to be registered under the terms of the Registration Act of 1866 which prevailed at the time they were executed.

It has however been contended that S. 17, Registration Act, read with S. 49, excludes from evidence any document which under the present Registration Act are to be registered, even though under the law which prevailed at the time when the document was executed registration was unnecessary. It must be admitted that the wording of cl. (1) of S. 17 is capable of the interpretation which has been put upon it and in the Courts below a very brief judgment of a single Judge of the Lahore High Court was quoted as authority for that interpretation. But there is considerable body of authority in favour of the contrary view. It has been pointed out that the wording of S. 17 repeats the wording of the section of the previous Act and that this wording has not been interpreted as taking away the evidential value of a document which under the law prevailing at the time when it was executed, complied with all the necessary formalities; and it has been pointed out that to interpret S. 17 (1), Registration Act, 1908, in its most literal sense would involve the conclusion that a document which did not require registration when it was executed and which could not now be registered owing to a lapse of time, would be shut out of evidence — a very anomalous position which would require unambiguous language to justify it. This view has been taken in Bombay (*vide* 18 Bom 92[4]), in Calcutta (*vide* 9 Cal 68[5]) and in Allahabad (*vide* 8 A L J 609[6]) and the only contrary case which has been quoted before me is this very brief decision of a single Judge of the Lahore High Court. It seems to me, there is great weight of authority in support of the more reasonable view that S. 17 (1), Registration Act, when read along with S. 6, General Clauses Act, does not destroy the validity or the admissibility in evidence of a document which complied with all the necessary formalities as they existed at the time of its execution. I must hold therefore that Exs. 1 and 2 are not inadmissible in evidence to prove the nature of the transaction and though I do not agree with the reasoning of the Courts below, their conclusion is, in my opinion, correct.

One further point which has been argued is that on the defendants' case that they pay rent in kind for a portion of their holding as sub-tenants of the assignee of the original ryot the suit so far as it relates to this portion of the rent is triable by a civil Court. In my opinion, this contention must fail. Assuming that the plaintiffs have succeeded to the rights of one Rama Rao who was a tenant under the landholder, it is undeniable that the present state of affairs has existed for very many years. Under S. 8 (1), Madras Estates Land Act, whenever before or after the commencement of this Act the occupancy right in any ryoti land vests in the landholder, he shall have no right to hold the land as a ryot but shall hold it as a landholder; and under sub-s. 5 of S. 3 the term "landholder" includes every person entitled to collect the rents of an estate by virtue of any transfer from the owner. It seems to follow that when the Madras Estates Land Act came into force, the plaintiffs, being the landholders and also transferees of the ryoti interest in part of this land, must hold that land as landholders and not as ryots. The defendants having been in possession of the land, which is certainly on the findings, ryoti land, when the Act came into force, they acquired occupancy rights therein. It follows that the suit for the whole of this rent must lie only in the revenue Court and the civil revision petition is therefore dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

4. ('94) 18 Bom 92, Desai Motilal Mangalji v. Desai Parashottam Nandlal.
5. ('83) 9 Cal 68, Ram Coomar Singh v. Kishari.
6. ('11) 8 A L J 609 : 10 I C 314, Intizam Fatima v. Ali Baksh.

(28) A. I. R. 1941 Madras 604

LAKSHMANA RAO J.

In re Ponnuswami Reddiar and another Petitioners.

Criminal Revn. Case No. 478 of 1940 and Criminal Revn. Petn. No. 454 of 1940, Decided on 26th July 1940, to revise judgment of Sub-Divisional First Class Magistrate, Ariyalur, in C. A. No. 26 of 1940.

Criminal trial — Appeal against conviction — Appellate Court should not dispose of it on very day on which it is presented without going into records.

An accused was convicted under Ss. 451 and 355, Penal Code. In an appeal from the conviction the Appellate Court dismissed the appeal on the very day on which it was filed without going into the records:

Held that the appeal should not have been disposed of the same day in spite of the request of the advocate for time to obtain the necessary records.

[P 605 C 1]

A. V. Narayanaswami Iyer — for Petitioners.

Public Prosecutor — for the Crown.

FACTS. — The accused petitioners were charged under Ss. 451 and 355, Penal Code,

for an offence of having entered the complainant's sister's house where he was residing, dragged him out of the house and shod him. The accused petitioners were convicted under the aforesaid sections by the Sub-Magistrate, Perambalur and against the conviction and sentence an appeal was preferred to the Sub-divisional Magistrate, Ariyalur. The Sub-divisional Magistrate dismissed the appeal on the very day it was presented without going into the records. Against this decision the matter was taken up to the High Court in revision.

Order. — The appeal was presented on 2nd July 1940, and it should not have been disposed of the same day in spite of the request of the advocate for time to obtain the necessary records. The order of the Sub-divisional Magistrate is therefore set aside and the appeal is remanded to the Sub-divisional Magistrate of Musiri for disposal according to law.

C.R.K./D.S. *Order set aside.*

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(28) A. I. R. 1941 Madras 605

PANDRANG ROW AND KING JJ.

Kannoth Punnoron Krishnan and others — *Appellants*

v.

Kannoth Punnaran Thala and others — *Respondents.*

Second Appeal No. 379 of 1937, Decided on 28th October 1940, against decree of Dist. Court, North Malabar in A. S. No. 182 of 1936.

(a) Madras Marumakkathayam Act (22 of 1933), Ss. 48 and 4 (1) (b) (i) — Husband purchasing property in name of his wife and daughter — Wife dying before Act came into force — S. 48 does not apply to property.

Where a husband purchases property in the name of his wife and daughter, and the wife dies before the Act came into force her union with her husband cannot be treated as a legalised marriage since the union was not subsisting at the date when the Act came into force and consequently S. 48 cannot apply to the property. [P 605 C 2]

(b) Madras Marumakkathayam Act (22 of 1933), S. 48—S. 48 is not retrospective.

There is nothing in the language of S. 48 which directly refers to the period before the Act was passed or shows by necessary implication that the section must be applied retrospectively. [P 605 C 2 ; P 606 C 1]

O. T. G. Nambiar — for Appellants.

K. Kuttikrishna Menon and K. Govindan — for Respondents.

King J. — In this appeal the question arises whether the provisions of S. 48, Madras Marumakkathayam Act of 1932 shall be applied to the partition of a certain item of property. The property was admittedly purchased in the year 1881 by the husband of one Manikkam in the name of Manikkam and their eldest daughter Choyichi. The first part of S. 48 reads :

> Where a person bequeaths or makes a gift of any property to, or purchases any property in the name of, his wife alone or his wife and one or more of his children by such wife together, such property shall, unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons and daughters by such person and the lineal descendants of such daughters in the female line.

The section concludes with a proviso :

> Provided that, in the event of partition of the property taking place under Chap. VI, the property shall be divided on the stirpital principle, the wife being entitled to a share equal to that of a son or daughter.

Both the Courts below have held that this property must be divided per capita or in other words, that S. 48 does not apply to its division. Two reasons are given, one by the District Munsif with which the District Judge does not agree, and another by the District Judge. The first reason is that S. 48 cannot apply to the property in question because Manikkam cannot legally be called the wife of Kelan, the purchaser. The requirements of a marriage are set forth in S. 4 of the Act, and it is provided by S. 4 (1) (b) (i) that if the conjugal union has been openly solemnized in accordance with the customary ceremonies that were prevailing in the community to which the parties or either of them belongs before the date on which this Act comes into force and is subsisting on such date, it becomes a regular marriage. It is admitted that Manikkam died before the Act came into force. It is therefore clear that her union with Kelan was not subsisting on that date and therefore her union with Kelan can never have been a legalised marriage. That being so, she was not Kelan's wife and the language of S. 48 cannot apply to the acquisition of this property. This was the view taken by the learned District Munsif and we think it is a sound view and no argument has been addressed to us in appeal which will induce us to alter that opinion.

The second ground upon which the District Judge relies is that S. 48 cannot be made retrospective. This ground also, we think, is sound. It is argued for the appellant that, since the Marumakkathayam Act has created for the first time the right to partition which did not exist before, it is not unreasonable that such a right should be restricted by the proviso which is found

in S. 48. We are unable to see any such reasonableness. There was a right of partition before the Act though it depended upon the consent of all the members of the family. If such a consent were given, the division of property acquired in this way would always be per capita. There have therefore arisen vested interests in the members of a tavazhi who can rightly expect that property should be divided in a certain way in case they should enter into a partition. The right of partition has merely been extended by the Act and we can see no reason at all why that right should be in any way restricted by making a change of this kind retrospective. There is nothing in the language of s. 48 which directly refers to the period before the Act was passed. There is nothing in the language of the section which by necessary implication shows that the section must be applied retrospectively. It is in accordance with principles of natural justice that, when a new enactment effects a change in the law, that change shall date only from the time the Act comes into force. We can see no reason whatever to regard S. 48 as being on any score retrospective and accordingly hold that this second appeal must fail. It is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 606

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Official Receiver, Nellore — Appellant

v.

Nerella Venkiah and another — Respondents.

Letters Patent Appeal No. 48 of 1939, Decided on 4th November 1940, against judgment and order of Wadsworth J., in A. A. A. O. No. 51 of 1937, D/- 16th August 1939.

Civil P. C. (1908), S. 47 and O. 21, R. 22 — Insolvent's property sold in execution of decree against him—No notice on Official Receiver served—Official Receiver being insolvent's representative is representative of party to decree within meaning of S. 47 and is competent to apply to have sale declared void.

After the adjudication the insolvent's interest in his property devolves upon the Official Receiver who must be taken to represent the insolvent and not merely the creditors. Consequently, where in execution of a decree against the insolvent his property is sold the Official Receiver being a representative of a party to the decree, namely the insolvent, is competent by reason of S. 47 to apply to have the sale declared void on the ground that it was held without notice being served upon him as required by O. 21, R. 22. The fact that the auction purchaser claims through the insolvent judgment-debtor cannot make the dispute one between representatives of one party only, namely the judgment-debtor, so as to take the case out of the purview of S. 47 : ('24) 11 A I R 1924 Mad 431 (F B), *Ref.* [P 607 C 1,2]

M. S. Ramachandra Rao and D. R. Krishna Rao — for Appellant.

Ch. Raghava Rao and T. K. Sundararaman — for Respondents.

Leach C. J.—On 9th August 1929 an application was filed in the Court of the Subordinate Judge of Nellore for the adjudication in insolvency of one Lebakula Subba Reddi, the father of five sons. He died before the petition could be heard, but the petition was continued against his three elder sons and rightly or wrongly an order for adjudication was passed against them on 24th November 1930. On 16th November 1934, respondent 2 in this appeal filed a suit against the five sons for the money owed by them on a promissory note, which was a renewal of an earlier promissory note made by the father. Respondent 2 did not implead the Official Receiver, although he knew of the adjudication of the three sons. The suit was not defended and in due course a decree was passed against the defendants, which resulted in respondent 2 instituting execution proceedings, in the course of which he attached certain immovable property belonging to the family. On 18th November 1935 the property was sold by the order of the Court and purchased by respondent 1. On 17th December 1935 the two younger sons applied to the Court for an order setting aside the sale on the ground of material irregularity and fraud in the publication of the sale, and at the same time a similar application was filed by the Official Receiver, who is the appellant in this appeal. The appellant also relied on the provisions of O. 21, R. 22, Civil P. C., by reason of which he ought to have received notice of the execution proceedings. It is common ground that no notice was served upon him.

The District Munsif of Kavali, in whose Court respondent 2's suit had been decreed and the execution proceedings conducted, held that there were no grounds for setting aside the sale and accordingly dismissed the petition. The two younger sons did not question the District Munsif's decision, but the appellant did. He appealed to the District Judge of Nellore, who allowed the appeal. The District Judge considered that S. 47, Civil P. C., applied and that it gave the appellant the right of challenging the

sale as the representative of the three insolvent judgment-debtors. He set aside the sale on the ground that the insolvent judgment-debtors had no interest in the property, because it had devolved upon the appellant. Respondent 1 then appealed to this Court and his appeal was allowed by Wadsworth J. The main reason given by the learned Judge for allowing the appeal was that the appellant was not the representative of the insolvent judgment-debtors, but of their creditors and therefore he was not within the provisions of S. 47, Civil P. C.

We are of the opinion that the learned Judge erred in allowing the appeal. Order 21, R. 22, makes it obligatory on a decree-holder to serve notice of an application for execution on the legal representative of a party to the decree, or where the party to the decree has been declared insolvent, or the official assignee or the receiver in insolvency. A Full Bench of this Court held in 47 Mad 288[1] that a sale which has been held without the service of the notice required by O. 21, R. 22 is void and therefore if the appellant is to be regarded as a representative of a party to the decree he had the right to institute the petition which has given rise to this appeal and to have an order passed in his favour. It has been argued on behalf of respondent 1, the purchaser at the auction, that this is not a dispute between the representatives of the parties to the suit, but between the representatives of the insolvent judgment-debtors, that is to say a dispute between the representatives of one side. We cannot accept this contention. The appellant as the Official Receiver represents the insolvent judgment-debtors. Their interest in the property with which these proceedings are concerned devolved upon him. We disagree with the learned Judge that the appellant must be regarded merely as the representative of the creditors and we are of the opinion that the fact that respondent 1 claims through the judgment-debtors does not make the dispute one between the representatives of the judgment-debtors. It is obviously a dispute between respondent 2 as the decree-holder and the Official Receiver who represents the interests of the insolvent judgment-debtors. What the appellant has complained of and is complaining of, is not what respondent 1 has done. He has throughout complained of the fact that respondent 2 has brought this property to sale without notice to him. Therefore, the dispute is clearly between the decree-holder and the representative of the insolvent judgment-debtors which means that S. 47 has full application. The mere fact that respondent 1 as the auction purchaser is affected by the proceeding will not make it any the less a dispute between one of the parties and the representative of the other parties to the suit. The appellant having the right of recourse to the Court by virtue of the provisions of S. 47 he is entitled to have his petition granted by reason of the non-observance of O. 21, R. 22.

The result is that the appeal will be allowed so far as the interest of the three insolvent judgment-debtors in the property is concerned. The District Judge set aside the sale with regard to the two non-insolvent judgment-debtors also, but here he erred. As the appellant has succeeded he is entitled to his costs throughout. A memorandum of cross-objection has been filed by respondent 1 but it has not been pressed and it will be dismissed without costs.

C.R.K./G.N. *Appeal allowed.*

1. ('24) 11 A I R 1924 Mad 431 : 80 I C 92 : 47 Mad 288 : 46 M L J 104 (F B), Rajagopala Iyer v. Ramanujachariar.

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* (28) A. I. R. 1941 Madras 607

PATANJALI SASTRI J.

Vinjamuri Venkatanarasimhacharyulu — *Petitioner*

v.

Jami Gangaraju amended as Ganiraju — *Respondent.*

Civil Revn. Petn. No. 1664 of 1937, Decided on 30th August 1940, to revise decree of Dist. Munsif, Kovvur, in S. C. C. No. 190 of 1936.

* (a) Evidence Act (1872), S. 116 — Scope — Lessee obtaining lease under registered kadapa from lessor as absolute owner of property leased — In suit by lessor on lease lessee is estopped from pleading lessor to be undisclosed agent and discharge by payment to real owner.

The rule of estoppel laid down in S. 116 of the Act, precludes the tenant from showing that in granting the lease, the landlord acted as the agent of another person who was the owner of the property but without disclosing his agency, and that the liability to pay the rent was discharged by payment to that owner ; for he cannot establish such a plea without showing that the person to whom he paid the rent and not his lessor was the owner of the property leased, which is exactly what the estoppel is intended to prevent him from showing. [P 608 C 1, 2]

(b) Evidence Act (1872), S. 116—'Landlord'—Meaning of — Benamidar in possession, granting lease without disclosing benami character is landlord within meaning of S. 116 *(Obiter)*.

A benamidar happening to be in possession of the property on behalf of the real owner and

granting a lease of it without disclosing his benami character, clearly comes within the protection of S. 116 as he is the person who in fact leases the property and places the tenant in possession : 31 Mad 461, *Expl.* [P 608 C 2]

P. Somasundaram and P. Satyanarayana — for Petitioner.

V. Rangachari — for Respondent.

Order. — This revision petition raises an interesting question of law on which it is said there is no direct authority. The petitioner brought the suit for recovery of the first year's rent payable under a registered kadapa executed by the respondent on 23rd May 1935 for a term of five years. The defence was that out of the 5 acres 40 cents covered by the kadapa (Ex. A), 4 acres and 10 cents belonged to the petitioner's adoptive mother, that the petitioner who was managing her properties on her behalf leased the said 4 acres and 10 cents along with 1 acre and 30 cents of his own land, describing the entire property as his own, that part of the rent proportionate to the extent belonging to her was paid and accepted by the petitioner's adoptive mother and that the balance had been paid to the petitioner. The kadapa recites that the properties leased were in the absolute possession and enjoyment of the petitioner and contains a covenant by the respondent to pay the rent to the petitioner. There can be no doubt, therefore, that the respondent took the lease from the petitioner as the absolute owner of the properties leased. It has, however, been found as a fact by the Court below that the petitioner had been managing the properties of his adoptive mother, that 4 acres and 10 cents out of the land comprised in the lease belonged to her and that the respondent had made payments as alleged by him. On these findings the Court below held that there was no estoppel and dismissed the suit.

The petitioner's learned counsel contended that the respondent was estopped under S. 116, Evidence Act, from denying that the petitioner had title to the entire property covered by the lease, and that the lower Court was wrong in allowing the respondent to allege and prove the contrary. It was, however, argued for the respondent that the rule of estoppel laid down in S. 116, Evidence Act, does not preclude the tenant from showing that, in granting the lease, the landlord acted as the agent of another person who was the owner of the property but without disclosing his agency, and that the liability to pay the rent was discharged by payment to that owner. Learned counsel relied on Woodfall on Landlord and Tenant, pp. 90 and 91 as showing that the principle applicable to contracts made by an undisclosed agent (see S. 231, Contract Act) applies also to contracts of tenancy. It may be that, according to this principle, the real owner could sue to enforce the covenant for payment of rent but it would be open to the tenant in such a suit to apply to have the agent, i. e., the lessor under the instrument, also impleaded as a party so as to have all questions regarding the right to rent completely settled in the suit and thus safeguard himself against having to pay the rent twice over. However, that may be, it is difficult to see, how the fact, that the undisclosed principal is also entitled to sue for the rent in a case of this sort, can be a ground for permitting the tenant to plead discharge by payment to the former, as that would be contrary to the rule of estoppel laid down in S. 116, Evidence Act; for, he cannot establish such a plea without showing that the person to whom he paid the rent and not his lessor was the owner of the property leased, which is exactly what the estoppel is intended to prevent him from showing.

Learned counsel for the respondent placed reliance on 31 Mad 461,[1] where it was held that in the case of a lease executed in favour of a person benami for another, the real owner and not the benamidar must be regarded as the landlord for the purposes of S. 116, Evidence Act. The facts of the case do not clearly appear in the report but it seems to me that a distinction must be made between a case where a person claiming to be the owner of a certain property leases it to a tenant but takes the lease deed in the name of his benamidar and the case where a benamidar happening to be in possession of the property on behalf of the real owner grants a lease of it without disclosing his benami character. In the former case, it may be correct to say that the tenant's estoppel operates in favour of the real lessor and not the benamidar who was not a party to the transaction. The decision in 31 Mad 461[1] was apparently a case of that kind. But in the second case referred to above, the benamidar clearly comes within the protection of S. 116 as he was the person who in fact leased the property and placed the tenant in possession. If the proposition laid down in 31 Mad 461[1] was intended to apply also to this class of cases, I would respectfully dissent from it. In the result, the

1. ('08) 31 Mad 461, Kuppu Konan v. Thirugnanasambandam Pillai.

revision petition is allowed with costs and the petitioner will have a decree for the amount claimed less the sum found to have been paid to him. The parties are agreed that the sum payable on this basis is Rs. 162. There will be a decree accordingly for this sum with interest at six per cent from date of suit. The parties will pay and receive proportionate costs in the lower Court.

C.R.K./N.K. *Revision allowed.*

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* (28) A. I. R. 1941 Madras 609

KING J.

Subbiah Ambalam Servai — Petitioner

v.

Unnamalai Achi and others — Respondents.

Civil Revn. Petn. No. 55 of 1939, Decided on 17th January 1941, to revise decree of Dist. Munsif, Devakottah, D/- 29th July 1938.

* Limitation Act (1908), S. 22—Money due from deceased—Suit for recovery against legal representative out of estate in his hands—Suit is against estate and not representative as individual — First, one legal representative and then another impleaded—Estate must be regarded as represented throughout—There is no change of defendants in real sense of word.

A suit by a plaintiff to recover money on the allegation that the money was a debt due to him by a deceased person, and that it should be paid by the legal representative of that deceased person if his estate has come into his hands, is in essence a suit not against the representative as an individual but the estate. Consequently, where in the same suit first one legal representative and then another is impleaded, the estate which is the object of the suit must be taken to have been represented throughout, there being no change of defendants in the real sense of the word, so as to attract the provisions of S. 22: ('29) 16 A I R 1929 Mad 482 and ('30) 17 A I R 1930 Mad 930, *Rel. on;* ('21) 8 A I R 1921 Mad 528 and ('25) 12 A I R 1925 Mad 917, *Disting.*; 10 Bom H C R 224 and ('32) 19 A I R 1932 Lah 314, *Dissent.* [P 610 C 1, 2 P 611 C 1]

S. Venkatesa Ayyangar — for Petitioner.

V. Ramaswami Ayyar and V. Seshadri — for Respondents.

Order.—The petitioner in this case sued in the Court of the District Munsif of Devakottai to recover a sum of Rs. 150 which was entrusted by him at Penang on 24th November 1934 with one Mariappan, the agent of Ramaswami Chettiar, for the purpose of remitting that money to British India. The suit was filed on 24th November 1937 on the last day permitted by limitation on the assumption that the limitation began to run from the date of the entrustment. Ramaswami Chettiar was then dead and his widow was impleaded as defendant and a decree was sought for against the assets of Ramaswami Chettiar in her hands. While the suit was pending, it was brought to the notice of the plaintiff that Ramaswami Chettiar had left a will executed on 17th September 1936 in which two persons were appointed as executors of his estate. Thereupon an application was made by the plaintiff to implead these executors as defendants 2 and 3 and on 6th July 1938 they were duly impleaded. The only point which requires decision in this petition is whether the claim of the plaintiff is barred by limitation as against defendants 2 and 3. The learned District Munsif has held that the suit is barred by limitation and in so holding he relies upon the language of S. 22, Limitation Act, which runs as follows :

> Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

The question therefore for me to decide is whether S. 22 has been rightly applied by the learned District Munsif to the facts of this case. Clearly, if defendants 2 and 3 are new defendants within the meaning of S. 22 the suit was barred on the date when they were ordered to be impleaded. But it is argued for the petitioner that they are not really new defendants, but merely new representatives of the same estate which was already represented by the impleading of defendant 1 at the time when there was no bar of limitation. It seems to me that this argument must prevail. It is quite clear that the plaintiff in the present suit was not suing either defendant 1 or defendants 2 and 3 in their personal capacity. Although it is true that the estate of a deceased person must be represented in any suit by some living person, the real defendant in this suit may rightly be said to be the estate of Ramaswami Chettiar. It was Ramaswami Chettiar who was plaintiff's debtor and plaintiff seeks to recover the amount of the debts from whosoever may represent Ramaswami Chettiar's estate. It seems to me reasonable therefore, on general principles to argue that as defendant 1 and defendants 2 and 3 were all impleaded as representing Ramaswami Chettiar's estate, there is in essence the same defendant throughout.

It is, however, argued for the respondents here that if a wrong legal representative is impleaded, the estate against which the suit is laid cannot be said to be properly represented and therefore is not represented at all. On the facts of the present case, it

would follow that the estate of Ramaswami Chettiar was never represented until defendants 2 and 3 were added. Therefore, the estate of Ramaswami Chettiar was sued against for the first time on a date when the suit was barred by limitation. This argument cannot be upheld in the face of two decisions of Benches of this Court: 30 M L W 778[1] and 60 M L J 97.[2] These decisions are directly in point, although in one sense they do not deal with exactly the same question. They are cases in which a decree had already been granted against the estate of a deceased person represented by a legal representative who turned out after the decree not to have been the rightful legal representative of the deceased. It was held in both these cases that if the suit had been bona fide brought by the plaintiff against the person whom he reasonably thought to be the real legal representative, the estate was sufficiently represented by that person, and the decree, in the absence of anything to suggest fraud or collusion, was binding upon the true legal representative.

It follows on an analysis of those cases that whoever may be impleaded as the representative of an estate if impleaded bona fide the estate is represented. Therefore, if at one time in the same suit, one defendant who is not the real representative is impleaded and at another time the rightful legal representatives are also impleaded, the same estate has been represented throughout the suit. It is true that there are two cases cited before me, which hold that in circumstances similar to those with which I am now concerned, a suit would be barred by limitation. One of these is 10 Bom H C R 224[3] a decision given so long ago as 1873. This decision deals with S. 14, Limitation Act, then in force and not with S. 22. There is also a decision reported in AIR 1932 Lah 314.[4] But it is significant that the learned Judges in that case gave as their final and clinching reason for their decision that a decree passed without the addition of the true legal representative to the estate of a defendant could in no manner have been binding upon that legal representative. That is directly contrary to the decisions of this Court in 30 M L W 778[1] and 60 M L J 97[2] to which I have already referred. I cannot therefore be asked in disposing of this petition to follow this ruling of the Lahore High Court, and with great respect I see no reason why I should follow the decision of the Bombay High Court which does not apparently seem to have been followed during the long interval which has elapsed since 1873.

I have also been referred by the learned advocate for the respondents to two Madras cases, 40 M L J 532[5] and A I R 1925 Mad 917,[6] in which S. 22 has been applied. In 40 M L J 532[5] plaintiff who was one of the executors under a will brought a suit on behalf of the estate of the deceased testator. He did not join with him the other executor nor did he implead him as a defendant. Finally, the co-executor was impleaded as a defendant on a date on which the suit would have been barred by limitation. It was held in 40 M L J 532[5] that as defendant 6 had not been impleaded within time, the suit must be barred. In A I R 1925 Mad 917[6] a suit was filed by the daughter of a deceased person claiming as heir to him. On an inspection of the will of the deceased, it was discovered that another person was appointed executor and therefore the executor alone was competent to file the suit. The executor was then added as an additional plaintiff but at the time when the executor was added, the suit was barred by limitation. It was held that S. 22 applied to this case and plaintiff's suit was barred. It seems to me that these rulings have nothing to do with the particular problem before me. They are both cases as will be seen of plaintiffs who have filed suits which they were incompetent to file. It cannot be denied that when a plaintiff, claiming to be the representative of a deceased person, files a suit, he is filing it as an individual, and that anybody else who is joined in the suit later must be a separate individual from him. Clearly, therefore, S. 22 applied and a second plaintiff or any person who ought to be a plaintiff or impleaded as a formal defendant is a new plaintiff or a new defendant within the meaning of that section. There is no case here of an estate as such suing for any benefit. Where, however, a plaintiff, as in this case, is suing to

1. ('29) 16 A I R 1929 Mad 482: 120 I C 65: 30 M L W 778, Sanna Govappa v. Rodda Sanna Govappa.
2. ('30) 17 A I R 1930 Mad 930: 129 I C 469: 54 Mad 212: 60 M L J 97, Chathurbujadoss Khushaldoss & Sons v. Raja Manikka Mudali.
3. ('73) 10 Bom H C R 224, Kavasji Sorabji v. Barjorji Sorabji.
4. ('32) 19 A I R 1932 Lah 314 : 137 I C 89 : 33 P L R 258, Northern Bank of India Ltd. v. Rameshchandar.
5. ('21) 8 A I R 1921 Mad 528 : 63 I C 104 : 40 M L J 532, Seerangathunni v. Vaithilinga Mudaliar.
6. ('25) 12 A I R 1925 Mad 917 : 85 I C 961, Venkatasubbamma v. Pulipulla Reddi.

recover money on the allegation that the money was a debt due to him by a deceased person, and that it should be paid by the legal representative of that deceased person if his estate has come into his hands, he is in essence suing not the representative as an individual but the estate. As already mentioned, an analysis of the principles upon which 30 M L W 778[1] and 60 M L J 97[2] were decided makes it clear to my mind that where in the same suit first one legal representative and then another is impleaded, the estate which is the object of the suit has been represented throughout and there is no change of defendants in the real sense of the word.

I hold accordingly that S. 22 does not apply to the present case and that the suit was brought within time. The decree of the learned District Munsif will therefore be set aside. It is argued for the respondent that there is no clear finding in the present case that the suit was brought in the first instance against defendant 1 in the genuine belief on the part of the plaintiff that defendant 1 was the true legal representative of Ramaswami Chettiar. On the other hand, there is no finding to the contrary and it seems to me extremely probable that any contention of this kind contesting the honesty of the plaintiff must necessarily have been raised during the proceedings for the adding of defendants 2 and 3 to the suit. The affidavits filed in connexion with those proceedings are not available before me at the present time. But it seems to me reasonable to argue that if the Court had any reason to suspect that the plaintiff had known of the existence of defendants 2 and 3 as the executors of Ramaswami Chettiar at the time when he filed his suit, it would never have permitted these defendants to be impleaded at all. I am not prepared in these circumstances to accept the contention of the learned advocate for the respondents that the suit should be remanded to the District Munsif for a further finding on the point of limitation to depend upon the finding whether the action of the plaintiff in filing the plaint only against defendant 1 was or was not bona fide. I am convinced, as I say, that it must have been bona fide in this sense. All other defences to the suit have been duly considered and found against the defendants by the learned District Munsif. It follows therefore that in allowing this petition, a decree must be granted to the plaintiff with costs throughout against defendants 2 and 3 payable out of the estate of Ramaswami Chettiar with interest at six per cent. per annum from the date of plaint to the date of realisation.

C.R.K./G.N. *Petition allowed.*

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(28) A. I. R. 1941 Madras 611

WADSWORTH AND PATANJALI SASTRI JJ.

Vasireddi Pitchayya — Petitioner

v.

Lavu Subbayya — Respondent.

Civil Revn. Petn. No. 1865 of 1940, Decided on 5th November 1940, to revise order of Sub-Judge, Tenali, D/- 10th August 1938.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 3 (i), 19 and 20 — Agriculturist partner personally liable for partnership debt is judgment-debtor and person entitled to benefits of the Act.

A debt incurred by a partnership is really a debt incurred by the partners for which each of them is liable. Where the decree for partnership debts recognizes this and makes the partners personally liable, each of the partner will be a judgment-debtor with a liability and if any of them is an agriculturist he shall be entitled to apply under Ss. 19 and 20. [P 611 C 2]

K. Kotayya — for Petitioner.

Ch. Raghava Rao — for Respondent.

Wadsworth J.—This appeal has been treated as a revision petition and the appellant will pay the deficient court fee. The appellant applied under Ss. 19 and 20 of Madras Act, 4 of 1938 to scale down a decree. The decree in question was based on a debt due by the appellant and others as members of a firm and the cause title treats the firm as defendant 1 and the managing partners as defendants 2 to 9. The appellant is defendant 7. The lower Court has rejected the application on the ground that a firm is not a person under the definition in S. 3 (1) of the Act and therefore a debt incurred by a firm is not one which can be scaled down and if that debt is due from an agriculturist, he cannot get the benefits of the Act, because the debt was not incurred by him qua agriculturist. We are unable to accept this reasoning. A debt incurred by a partnership is really a debt incurred by the partners for which each of them is liable. This is recognized by the decree which makes the appellant and his partners personally liable. The appellant is therefore a judgment-debtor with a liability and if, as appears to be the case, he is an agriculturist, he is entitled to apply under Ss. 19 and 20. The lower Court has not gone into the questions arising out of the process of scaling down. We are informed that the whole of this application will become unnecessary if the appeal now pending against another order recording satisfaction

of the decree is dismissed. This appeal treated as a revision petition is allowed with costs and the application is remanded to the lower Court for disposal. The lower Court will keep the application pending until orders have been passed on the pending appeal (C. M. A. No. 225 of 1939) and will dispose of it after judgment therein.

C.R.K./N.K. *Petition allowed.*

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(28) A. I. R. 1941 Madras 612

ABDUR RAHMAN J.

Ramachandra Ayyar and others — *Appellants*

v.

Ranganayaki Ammal and others — *Respondents.*

Second Appeal No. 107 of 1936, Decided on 16th January 1941, against decree of Sub-Judge, Salem, in A. S. No. 152 of 1934.

(a) Hindu law — Will — Bequest by father to sons — Father can determine whether property bequeathed shall be ancestral or self acquired— In absence of such declaration or contrary intention property must be presumed to be ancestral — Will by father bequeathing property to sons for their lives without powers of alienation but permitting grandchildren to alienate it when it devolved on them—Father held intended property to devolve on sons as ancestral property.

Under the Hindu law the father can determine whether the property which he has bequeathed to his sons shall be ancestral or self-acquired. In the absence of any such declaration or of any circumstances which would point to a contrary intention, it must be presumed to be ancestral. [P 613 C 1]

A Hindu father executed a will under which he bequeathed property to his sons for enjoyment during their lives without any powers of alienation but permitted his grandchildren to alienate the same when it devolved on them subsequent to the sons' death :

Held that there was nothing in the will to show that the father did not want the property to devolve on his sons as ancestral property. The facts that the shares were not specified in the will or the right of management was not given by the father to any one of his sons did not point to the inference that the father did not want the sons to enjoy the property as ancestral. The fact that the sons had got a limited interest only in the property bequeathed to them did not also rebut the presumption of the joint tenancy : ('37) 24 A I R 1937 All 197 and ('26) 13 A I R 1926 Mad 273, *Rel. on*; ('23) 10 A I R 1923 P C 160, *Expl.* [P 613 C 2]

(b) Hindu law — Will — Cancellation—Onus to prove is on person alleging it.

The onus to prove that the will was cancelled by the testator lies on the party alleging the same. [P 614 C 1]

(c) Evidence—Admissibility—Secondary evidence admitted in trial Court without objection— Its admissibility cannot be challenged in appeal.

Once secondary evidence of a will is found to have been admitted by the trial Court without any objection the contention in appeal as to its inadmissibility must be overruled. [P 614 C 1]

(d) Practice — New plea — Second appeal — Case proceeding in lower Courts on footing that plaintiff had interest and locus standi to sue — Plaintiff's competency cannot be challenged in second appeal.

Where the case has proceeded in the trial Courts on the footing that the plaintiff had interest in the suit property and the locus standi to maintain the action, it is too late in second appeal to challenge the plaintiff's competency to maintain the action and to start the case on a new basis. [P 614 C 1, 2]

B. V. Viswanath Ayyar—for Appellants.

D. R. Krishna Rao and A. Bhujanga Rao — for Respondents.

Judgment. — The main point to be decided in this appeal relates to the character of the property held by Varada Pillai, defendant 2. His father Vijayaraghava executed a will (EX. B) on 29th April 1918 under which he bequeathed the property to his sons for enjoyment during their lives. It also provided against the alienations of this property by them but contained a clause that his grandchildren could do so after the property devolved on them subsequent to his sons' death. It contained a further provision for charity as well; but we are not at present concerned with the property which was reserved for charity or with the right and duty of conducting the same. Vijayaraghava had three sons at the time when the will was executed, Thiruvengada Pillai, Varada Pillai and Krishna Pillai, but the youngest of these (Krishna Pillai) died during his lifetime. Vijayaraghava died in October 1918 and the eldest son of his, Thiruvengada, five years later.

Varada Pillai, defendant 2, entered into a partnership with defendant 1 and carried on business for some time. They could not pull on satisfactorily and defendant 1 brought a suit for dissolution of partnership and rendition of accounts in the Court of the District Munsif of Dharmapuri (O. S. No. 73 of 1926). A preliminary decree was passed and after the accounts were taken some money was found due to him by Varada Pillai. A final decree was consequently passed in favour of defendant 1. In execution of that decree he brought the properties in suit to sale and purchased them himself. The present plaintiffs 1 and 2 who are daughters of Thiruvengada Pillai and plaintiff 3 who is the daughter of Varada Pillai brought the present suit asking for a declaration that they were the owners of the properties purchased by defendant 1, and defendant 1 had not acquired any proprietary rights in them by reason of his purchase through Court.

The plaint also contained a prayer in the alternative that if Varada Pillai was found entitled to a third share of the income from the lands for his lifetime subject to the liability with which the said right was burdened under the will that defendant 1 should not get anything more than his (Varada Pillai's) right of enjoyment in a third of the suit properties during his lifetime. A prayer for injunction restraining defendant 1 from interfering with the plaintiffs' possession of the suit properties was also included. Defendant 1 pleaded that the properties were the joint properties of Vijayaraghava and his sons and that the will of Vijayaraghava was for that reason invalid. The second objection raised by him was to the effect that the will was cancelled by Vijayaraghava during his lifetime and the cancellation was recorded on the back of the original will. The third plea, which is really the main plea in this appeal, was that the property was taken by Vijayaraghava's sons under the will as joint tenants and devolved on Varada Pillai as a survivor after the death of his brother Thiruvengada which he was entitled to enjoy for his lifetime in any case. The District Munsif of Krishnagiri held on the last two points against the plaintiffs and dismissed their suit. On appeal to the Subordinate Judge of Salem this judgment was reversed and the plaintiffs' suit was decreed. Aggrieved by that judgment and decree defendant 1 has come up to this Court in second appeal.

As observed by their Lordships of the Privy Council in 45 ALL 596,[1] there is a great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest by a father of property, which in the father's hand was self-acquired to his son. No final decision was however arrived at by them and in the absence of any such decision the view consistently taken by this Court is that the father can determine whether the property which he has bequeathed shall be ancestral or self-acquired and that in the absence of any such declaration or of any circumstances which would point to a contrary intention, it would be presumed to be ancestral. This was conceded by learned counsel for the respondents but he urged that the presumption is rebutted by the provisions in this will which indicate that Vijayaraghava did not wish to bequeath the property to his sons as an ancestral property. Having gone through the will with him I am of opinion that there is no force in this contention. There is nothing in this document which would show that Vijayaraghava did not want the property to devolve on his sons as ancestral property. The learned subordinate Judge, on a wrong construction of this will, arrived at the conclusion that Thiruvengada's daughters would take their father's share of the property during the lifetime of their uncle Varada Pillai. Had this been so, in fact, the presumption would have been rebutted and the decision of the lower appellate Court would have been correct. But unfortunately for the respondents it is not so. There is nothing in the will to show that the property bequeathed by Vijayaraghava or any share thereof devolved on Thiruvengada's children on their father's death. The facts that the shares were not specified in the will or the right of management was not given by Vijayaraghava to any one of his sons do not point to the inference that the father did not want the sons to enjoy the property as ancestral. The fact that the sons had got a limited interest only in the property bequeathed to them would not also rebut the presumption of the joint tenancy. This was held by a Division Bench of the Allahabad High Court in A I R 1937 ALL 197[2] and this in spite of the fact that the view of that Court has been against the presumption as to the ancestral character of the property when bequeathed by a father which is raised in this presidency. When a gift is made by a father to his sons the presumption of joint tenancy is stronger and it has been held to be so in a decision by a Division Bench of this Court: 49 Mad 98[3] at p. 105.

For the above reasons I would hold that, in the absence of anything in the will which would lead me to infer Vijayaraghava's intention to be that the property should be enjoyed by his sons as tenants-in-common, it was enjoyed by them as joint tenants. Since one of the characteristics of joint tenancy is for the property to devolve by survivorship, Varada Pillai must be held to have, on his brother Thiruvengada's death, got the property by survivorship. The second contention advanced by learned counsel for the appellant was that inasmuch as the original will was not produced on behalf of the

1. ('23) 10 A I R 1923 P C 160 : 76 I C 922 : 45 All 596 : 26 O C 257 : 50 I A 265 (P C), Lal Ram Singh v. Deputy Commissioner of Pratabgarh.

2. ('37) 24 A I R 1937 All 197 : 168 I C 541, Suraj Prasad v. Mt. Gulab Dei.

3. ('26) 13 A I R 1926 Mad 273 : 93 I C 662 : 49 Mad 98 : 50 M L J 413, Janakiram Chetti v. Nagamony Mudaliar.

respondents, it would be presumed to have been cancelled by Vijayaraghava. The onus of proving that Vijayaraghava had cancelled his will lay on defendant 1. He failed to discharge that burden. The District Munsif who was inclined to raise a presumption against the plaintiffs was not satisfied that it was cancelled by Vijayaraghava. He thought that it might have been cancelled by Vijayaraghava's sons after their father's demise. But there was no proof of that fact on the record and he should not have come to a decision on a pure surmise. Nor was this plea raised on behalf of defendant 1. He alleged that it was cancelled by Vijayaraghava and once the District Munsif was of opinion that this allegation was not established, he should have recorded his finding and abstained from going any further. The lower appellate Court did not also find in favour of defendant 1's contention, although it must be admitted that the finding by the lower appellate Court on this point is not as clear as it might have been. A copy of the registered will was produced during the trial and when secondary evidence of that document was led on behalf of the plaintiffs no objection was raised by defendant 1 on that ground. Secondary evidence was thus permitted to go on the record; and once it is found to have been admitted by the trial Court without any objection the contention in appeal on behalf of defendant 1 as to its inadmissibility must be overruled. The lower appellate Court has given good reasons why secondary evidence should have been and was received by the District Munsif and it is quite sufficient to say that I find myself in agreement with the same. At all events there is nothing on the record to show that this will was cancelled by Vijayaraghava and in the absence of any such evidence on the record the finding must have been, as it was, against defendant 1.

Learned counsel for the appellant also contended that the lower appellate Court should not have passed a decree in favour of the plaintiffs as there was nothing on the record to show that they are the owners of the property or that the bequest in the will by their grandfather was in their favour. Some objection appears to have been raised on behalf of defendant 1 in the written statement in regard to the competency of the plaintiffs to maintain the present action but it was not pursued and the case proceeded in the lower Courts on the footing that the plaintiffs had interest in the property and locus standi to maintain the action. Had defendant 1 been serious in regard to this contention, it is difficult to conceive that nothing should have been heard about it during the five years that this case remained pending in the subordinate Courts. It is too late now to start this case on a new basis. I would therefore hold that a decree should have been passed in favour of the plaintiffs even if the property was found to have been held, as I have now found it to be, by Varada Pillai as a joint tenant. The lower appellate Court has given an indication in its judgment of what the decree should have been in that event. Since I am not agreeing with the lower appellate Court's finding in regard to the tenancy being in common the alternative decree suggested by the lower appellate Court appears to be correct.

The result is that the appeal is accepted to that extent and a decree is passed in favour of the plaintiffs in the terms suggested by the learned subordinate Judge in the event of the property in Varada Pillai's hands being found to be ancestral although limited as a life estate. In view of the fact that defendant 1 is succeeding to a large extent I would give him two-thirds costs in this and in the lower appellate Court and one-third costs in the trial Court. Leave to appeal is refused.

C.R.K./G.N. *Appeal partly accepted.*

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(28) A. I. R. 1941 Madras 614

LAKSHMANA RAO J.

President, Pakkam Panchayat Board— Petitioner

v.

Munuswami Reddy — Respondent.

Criminal Revision No. 635 and Petn. No. 596 of 1940, Decided on 29th November 1940, to revise judgment of Stationary Second Class Magistrate, Trivellore, D/- 27th June 1940.

Madras Local Boards Act (14 of 1920), S. 207 —Accused found guilty under S. 207—Acquittal on ground that result of his objection petition was not communicated to him is unsustainable.

The acquittal of an accused found guilty under S. 207 on the ground that the result of his objection petition was not communicated to him is unsustainable. [P 614 C 2]

V. Ramaswamy Ayyar — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The Sub-Magistrate has in effect found the accused guilty of the offence under S. 207, Madras Local Boards Act, and the acquittal of the accused on the ground that the result of his objection petition was not communicated to him is unsustainable.

The acquittal is therefore set aside and there will be a re-trial of the accused in accordance with law.

C.R.K./G.N. *Acquittal set aside.*

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(28) A. I. R. 1941 Madras 615

LEACH C. J. AND HAPPELL J.

Sree Rajah Vatchavaya Venkatasurya-narayana Jagapathiraju Bahadur Zamindar Garu — Appellant

v.

Maddukuri Tirupatayya and others — Respondents.

Letters Patent Appeal No. 37 of 1939, Decided on 26th February 1941, against judgment of Wadsworth J., *Reported in ('40) 27 A I R 1940 Mad 819.*

Madras Local Boards Act (14 of 1920), S. 89 — Landholder filing suit in revenue Court for recovery of cess cannot recover for more than three years.

A landholder who wishes to recover cess under the Madras Local Boards Act, does not need to sue in the revenue Court, but if he does so he is restricted to what that Court can give him. Therefore, where a land-holder sues in a revenue Court for the recovery of cess, he cannot recover for more than three years under S. 77, Madras Estates Land Act, even though he would have been entitled to recover for six years if he had instituted the suit in the Civil Court: ('37) 24 AIR 1937 Mad 217 (FB), *Ref.* [P 615 C 2; P 616 C 1]

P. Somasundaram — for Appellant.

V. Viyanna — for Respondents.

Leach C. J. — The appellant is the zamindar of Tuni and sued in the Court of the Deputy Collector of Peddapur to recover from the respondents in this appeal what he had been compelled to pay by way of cess under the Madras Local Boards Act 1920 in respect of Faslis 1338 to 1343. The respondents are darmilla inamdars or under-tenure holders, within the zamindari. They contested the right of the appellant to sue for more than what he had paid in respect of the last three faslis. Their contention was that as the appellant in suing in the revenue Court had called in aid the Madras Estates Land Act he could not recover for more than three years. This contention was accepted by the Deputy Collector, by the District Judge of West Godavari on first appeal and by Wadsworth J. on second appeal. This appeal is from the judgment of Wadsworth J. who gave the necessary certificate under Clause 15, Letters Patent. By virtue of S. 88, Madras Local Boards Act, the appellant had the right to recover from the respondents the amounts which he claimed, and if he had instituted the suit in the civil Court it is not contested that he would have been entitled to a decree for what he had paid by way of cess during the six years preceding the suit. In I L R (1937) Mad 498,[1] a Full Bench of this Court held that a suit which had been filed in a civil Court to recover cesses under the Madras Local Boards Act was governed by Art. 120, Limitation Act. The respondents rely, however, on the provisions of S. 89 of the Act. That section says :

> Every landholder, sub-landholder or any other intermediate landholder, as the case may be, shall in recovering any amount which may be due to him under the provisos to S. 88, be entitled to exercise the same powers as may, under any Act or Regulation which now is, or hereafter may be, in force, be exercised by any landholder in the recovery of rent, and shall be liable to all the penalties prescribed therein for the abuse of such powers.
>
> *Explanation.* — A landholder or sub-landholder shall, in recovering the amount due to him, under proviso 1 to S. 88 from the intermediate landholder referred to therein, be entitled to exercise the powers and be subject to the penalties specified in this section, as if the intermediate landholder were a ryot with whom a patta and muchelika had been exchanged and the provisions of the Madras Estates Land Act, 1908, shall, so far as may be, be applicable thereto.

By reason of this section the appellant is given the right, if he so chooses, to use the same machinery as a landholder is allowed to use for recovering arrears of rent from a ryot. The Madras Estates Land Act gives the landholder three remedies, namely : (1) He may sue in the revenue Court for the recovery of what is due to him; (2) without recourse to a suit in the revenue Court he may distrain for rent, or (3) he may sell the holding through the Collector without recourse to a suit. Section 77 expressly provides that a landholder shall be entitled to recover any arrear of rent by a suit before the Collector, by distraint and sale of moveable property belonging to the tenant or by the sale of the ryot's holding. If he institutes a suit in the revenue Court he cannot recover arrears of rent for more than three years. This is the effect of Art. 3 of Part A of the Schedule. If he distrains he is limited to the rent which has accrued due within the 12 months preceding the demand under S. 78. This provision is contained in S. 77D. If a landholder wishes to sell the holding without recourse to a suit he is again limited to one year's rent. See Ss. 111 and 112.

Mr. Somasundaram on behalf of the appellant has frankly conceded that a landholder who wishes to recover from an under-

1. ('37) 24 A I R 1937 Mad 217 : 167 I C 490 : I L R (1937) Mad 498 : (1937) 1 M L J 91 (F B), Rajah of Vizianagaram v. Thammanna.

tenure holder cess paid by him under the Madras Local Boards Act cannot by using the machinery provided by the Madras Estates Land Act, distrain for more than one year's cess or sell in the summary manner provided by S. 111 and the connected sections for more than one year's arrears. In these circumstances, it is very difficult to understand why he should be allowed to sue in the revenue Court for a greater period than that allowed by the Madras Estates Land Act. A suit in the revenue Court is of a summary nature and therefore is subject to less delay than that entailed in a suit in a civil Court. The landholder who wishes to recover cess does not need to sue in the revenue Court, but if he does so he is restricted to what the Court can give him. Mr. Somasundaram has argued that the Madras Estates Land Act does not expressly cut down his rights under the Madras Local Boards Act. That is true, but if he appeals to the Madras Estates Land Act to help him to recover what is due to him he can get nothing more than that Act contemplates. As already indicated there cannot be any difference in principle when distraint is levied or property is sold summarily and when a suit is brought under S. 77, Madras Estates Land Act. For these reasons, we consider that the learned Judge was right and that the appeal should be dismissed with costs in favour of respondent 2 who alone is represented by counsel.

C.R.K./K.S. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 616

LEACH C. J. AND HAPPELL J.

Corakarai Seetharama Chettiar — *Appellant*

v.

Sheikh Abdul Rahiman Sahib — *Respondent.*

Letters Patent Appeal No. 22 of 1940, Decided on 27th February 1941, against judgment of King J., *Reported in ('41) 28 A I R 1941 Mad 40.*

Limitation Act (1908), Art. 182 (2) — Word "appeal" in Art. 182 (2) means appeal which affects decree sought to be executed—Application by judgment-debtor for recording satisfaction of decree dismissed—Appeal therefrom also dismissed—Appeal does not fall under Art. 182 (2) and hence time does not run from its dismissal.

The word 'appeal' in Art. 182 (2) means an appeal which affects the decree sought to be executed. The application by the judgment-debtor for recording satisfaction of the decree was dismissed. An appeal therefrom was also dismissed. The decree-holder contended that time began to run from the date on which the appeal was dismissed : *Held* that the appeal did not fall within the purview of Art. 182 (2) because the granting of the judgment-debtors' application for entering up satisfaction would not have cancelled the decree. The decree would stand even then and govern the rights of the parties. The only effect of the payment of the decretal amount would be that the decree could no longer be available to support an application for execution: ('39) 26 AIR 1939 Mad 157 and ('32) 19 A I R 1932 P C 165, *Expl.* [P 616 C 2; P 617 C 2]

K. Rajah Ayyar — for Appellant.

P. S. Narayanaswamy Iyer — for Respondent.

Leach C. J.—The Letters Patent Appeal involves the question of the effect of the judgment of this Court in I L R (1939) Mad 252.[1] In that case a Division Bench consisting of King and Krishnaswami Ayyangar JJ. held that the word "appeal" in Col. 3 of Art. 182, Limitation Act, means "an appeal in the suit which is likely to affect the decree sought to be executed," and not merely an appeal against the actual decree or order sought to be executed. In other words, the word "appeal" does not necessarily mean an appeal from the decree or order referred to in Col. 1 of the Article. In the present case the facts are very different from the facts in I L R (1939) Mad 252[1] and King J., whose judgment is now under appeal, has held that the decision in I L R (1939) Mad 252[1] does not govern the present case. In I L R (1939) Mad 252[1] there was an appeal against an order refusing to set aside an ex parte decree and the Court held that the period of three years prescribed by Art. 182 ran from 20th October 1932, the date of the appellate decree of the High Court, and not from 5th March 1930, the date of the ex parte decree. In the case now before the Court, a preliminary mortgage decree was passed on 3rd April 1928 in favour of the appellant and the final decree followed on 9th November 1929. On 24th November 1931, the judgment-debtors applied for an order directing the entering up of satisfaction of the decree. The appellant denied that the decree had been satisfied and on 28th November 1931 he applied for the sale of the mortgage property, but his application was dismissed on 2nd April 1932. On 30th June 1932, the Court also dismissed the application by the judgment-debtors for an order directing satisfaction to be entered up. The judgment-debtors appealed against the order dismissing their application but were again unsuccessful.

The decree of the appellate Court was passed on 20th March 1933. On 21st August

1. ('39) 26 A I R 1939 Mad 157: 181 I C 491: ILR (1939) Mad 252 : (1938) 2 M L J 1048, Sriramchandra v. Venkateswara.

1935 the appellant again applied for the sale of the mortgage property in pursuance of the final decree obtained by him on 9th November 1929. This application was opposed on the ground that the decree had become barred by limitation inasmuch as more than three years had elapsed from the dismissal of the appellant's previous application. The appellant's case was that the period of limitation commenced to run against him only from 20th March 1933 when the appeal filed by the judgment-debtors against the order on their application was decided. The District Munsif of Salem, in whose Court the mortgage decree was passed, decided against the appellant and his judgment was upheld by the District Judge of Salem on appeal. King J. on second appeal agreed that the Courts below were right. The argument advanced on behalf of the appellant is that the application filed by the judgment-debtors for an order directing the entering up of satisfaction was an application which was likely to affect the decree, because if it were granted it would mean that there will be no decree to execute. Therefore the appellant was entitled to wait until the application had been finally decided before taking any further steps to bring the mortgage property to sale.

In addition to referring to the judgment in I L R (1939) Mad 252,[1] the learned advocate for the appellant has laid great stress on a passage in the judgment of the Privy Council in 60 Cal 1[2] where it is said that so long as there is any question sub judice between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage. As King J. has remarked in the judgment under appeal the appellant's argument is very plausible, but the learned Judge was not prepared to extend the judgment in ILR (1939) Mad 252,[1] which he himself delivered, to the present case and refused to regard the dictum of the Privy Council in 60 Cal 1[2] as having application here. We consider that he was right. While the word "affect" is very wide in its scope, in using it in I L R (1939) Mad 252[1] the learned Judges were not intending to give it the wide application which the appellant would have. In the present case King J. has clearly indicated this. In I L R (1939) Mad 252,[1] if the appeal against the order refusing to set aside the ex parte decree had been successful, the ex parte decree would have been cancelled. In the present case the granting of the judgment-debtors' application for an order directing the entering up of satisfaction would not have cancelled the decree. The decree would still stand and govern the rights of the parties. The only effect of the payment of the decretal amount would be that the decree could no longer be available to support an application for execution. That is the distinction between I L R (1939) Mad 252[1] and the present case. In 60 Cal 1[2] the Privy Council were concerned with the question whether any application by a party to an appellate Court to set aside or revise a decree or order of a Subordinate Court was an appeal within the meaning of Art. 182 (2) and they held that it was. There, if the application had been successful the decree would have been set aside or revised. We agree with King J. that the judgment in I L R (1939) Mad 252[1] cannot be given the meaning which the appellant would have. For these reasons the appeal will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

2. ('32) 19 A I R 1932 P C 165 : 137 I C 529 : 60 Cal 1 : 59 I A 283 (P C), Nagendranath De v. Sureschandra De.

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(28) A. I. R. 1941 Madras 617

LAKSHMANA RAO J.

Public Prosecutor, Madras — Appellant

v.

Panchakarla Sooramma — Respondent.

Criminal Appeal No. 457 of 1940, Decided on 25th October 1940, against the acquittal of respondent by Stationary Sub-Magistrate, Cocanada, D/- 16th February 1940.

Madras Prevention of Adulteration Act (3 of 1918), S. 20, Rules under, Rr. 27 and 29—Addition of water to milk is sufficient for conviction under Rr. 27 and 29 — Purity of milk is immaterial.

The addition of water to milk is sufficient for conviction under Rr. 27 and 29, the purity of milk being immaterial. Consequently, where the accused is convicted under Rr. 27 and 29 for adding water to milk his acquittal on the ground that the milk was not otherwise adulterated is unsustainable.

[P 618 C 1]

Appellant in person.

Judgment. — This is an appeal by the Provincial Government against the acquittal of respondent of an offence under Rr. 27 and 29 framed under S. 20, Madras Prevention of Adulteration Act. The respondent, a golla woman, was selling milk near the railway station and the Sanitary Inspector purchased half a seer of milk for sample. The milk was found to contain 14 per cent. of water and R. 27 of the rules framed under

S. 20, Madras Prevention of Adulteration Act, provides that no person shall add any water to milk intended for sale or offer for sale milk to which any such addition has been made. Rule 29 makes a breach of that rule punishable with fine and the purity of the milk is immaterial. The respondent would therefore be guilty under Rr. 27 and 29 and her acquittal on the ground that the milk was not otherwise adulterated is unsustainable. The appeal is therefore allowed and the order of the acquittal is set aside. The respondent is convicted under Rr. 27 and 29 framed under S. 20, Madras Prevention of Adulteration Act, and sentenced to pay a fine of Rs. 10 with simple imprisonment for one week in default.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 618

HORWILL J.

Tetali Surayya — Appellant

v.

Karri Peda Balakrishnayya and another — Respondents.

Second Appeal No. 75 of 1938, Decided on 11th December 1940, against decree of Sub-Judge, Rajahmundry, D/- 16th August 1937.

(a) Hindu law—Marriage—Stridhan — Sulka is permitted even in Brahma form.

Sulka is permitted and recognised even in Brahma form of marriage and is not confined only to the Asura form. [P 618 C 2]

(b) Hindu law — Texts — Smriti Chandrika's authority is confined to questions where Mitakshara is silent — Other authorities unanimous and against Mitakshara — Other authorities may be preferred.

The authority of the Smriti Chandrika must be confined to questions where the Mitakshara is silent and the reasoning of the Smriti Chandrika is consistent with the rules in the Mitakshara : ('15) 2 AIR 1915 P C 70, *Foll.* [P 619 C 1]

Where the other authorities are unanimous and against the Mitakshara, they may be preferred : 34 All 234 (P C), *Rel. on.* [P 619 C 1]

(c) Hindu law—Marriage—Stridhan — Sulka —Present to girl or her father for primary purpose of purchasing bride or securing marriage is sulka — Simple gift to prospective wife not tainted with idea of purchase is not sulka.

The definition of sulka in the Smriti Chandrika should be read with the definition given in the Mitakshara and the classifications given in the Smriti Chandrika must be regarded as sulka only if there is attached to the gift some idea of a bride price. If the present is given to the girl or to the father of the girl for the primary purpose of purchasing a bride or securing the marriage, then it would come within the definition of sulka; but these same classes of gifts, if not tainted with the idea of purchase, being simple gifts to a prospective bride, would not fall within the definition of sulka and will be governed by the stridhan rules of succession. [P 619 C 1]

Ch. Raghava Rao — for Appellant.

C. Rama Rao — for Respondents.

Judgment. — Just before the marriage of Bulli Venkamma her father was given Rs. 800 by her prospective husband's father for the purchase of jewels and saree samans. Now that she is dead there are two sets of claimants for the property that was purchased with this Rs. 800. They are her husband, defendant 1, who claims as the heir of his son, defendant 2, who died pending suit and who in his turn claimed as the stridhana heir of his mother. The other claimants are the plaintiffs, who are the brothers of Bulli Venkamma, who say that this property was sulka, in which case the brothers are the persons first in the list of those entitled to succeed to that particular kind of stridhana property. Both the Courts below found that the property was not sulka and that consequently it descended to her son in the way that stridhana property ordinarily does. Mr. Raghava Rao relies on the definition of sulka in the Smriti Chandrika, in which it is defined as wealth received as the price of household utensils, of beasts of burden, of milch cattle, or ornaments. In the Mitakshara, on the other hand, sulka is defined as a gratuity for which a girl is given in marriage, regarding which Trevelyan says in his third edition of his "Hindu Law" at p. 475 :

> According to the more usual view, this was the gratuity for the receipt of which a girl is given in marriage. It was originally paid to the father as the price of the bride, but when that was forbidden the father received it for the bride, and it became her property, as her dowry.

Much the same is said of sulka in Ghose's Hindu Law, Vol. I, at p. 331. Mr. Rama Rao, relying on the origin of this particular kind of property, contends that sulka is not a form of gift which pertains to the Brahma form of marriage and is given only in the Asura form. I do not however find any authority for this in the text books or in the original texts that have been cited to me. On the contrary, sulka is discussed in the text books with other forms of stridhana property, and this distinction is not drawn. It would seem that when, instead of the father's receiving property for himself, he took it and gave it to the bride, it came to be regarded as unobjectionable by the ancient authorities and was therefore permitted even in connection with the Brahma form of marriage. Mr. Raghava Rao empha-

sises the importance of the Smriti Chandrika in South India and argues that all kinds of property mentioned in the definition of sulka in the Smriti Chandrika must be considered as sulka when it is given before marriage into the hands of the father. As to the relative value of the authority of the Mitakshara and the Smriti Chandrika, Mayne in his "Hindu Law and Usage," p. 50, Edn. 10 discusses a decision of the Judicial Committee in 37 ALL 604[1]:

> The Judicial Committee, after pointing out that the Smriti Chandrika admittedly differs from the author of the Mitakshara in several essential rules of law, said it seems, to say the least, doubtful whether an enunciation in the Smriti Chandrika can be safely applied except perhaps by way of analogy to explain a dubious or indeterminate phrase or term in the Mitakshara. In other cases, where its authority on specific questions in respect of inheritance to stridhana was tested, its views were not followed. Again, while the Mitakshara gives the preference to the mother on the ground of propinquity, the Smriti Chandrika gives the preference to the father. The authority of the Smriti Chandrika must therefore be confined to questions where the Mitakshara is silent and the reasoning of the Smriti Chandrika is consistent with the rules in the Mitakshara. There can therefore be little doubt that its general authority is fairly high on points on which it does not come into conflict with the Mitakshara.

This quotation from Mayne seems to be in accordance with judicial decisions. It may be true that where the other authorities are unanimous and against the Mitakshara, they may be preferred, as apparently they were in 34 ALL 234.[2] I do not think that it is necessary from a reading of the two definitions quoted above to posit a contradiction. It seems clear that even though we take the definition of sulka given in the Smriti Chandrika, we must sill read it with the definition given in the Mitakshara and must regard as sulka the classifications given in the Smriti Chandrika only if there is attached to the gift some idea of a bride price. If the present is given to the girl or to the father of the girl for the primary purpose of purchasing a bride or securing the marriage, then it would come within the definition of sulka; but these same classes of gifts, if not tainted with the idea of purchase, being simple gifts to a prospective bride, would not fall within the definition of sulka. The parties are kapus a very orthodox sub-caste of sudras; and it is not contended that the practice in this particular case differed from the customary practice of the community. Nor is it said that there is any essential difference between the practice in this community and that prevailing among the twice born castes. In fact, Mr. Raghava Rao goes so far as to say that all forms of dowry which are the subject of barter and which are actually given before the marriage ceremony takes place would come under the classification of sulka. It is common knowledge that such presents are not ordinarily treated as such, but pass to the children after the mother's death in the same way as other forms of stridhana. Evidence has been let in in the present case, including the evidence of two documents, Exs. 2 and 3, of which the plaintiffs were writers or attestors, of two separate instances in which property of this nature has passed to the children and not to the heirs according to the succession for sulka. This is evidence that the parties do not regard such gifts as sulka. As to the presumption arising in such cases, I feel myself in accord with the learned author of Mayne's "Hindu Law" who at p. 755 when writing of sulka says :

> The sulka in the older sense of bride price, ultimately received by the bride herself, is obsolete; where it is now paid to the parents or the brother in the Asura marriage, it does not raise any question of succession to her stridhana. When it is paid to the bride herself, either as the price of ornaments or household furnishings or as a complementary present, it would be her ordinary stridhana; for there is no reason why any dowry given to the wife by the husband in modern times should be treated as attracting a special order of succession which was applied to some obscure form of the ancient bride price, which the father may be supposed, after receiving, to have handed back to his daughter.

Both the Courts below were satisfied from the evidence that the suit gift was not considered by the parties to be in any sense a payment for the bride without which the marriage could not take place. Mr. Raghava Rao contends that the lower Courts did not try to read the definition given in the Smriti Chandrika with the definition given in the Mitakshara so as to reconcile them, and then to regard the evidence in the light of this combined definition. I think however that the lower Courts had very clearly before them the essential nature of sulka and judged the evidence accordingly. The appeal therefore fails and is dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

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1. ('15) 2 AIR 1915 P C 70 : 30 I C 529 : 37 All 604 : 42 I A 208 (P C), Buddah Singh v. Laltu Singh.
2. ('12) 34 All 234 : 14 I C 1000 : 39 I A 121 : 9 A L J 263 (P C), Debi Mangal Prosad Singh v. Mahadeo Prasad Singh.

(28) A. I. R. 1941 Madras 620

LEACH C. J. AND HORWILL J.

Haji Abdul Kuthus Sahib

v.

Inayathulla Sahib.

Letters Patent Appeal No. 16 of 1937, Decided on 8th November 1940, from judgment of Venkataramana Rao J., *Reported in ('37) 24 A I R 1937 Mad 727.*

Provincial Insolvency Act (1920), S. 44 (2), (3) — On discharge debt becomes unenforceable — Discharge of insolvent — Creditor previously attaching debtor's wife's house—Wife not under personal liability to pay nor coming within Sec. 44 (3)—Creditor cannot sell house: *1937 M.W N 279= ('37) 24 A I R 1937 Mad 727=170 I C 851, REVERSED.*

Under S. 44 (2), on discharge, the debt which the insolvent owed to his creditors becomes unenforceable. Hence creditors of an insolvent who has been released from all liability to his creditors' debts, are not entitled to enforce payment by the sale of a previously attached house belonging to the insolvent's wife when she herself is under no personal liability to pay the debt and she does not come within any of the categories mentioned in sub-s. (3) of S. 44 of the Act: (1872) 7 Q B 527, *Ref.*; ('36) 23 A I R 1936 Mad 100, *Disting.*; 1937 M W N 279, ('37) 24 A I R 1937 Mad 727, 170 I C 851, *REVERSED.* [P 620 C 2; P 621 C 1]

N. Srinivasa Ayyangar and R. Ramamurthy — for Appellant.

N. Sivaramakrishna Ayyar — for Respondent.

Leach C. J. — This appeal raises the question of the effect of S. 44, Provincial Insolvency Act. Appellant 1 was adjudicated an insolvent by the District Munsif of Trivellore on 26th March 1927 on a petition which had been presented on 2nd October 1926. The appellant apparently had no assets and as so often happens his creditors took no interest in the proceedings after the adjudication order had been obtained. The result was that when he applied for his discharge his application was not opposed and it was granted on 8th February 1928. Appellant 1 was indebted to the estate of one Habibulla Sahib, who is now represented by the respondents in this appeal. Habibulla Sahib had obtained a decree against appellant 1 and on 21st February 1923 he attached a house as property belonging to appellant 1. As a matter of fact, this property was the property of the appellant's wife, Maimoona Bi Bi. It had belonged to appellant 1, but on 12th February 1923 he transferred it to his wife and it was held by this Court in other proceedings that the transfer was lawful. On 24th July 1927, Maimoona Bi Bi applied for the removal of the attachment on the ground that the property was hers, but her application was dismissed by the District Munsif of Vellore, who relegated her to a regular suit. She filed a suit, but on the date of the hearing she did not appear and it was dismissed with costs. Therefore, so far as the respondents' execution proceedings were concerned, the house was liable to be seized and sold for appellant 1's debt, and it undoubtedly remained liable until 8th February 1928, when appellant 1 obtained his discharge. The question which the Court is called upon to consider in this appeal is whether the house remained to be seized and sold after that date. The District Munsif held that the respondents were entitled to have the house sold and his decision was concurred in by the District Judge of North Arcot on appeal. The appellant then appealed to this Court and Venkataramana Rao J., who heard it, decided that the Courts below had correctly interpreted the law, but he gave a certificate permitting the filing of the appeal under cl. 15 of the Letters Patent. Section 44, Provincial Insolvency Act, reads as follows :

(1) An order of discharge shall not release the insolvent from (a) any debt due to the Crown; (b) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party; (c) any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party; (d) any liability under an order for maintenance made under S. 488, Criminal Procedure Code, 1898.

(2) Save as otherwise provided by sub-s. (1), an order of discharge shall release the insolvent from all debts provable under this Act.

(3) An order of discharge shall not release any person who, at the date of the presentation of the petition, was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him.

Therefore unless a debt is of the nature of any of those set out in sub-s. (1) an order of discharge absolves the insolvent from liability to pay all his debts which were provable under the Act, but an order of discharge does not by virtue of sub-s. (3) release third parties who are also liable. The section displays no ambiguity and by reason of it the debt which appellant 1 owed to the respondents became unenforceable by them. On 8th February 1928, the Court ordered the appellant's discharge and as was pointed out in (1872) 7 Q B 527,[1] if the debt is gone the creditor's right to seize in respect of it is also gone. In upholding the decision of the District Judge, Venkataramana Rao J. considered that because Maimoona Bi Bi had allowed her suit to be dismissed for default, her property was

1. (1872) 7 Q B 527 : 41 L J Q B 221:26 L T 693, Thomson v. Cohen.

liable to be sold in execution for appellant 1's debts notwithstanding the order of discharge. The learned Judge relied on the decision of Cornish J. in 69 M L J 799.[2] In that case the appellant had attached before judgment property belonging to the respondent. The respondent nevertheless sold the property to a third person. Subsequently, the respondent was adjudicated an insolvent and the appellant proved his debt. As in the present case there were no assets, and in due course the respondent obtained his discharge. The appellant then sought to execute his decree against the property which he had attached. It was held that the effect of the sale to the third party, contrary to the provisions of S. 64, Civil P. C., was not to make the transfer absolutely void, and the property could be regarded as an asset of the debtor notwithstanding the transfer. The alienee had taken the property subject to the right of the appellant to sell it in execution. It is not necessary for us to consider whether that case was rightly decided, because the facts are not similar to the facts in the present case. It is not a matter of a transfer of property after attachment. The transfer to Maimoona Bi Bi took place before the decree and long before the insolvency. It was obviously because the property had been transferred to Moimoona Bi Bi that the Official Receiver in this case made no attempt to take possession.

The position then is this. The appellant, by reason of the statute had been released from all liability to pay the respondents' debt, but the respondents wish to enforce payment by the sale of the house belonging to Maimoona Bi Bi. In our opinion, they are not entitled to do so, because Maimoona Bi Bi herself was under no personal liability to pay the debt and she did not come within any of the categories mentioned in sub-s. (3) of S. 44, Provincial Insolvency Act. It is true that by her conduct she could not have prevented the property from being sold had a sale been held before the discharge, but inasmuch as the debt became unenforceable by reason of the discharge it follows that the right to proceed against Maimoona Bi Bi's house disappeared at the same time. If the debt were an existing and enforceable debt, then the respondents could proceed with the attachment and bring the property to sale, but inasmuch as the debt has gone the respondents are not in a position to take proceedings in execution. Section 44 prevents them. The result is that the appeal will be allowed with costs in this Court and before Venkataramana Rao J., but each party will pay their own costs in the Court of the District Munsif and in the District Court.

C.R.K./N.K. *Appeal allowed.*

2. ('36) 23 AIR 1936 Mad 100 : 159 I C 1027 : 69 M L J 799, Duraiswamy v. Arumuga Naicker.

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(28) A. I. R. 1941 Madras 621

LEACH C. J. AND SOMAYYA J.

In re Syed Gaffar Sahib — Petitioner.

Criminal Revn. No. 273 and Petn. No. 259 of 1941, Decided on 24th March 1941, to revise judgment of Joint Magistrate, Tirupattur, D/- 16th December 1940.

Madras Prohibition Act (10 of 1937), S. 4 (1) (a)—S. 4 (1) (a) is not ultra vires of Provincial Legislature.

The Act in prohibiting the possession of intoxicating liquors under S. 4 (1) (a) is not ultra vires of the Provincial Legislature. [P 621 C 2]

T. S. Venkataraman and G. Venkatarama Sastri — for Petitioner.

Leach C. J. — The petitioner has been convicted under S. 4 (1) (a), Madras Prohibition Act, of being in unlawful possession of a quantity of arrack and sentenced to pay a fine of Rs. 100 and in default to undergo rigorous imprisonment for three months. The Court is asked to quash the conviction and sentence in the exercise of its powers of revision on the ground that in prohibiting the possession of intoxicating liquor the Madras Prohibition Act is ultra vires the Provincial Legislature, but this contention obviously cannot be accepted so far as this case is concerned. Clause 31 of the Provincial Legislative List in Sch. 7 to the Government of India Act, 1935, gives the Provincial Legislature full power to legislate with regard to the production, manufacture, possession, transport and sale of intoxicating liquors. Section 4 (1) (a), Prohibition Act, prohibits inter alia the possession of intoxicating liquors. It is said that the Act is ultra vires the Provincial Legislature, because cl. 19 of the Federal Legislative List places in the Central Legislature the power to legislate with regard to "import and export across frontiers as defined by the Federal Government." In this case there is no question of any import or export. The case is merely concerned with the possession of arrack manufactured in the Madras presidency. The Provincial Legislature having power to prohibit the possession of arrack and the petitioner having been found in possession of such liquor the conviction was a lawful one. The petition will be dismissed, and as we do not consider

that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, we do not feel called upon to give a certificate under S. 205. It may be added that no certificate has been asked for.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 622

VENKATARAMANA RAO J.

In the matter of Travancore National & Quilon Bank Ltd., (in Liquidation)
G. Samuel — Applicant
v.
Cyril Gill and John Stanley Goodwin — Official Liquidators —
Respondents.

Application No. 2204 of 1939 (in O. P. No. 158 of 1938), Decided on 3rd May 1940.

Set-off — Bank lending Rs. 2000 to *G* — *S* having Rs. 4300 in fixed deposit with bank giving same as security and allowing bank to set it off against loan advanced by it to *G* any time—Bank going into liquidation—*G* claiming to have loan due by him set-off against amount due by bank to *S* — No set-off held could be allowed — Equity of case held demanded that bank should adjust dividend payable under deposit towards amount due and recover balance alone — S. 229, Companies Act, held did not apply.

The bank lent a sum of Rs. 2000 to *G*. On the date of the loan, *S* who had a sum of Rs. 4300 in fixed deposit with the bank covered by a fixed deposit receipt bearing the same date gave that amount as security the terms whereof were evidenced by a letter written by *S* to the bank which ran as follows : "I beg to hand you herewith fixed deposit amount receipt for Rs. 4300 as security for the pronote loan of Rs. 2000 you have granted to Mr. *G*. I hereby authorise you to set off at any time the whole or any portion of the said deposit and interest accrued thereon towards the said loan whenever you deem it necessary." The fixed deposit was for a period of two years and on the date when the bank went into liquidation it had not matured. *G* did not pay anything towards the promissory note, but claimed to have the amount due by the bank to *S* set off against the amount due by him :

Held that no set off could be allowed since by reason of the liquidation of the bank *S* could not claim the full amount from the bank and there could be no cause of action against the bank for any diminution in the value of security. Much less could *G* claim the full value of the security. It was open to the bank to give up the security if it chose : ('39) 26 A I R 1939 Mad 915, *Rel. on* ; (1925) A C 489 and ('35) 22 A I R 1935 Rang 201, *Disting.*; ('40) 27 A I R 1940 Mad 266, *Expl.* [P 624 C 2; P 625 C 1]

But the equity of the case demanded that the bank should adjust the dividend payable under the deposit towards the amount due and recover only the balance : [P 625 C 1]

Held further that S. 229, Companies Act, did not apply and no set-off could be claimed thereunder. [P 622 C 2; P 623 C 1]

S. Parthasarathy and V. K. Thiruvenkatachrai — for Petitioners.

K. R. Vepa — for Creditor.

G. Ramakrishna Ayyar and C. M. J. Ernest — for Applicant.

C. Krishnaswami Iyer — for Respondents.

Order. — This application raises a question of set off. The Travancore National and Quilon Bank hereinafter called the bank, lent a sum of Rs. 2000 to the applicant herein, Mr. G. Samuel, on a promissory note dated 7th October 1936. The bank was not willing to lend this sum to him without security. His mother-in-law Mrs. G. P. Sathanansham Srinivasan offered to give the necessary security. On the date of the loan, she had a sum of Rs. 4300 in fixed deposit covered by the fixed deposit receipt bearing the same date. She gave that amount as security. In her affidavit Mrs. Srinivasan states that she gave the said security on the definite understanding that the bank should adjust the amount due by Mr. Samuel from and out of the money due to her under the said deposit at the time of maturity. The terms on which she gave the said security were reduced to writing and are evidenced by a letter written by Mrs. Srinivasan to the bank and it runs thus :

I beg to hand you herewith fixed deposit amount receipt, No. 116 for Rs. 4300 dated 7th October 1936 as security for the pronote loan of Rs. 2000 you have granted to Mr. G. Samuel. I hereby authorise you to set off at any time the whole or any portion of the said deposit and interest accrued thereon towards the said loan whenever you deem it necessary.

It appears from the affidavit of the Official Liquidators that along with the said letter a duly receipted fixed deposit receipt in blank was also lodged with the bank. The fixed deposit was for a period of two years and on the date when the bank went into liquidation it had not matured. Mr. Samuel has not paid anything towards the promissory note, but he claims that he is entitled to have the amount due by the bank to Mrs. Srinivasan set off against the amount due by him. Mrs. Srinivasan has also filed an affidavit stating that she is willing to have the amount set off. The question is not whether she is willing, but whether a set off can be allowed in law. Mrs. Srinivasan has not personally undertaken to repay the debt except giving security as aforesaid. There are no mutual dealings in this case, which would entitle the applicant to claim a set off under S. 229, Companies Act, under

which in the winding up of an insolvent company the same rules should prevail and be observed as are in force for the time being under the law of insolvency with respect to the estate of persons adjudged insolvent.

Mr. G. Ramakrishna Iyer who appears for the applicant has not been able to put before me any authority in support of the contention that he can claim a set-off under the said section. His contention however is that Mrs. Srinivasan was a surety for Samuel though her liability is limited to the extent of her security and a surety can claim to have the debt due to her by the bank set off against the debt due by the principal. In support of this contention he relied on a ruling of my learned brother Gentle J. in Applications Nos. 8415 and 849 of 1939.[1] In that case both the principal and the surety were severally liable to pay the debt due to the bankrupt creditor. Therefore, the learned Judge following the rule that if a surety being severally liable has money in the hands of the creditor who became a bankrupt, he was entitled before the trustee sues the principal to have the amount applied in satisfaction of the debt. To put it concretely, A owes a debt to B; B owes a debt to C; C also agrees to stand surety for A and becomes liable in respect of A's debt; C is entitled to have the amount due to him set off against the amount due from the debtor and in respect whereof he is liable. The reason is there is a demand by A against C, and there is a cross demand by C against A. In this case the bank cannot call upon Mrs. Srinivasan to pay the debt; all that they are entitled to is to realise the security and pay themselves off. I do not see how the said decision of my learned brother Gentle J. supports him.

Mr. Ramakrishna Iyer then contends, that an agreement to set off was entered into by the bank at the time of the contract and the said agreement is binding on the bank. He also raises another contention, namely the bank by reason of having gone into liquidation has impaired the security and is not in a position to return the security unimpaired on payment of the debt by Mr. Samuel and the bank is therefore not entitled to enforce the debt; in any event, it must give credit for the full value of the security. In opposition to this contention, the counsel for the Official Liquidators relies on the decision of my learned brother Gentle J. reported in (1939) 2 M L J 325,[2] (1884) 25 Ch D 716[3] and (1893) A C 181.[4] The case decided by Gentle J. appears to be a case in point. In that case the applicant was a subscriber for one ticket in a chit fund conducted by the Travancore National (Subsidiary) company and was a successful bidder for a sum of Rs. 940 at the auction held. Under the rules of the company he could only draw the amount of Rs. 940 on giving sufficient security for the due payment of the future instalments of the chit. Two of the brothers of the subscriber who were also subscribers to other chit funds conducted by the company offered to give the amount that might be due to them in respect of their tickets in the said chit funds as security for the amount that might be due in respect of future instalments if defaults were committed by their brother. The learned Judge held that no set off could be allowed. He distinguished two cases on which reliance was placed and held they were not applicable to the facts of that case. One was a case reported in (1925) A C 489[5] and the other, a decision of Leach J., (now my Lord the Chief Justice) in A I R 1935 Rang 201.[6] As Mr. Ramakrishna Ayyar laid considerable emphasis on these two cases, I shall proceed to deal with them.

In (1925) A C 489,[5] as pointed out by Viscount Cave, no question of a cross claim or set off really arose. The question that actually arose there was whether the defendant, who was indebted to the bankrupt firm and deposited certain rubber shares with them as security, was not entitled to a return of the said shares in specie on making a payment. It arose in this way. Before the firm became bankrupt, the firm sold the said shares without the knowledge or authority of the defendant who was not aware of such a sale till the bankruptcy. The trustee in bankruptcy claimed the balance of the debt due from the defendant after giving credit to the value of the shares. Lawrence J. before whom the matter came up was of the opinion that the bankrupt firm was guilty of wrongful conversion and that "the prin-

1. *Reported in* ('40) 27 A I R 1940 Mad 266, Sundaravaradan v. Narasimhachari.

2. ('39) 26 AIR 1939 Mad 915 : 186 I C 297 : (1939) 2 M L J 325, Sundaravaradan v. Mani Iyer.

3. (1884) 25 Ch D 716 : 53 L J Ch 618 : 50 L T 651 : 32 W R 396, Ex parte Caldicott; In re Hart.

4. (1893) 1893 A C 181 : 62 L J P C 61 : 68 L T 540, Commercial Bank of Australia v. Official Assignee of John Wilson & Co.

5. (1925) 1925 A C 489 : 94 L J Ch 221 : (1925) B & C R 54 : 133 L T 60 : 69 S J 395 : 41 T L R 336, Ellis & Co.'s trustees v. Dixon Johnson.

6. ('35) 22 A I R 1935 Rang 201 : 156 I C 1044, Official Assignee v. M. C. Harikrishna.

ciple that a mortgagee will not be permitted to sue his mortgagor for the mortgage debt, if he has parted with the mortgaged property otherwise than in exercise of a power of sale" would apply to the case. But the principle is not inflexible and some modification was required in the circumstances of that case. He was of the opinion that justice could be done in that case by ascertaining the market value of the share on the date of the receiving order and by setting off the amount so ascertained against the amount found due from the defendant and the balance directed to be paid by the defendant. When the matter went up before the House of Lords, Viscount Cave, L. C. was of the opinion that bankruptcy could not modify the application of the rule that if a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security, and if, having improperly made away with the security, he is unable to return it to his debtor, he cannot have judgment for the debt. However, he was not prepared to disturb the order made by Lawrence J., but he was emphatically of the opinion that there was no mutual credit within the meaning of S. 31, Bankruptcy Act, and he gave his reason thus:

> The right of the defendant was not to a money payment present or future, but to a return of his shares in specie as and when he paid off his debt.

It is thus clear that there is no question of a set off in that case. Mr. Ramakrishna Iyer contends that the principle of that case ought to be applied to the present case on the ground that the bank was unable to return the security by reason of the liquidation and in support of his contention he relied on the ruling of the Rangoon High Court reported in A I R 1935 Rang 201.[6] The rule as stated by Viscount Cave L. C. is applicable to a case where a mortgagee or a pledgee has improperly made away with the security. There is no question here of the bank improperly making away with the security or its inability to return it. The moment the debt is paid, it will release its security. The contention is, not that the security cannot be had but the value of the security has been diminished by the conduct of the bank. It seems to me that the rule of Viscount Cave L. C. will not be applicable to cases of liquidation or insolvency. The security in this case takes the form of a debt due by the bank. If that debt was owing to the debtor it will be a case of cross-demand and a case for a set off. But the security in this case was given by a third party and by reason of the liquidation the owner of the security cannot have any cause of action against the bank for any wrongful conversion. Under the law he cannot say that the value of his debt is impaired; he is only entitled to receive the dividend and cannot claim the full amount. While therefore the owner of the security cannot claim the full amount and there can be no cause of action against the bank for any diminution in the value of the security, it is not possible to understand how the applicant can claim the full value of the security. No doubt the view of Mr. Ramakrishna Iyer derives some support in the ruling of the Rangoon High Court, but that case is distinguishable. In that case there was a joint debt by a firm of partners. As security for the payment of the debt one of the partners gave his fixed deposit amount with a stipulation that that amount should be adjusted against the debt. On the facts the learned Judge found there was an agreement between all the parties that there should be a set off of this amount against the debt due by the firm. The learned Judge was very clear in stating that there was no question of mutual dealings within the meaning of the Bankruptcy Act. Apart from agreement it may perhaps be possible to justify the conclusion of the learned Judge on the ground that having regard to the fact that one of the partners was severally liable for the debt, a set-off is permissible. No doubt the learned Judge rested his decision on (1925) A C 489.[5] With due respect I am unable to agree in the reasoning of the learned Judge in regard to this.

Mr. Ramakrishna Aiyer next contends that on the facts it must be found in this case that there was an agreement to set off the amount of fixed deposit against the debt due by the applicant. From the terms of the letter given by Mrs. Srinivasan the bank is authorized to set off the whole or any portion of the said deposit and interest accrued thereon. Of course it confers a right on the bank to set off, if the bank so chose to do. From the terms of the letter it appears to me that the fixed deposit amount is given as security with the intention that the amount when realized may be appropriated by the bank towards the debt if they so chose to do. It is one thing to say that the bank has a right to set off but another thing to say that the applicant has got a right to set off and there was an agreement to set off. It is open to the bank to

give up the security if they like. I am therefore of the opinion that no set off can be allowed in this case but the equity of the case demands that the bank should adjust the dividend payable under the deposit towards the amount due and recover only the balance. In the circumstances, I do not direct the applicant to pay the costs of the Official Liquidators. I award Rs. 35 as and for costs of the Official Liquidators plus Rs. 35 for their counsel, Rs. 35 for Mr. Parthasarathy, counsel for the petitioning creditor and Rs. 35 for Mr. Vepa, the costs to come out of the assets of the bank.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 625

HORWILL J.

Parambath Kanaran and others — *Petitioners.*

v.

C. R. Vasudevan — *Respondent.*

Criminal Revn. No. 1084 and Petn. No. 1029 of 1940, Decided on 10th February 1941, to revise order of the Chief Presidency Magistrate, Egmore, Madras, D/- 1st November 1940.

(a) Criminal P. C. (1898), S. 552 — Application under S. 552 — Applicant alleging his legal marriage and taking away of girl by parents against her wishes—Magistrate held not justified in ordering production of girl without proof of marriage — Proceedings held should be quashed as dispute could be more satisfactorily decided by civil Court.

The applicant under S. 552 alleged in his petition that on the day following his legal marriage at Madras, the parents of the girl took her away against her wishes to her home and detained her there with the intention of getting her married to somebody else. The story of the parents was that they had come to Madras to answer an advertisement in which the applicant was seeking for a bride and finding that the applicant would not make a suitable husband they took the girl back again :

Held **that the Magistrate was not justified in ordering the production of the girl without being satisfied that the marriage had taken place.** [P 626 C 1]

Held further **that the proceedings should be quashed as the dispute could be decided more satisfactorily by a civil Court than by a summary order of a Magistrate.** [P 626 C 1]

(b) Penal Code (1860), S. 362—Abduction—Force or deceit must be established.

There can be no abduction unless force or deceit is used. [P 626 C 1]

K. K. Sreedharan — for Petitioners.

R. Karunakara Menon — for Respondent.

Crown Prosecutor — for the Crown.

Order.—The respondent put in an application in the Court of the Chief Presidency Magistrate purporting to be under S. 552, Criminal P. C., alleging that he was lawfully married to petitioner 3 here on 22nd September 1940, that the nuptials took place, and that on the following day, 23rd September 1940, the parents, petitioners 1 and 2 here, took away petitioner 3 against her wishes to her home and detained her there with the intention of getting her married to somebody else. The Magistrate issued a notice under S. 552, Criminal P. C., to produce the girl. On the date to which the case had been adjourned an advocate appeared on behalf of the petitioners and represented that it would be a great hardship to bring the girl all the way from Tellicherry in North Malabar to Madras to answer to a petition that could not in any case be granted because the girl was more than 16 years of age and no offence had been committed within the jurisdiction of the Magistrate. The Magistrate overruled that objection and ordered a non-bailable warrant to issue. Upon the representation of the advocate appearing for the petitioners here that it was illegal to have the girl arrested and that, in any case, it would be a very harsh method of procuring her attendance in Court, the order was cancelled after the advocate gave an undertaking that he would produce the girl on the adjourned date. In the meanwhile, he got a stay order from this Court. The question that arises is whether the order of the learned Chief Presidency Magistrate calls for any interference from this Court.

There can be no doubt that it would be very hard on the petitioners if without strong ground they were required to come from Tellicherry in North Malabar to Madras for the purpose of this petition unless the Magistrate was satisfied that their attendance was necessary. The petition was a very short one, and the only statements on which the learned Magistrate could act were that there was a legal marriage on 22nd September 1940 and that on 23rd September 1940 the girl was taken away. When he issued his second order he had heard the story of the other side, which was that they had come to Madras to answer an advertisement in which the respondent was seeking for a bride and that finding that the respondent would not make a suitable husband they took the girl back again. With these two stories in front of him, I think the learned Chief Presidency Magistrate should have required from the respondent some further evidence that a lawful marriage had taken

place: for unless he was satisfied that the marriage had taken place, the respondent clearly had no right to ask the Magistrate to have the girl brought back to Madras.

The learned Crown Prosecutor has pointed out that under S. 4 (Cl. 3), Madras Marumakathayam Act, notice of every marriage shall be given to some person appointed under the Act to register such marriages. If the learned Magistrate had been satisfied by a copy of such registration or otherwise that a marriage had really taken place, then the petitioners might have no cause for complaint in being required to come from Tellicherry in North Malabar to Madras to answer the charge; but they ought not to be required to do so unless the Magistrate had something more substantial before him than the respondent's petition as evidence that a marriage had taken place. Moreover, one would have expected that together with an application under S. 552, Criminal P. C., there would have been a complaint under the Indian Penal Code of the offence of abduction. The learned advocate for the petitioners has further pointed out that the offence, if any, that was committed in Madras was abduction, and there can be no abduction unless force or deceit is used. There is nothing in the petition which was sufficient to satisfy the learned Magistrate that force or deceit had been used in taking away the girl from Madras. Moreover, an order under S. 552, Criminal P. C., can only be passed if the girl is under sixteen years of age, which is not alleged in the petition.

It will follow from what has been said above that the order of the learned Chief Presidency Magistrate has to be set aside. One course that would be open to this Court would be to direct the Magistrate to enquire further into the matter and satisfy himself that an order under S. 552, Criminal P. C., should issue; but as the dispute between the respondent and the petitioners seems to be one that could be decided much more satisfactorily in a civil Court than by a summary order of a Magistrate, I do not think it in the interests of justice that the present proceedings should be continued. The petition is therefore allowed and the proceedings before the Chief Presidency Magistrate quashed. The respondent may pursue his remedy in a civil Court if so advised.

C.R.K./G.N. *Petition allowed.*

(28) A. I. R. 1941 Madras 626

KING J.

Vanguri Mahalakshmamma — *Petitioner*

v.

Vanguri Venkatanarayanamurthi and others — *Respondents.*

Civil Revn. Petn. No. 1120 of 1939, Decided on 28th January 1941, to revise order of Sub-Judge, Narasapur, D/- 27th June 1939.

(a) Court-fees Act (1870), S. 12 (2) — Court can reconsider order already passed under this sub-section.

There is noting in S. 12 (2) which states that a Court may not reconsider an order which it has already passed under that sub-section. Therefore an order which calls upon the appellant to pay a deficit court-fee on the plaint is not without jurisdiction. [P 627 C 2]

(b) Court-fees Act (1870), S. 12 (1)—Decision of Court come to after applying its mind, is final irrespective of the fact whether both parties have been heard or not.

The word 'decided' and the word 'decision' in S. 12 (1) are given without any qualifications at all and they must clearly apply to any adjudication by the Court, whether both parties have been heard or only one party has been heard or even if no party at all has been heard. The only essential is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the court-fee. Further questions of court-fee are not questions between the parties to a suit. The subject-matter of their litigation has nothing to do with court-fee. It is pre-eminently a matter between the Government and the subject, a matter for the safeguarding of which the Court of course must be the final authority. Hence, an order calling for an additional payment of court-fee on a memorandum of appeal is contrary to the provisions of S. 12 (1) and without jurisdiction : ('35) 22 A I R 1935 Mad 927; ('37) 24 A I R 1937 Mad 325 and (1938) 2 M L J 647, *Rel. on.* [P 627 C 2; P 628 C 1]

(c) Court-fees Act (1870), S. 12 (1)—Object of sub-section explained.

The real purpose for which this sub-section was enacted was to ensure that the Court at as early a stage as possible in the suit should finally determine what was the amount of court-fee payable before the subject-matter of the suit itself was to be embarked upon, and once the Court did so determine, the parties were not to be permitted to raise the question again before it. [P 628 C 1]

M. Appa Rao — for Petitioner.

P. Satyanarayana — for Respondents.

Order. — The petitioner here filed a suit in the Court of the District Munsif of Tanuku for the division of property held by her husband's relations on the assertion that her husband died divided from them and that a release deed executed by him in their favour was not binding upon her. She sued also for cancellation of that release deed. Court-fee was paid in two sums, one for the general

relief of the division and recovery of property and one for the cancellation of the release deed. The suit was dismissed on the ground that there was no division in status between the husband of the plaintiff and the other members of his family. In the course of the judgment, a finding was given that the release deed was brought about by undue influence and was therefore not binding on the widow. This finding, as will be seen, had no material effect upon the result of the suit which had to be dismissed because the plaintiff's husband had died as a member of a joint family. The plaintiff appealed against the decree dismissing her suit and at first sought to pay court-fee only upon the main prayer in her suit for the recovery of her husband's estate. In an order dated 3rd March 1937, however, the learned Subordinate Judge of Narasapur called upon her to pay court-fee also upon the prayer in the plaint in the lower Court for cancellation of the release deed. That court-fee was paid on 5th April 1937. The appeal remained pending for another two years and came up for hearing in 1939. By that time, a new Subordinate Judge had succeeded the Judge who passed the order of March 1937. The new Subordinate Judge once again discussed the question of court-fee and held that the method of valuation of the court-fee payable upon the relief for the cancellation of the release deed in the lower Court was defective and that upon the true method of valuation further court-fee was payable. An order was therefore passed on 27th June 1939 that the plaintiff should pay Rs. 405 deficit court-fee on the plaint and Rs. 405 deficit court-fee upon the memorandum of appeal. It is against that order that the present revision petition has been filed. This petition will have to be decided upon a consideration of S. 12, Court-fees Act. Section 12 runs as follows :

(i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided and the provisions of S. 10, para. (ii), shall apply.

It will at once be apparent that the learned Subordinate Judge's order falls into two portions, one of which purports to be under S. 12 (1) and the other under S. 12 (2). So far as the memorandum of appeal is concerned, the learned Judge is acting under S. 12 (1). So far as the plaint is concerned, the learned Judge is acting as a Court of appeal under S. 12 (2). There is nothing in S. 12 (2) which states that a Court may not reconsider an order which it has already passed under that sub-section. It seems to me therefore that it cannot be successfully argued that that part of the learned Subordinate Judge's order which calls upon the appellant to pay a deficit court-fee on the plaint is without jurisdiction. As this is a revision petition under S. 115, Civil P. C., I can see no ground for interference with that part of the learned Subordinate Judge's order. With regard to the order calling for an additional payment on the memorandum of appeal, it seems to me that it is contrary to the provisions of S. 12 (1). Section 12 (1) lays it down that the Court which entertains a memorandum of appeal shall decide what is the correct court-fee to be paid upon it and that decision shall be final as between the parties to the appeal. It is argued that, if a decision is to be final, it means that the same Court cannot reconsider its own decision. This has been held in three cases which have been brought to my attention, all in recent years, by Venkatasubba Rao J. in 69 M L J 479,[1] Venkataramana Rao J. in (1937) 1 M L J 89[2] and Pandrang Rao J. in (1938) 2 M L J 647.[3] It is argued for the respondents here that S. 12 (1) makes final only a decision which has been finally arrived at by the Court after both parties have been heard and that the phrase "shall be final as between the parties to the suit" would be meaningless unless this were the true interpretation of the word "decision." I am not able to accept this argument.

It seems to me that it would have been very easy for the Legislature to have laid it down that no final decision on a question of court-fee shall be given unless both parties are heard if that had been the intention of the Legislature. The word "decided" and the word "decision" are here given without any qualifications at all and they must clearly apply to any adjudication by the Court whether both parties have been heard

1. ('35) 22 A I R 1935 Mad 927: 158 I C 588: 69 MLJ 479, Lakshmana Iyer v. Palaniappa Chettiar.
2. ('37) 24 A I R 1937 Mad 325: 169 I C 875: (1937) 1 M L J 89, Sadasivam Pillai v. Varadaraja Odayar.
3. ('38) 1938-2 M L J 647, Durgiah, In re.

or only one party has been heard or even if no party at all has been heard. The only essential is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the court-fee; so that although in this case the first order of 3rd March 1937 was passed after hearing only the appellant and not the respondent, I can still see no reason why that order can be excluded from the term "decision" in this sub-section. The order is quoted in the later order of June 1939 and it is an order obviously passed after the Court has applied its mind to the question of the amount of court-fee payable. Nor do I see on general principles any reason why the Legislature should have required that both parties should be heard before a decision as to court-fee could be given. Questions of court-fee are not questions between the parties to a suit. The subject-matter of their litigation has nothing to do with court-fee. It is pre-eminently a matter between the Government and the subject, a matter for the safeguarding of which the Court of course must be the final authority. I am not prepared to hold that the Legislature at any time contemplated that this question of court-fee should form the subject-matter of an issue to be tried along with the other issues when the suit came up for adjudication. This has been also stated by Venkatasubba Rao J. in the judgment already referred to. He says at p. 482 :

> Under the prevailing usage, the Court fully goes into the question relating to the court-fee, only upon an objection taken in the written statement by the defendant; but, as the Judicial Committee points out in 43 Bom 507,[4] the Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, and from that view it follows that although in actual practice a defendant is permitted to object that the proper court-fee has not been paid, he has strictly speaking no legal right to raise such a plea, but his function must be deemed to be, subject to the Court's leave, merely to assist it in coming to a proper decision.

I am of opinion that the real purpose for which this sub-section was enacted was to ensure that the Court at as early a stage as possible in the suit should finally determine what was the amount of court-fee payable before the subject-matter of the suit itself was to be embarked upon, and that once the Court did so determine, the parties were not to be permitted to raise the question again before it. I therefore with respect follow the authorities already quoted and hold that this part of the order of the learned Subordinate Judge calling upon the petitioner to pay Rs. 405 upon the memorandum of appeal has been passed in direct contradiction of the provisions of S. 12 (1), Court-fees Act, and therefore without jurisdiction. I accordingly set aside that part of the order and, as already mentioned, affirm the other portion of the order relating to deficit court-fee on the plaint. Each party to this petition will bear his own costs.

C.R.K./K.S. *Order accordingly.*

4. ('18) 5 A I R 1918 P C 188: 50 I C 280: 43 Bom 507: 46 I A 24 (P C), Rachappa Subrao v. Chidappa Venkatrao.

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(28) A. I. R. 1941 Madras 628

WADSWORTH AND PATANJALI SASTRI JJ.

Mutha Venkateswarlu — *Petitioner*

v.

Kotha Venkatraju — *Respondent.*

Civil Revn. Petn. No. 239 of 1939, Decided on 13th February 1941, to revise decree of Dist. Munsif, Cocanada, D/- 19th September 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl. — Pro-note in favour of *A* and his brother *B*—*B* dying—Debtor executing separate pro-notes in favour of *A* and *B's* son *C* dividing balance due under original pro-note in equal shares—Debtor cannot go back to original pro-note in scaling down debt under subsequent pro-notes.

Where a pro-note is executed in favour of *A* and his brother *B* and on *B's* death his son *C* and *A* agree that the balance due under the pro-note should be divided between them in equal shares and the debtor executes separate promissory notes in favour of *A* and *C* for the aforesaid amounts, it is not open to the debtor to go back to the original pro-note in scaling down the debt due under the subsequent pro-notes : ('41) 28 A I R 1941 Mad 356, *Expl. and Foll.* [P 629 C 1, 2]

N. Vasudeva Rao — for Petitioner.

K. Bhimasankaran — for Respondent.

Wadsworth J.—This civil revision petition arises out of a small cause suit and raises questions under Ss. 8 and 9 of Madras Act 4 of 1938. The suit debt relates back to an original promissory note Ex. B dated 15th May 1930, executed by defendant 1 in favour of the plaintiff and his brother Krishnamurthi. Krishnamurthi died and after his death the plaintiff and Krishnamurthi's son agreed that the balance due under Ex. B should be divided between them in equal shares. The debtor accordingly executed two fresh promissory notes, one in favour of the plaintiff which is the suit promissory note (Ex. A), and the other in favour of Krishnamurthi's son. The lower Court has treated Ex. A as a renewal of Ex. B to the extent of plaintiff's share in that debt and has scaled down the debt applying the ex-

planation to S. 8 of the Act. It seems to us that this conclusion cannot be supported in view of our decision in (1941) 1 M L J 39.[1] We had to deal there with a debt due to one Srinivasa Iyer who died and after his death there was a partition between his two sons and two fresh promissory notes were executed for unequal amounts, one in favour of each of the two sons. We held in scaling down the claims in the two suits on these two promissory notes, that the debtor was not entitled to go back to the original promissory note in favour of the father. We observed that

> the explanation to S. 8 requires that the debt must continue in substance to be the same though the amount and the parties under the various documents given as vouchers for it need not be strictly identical. This requirement cannot be regarded as satisfied when the debt is divided among the heirs of the creditor and the debtor executes a separate instrument for a part of the debt in favour of each of such heirs.

An attempt has been made to distinguish that case from the present on two grounds: Firstly because that was a case of an original debt to the father superseded by two separate debts to the sons and not, as in the present case, a joint debt superseded by two separate debts. The other ground of distinction is that the earlier case was one of a division of the original debt into two unequal amounts, whereas here we are concerned with a division into two halves. The first distinction seems to us more apparent than real. In (1941) 1 M L J 39[1] the father (the original debtor) died and on his death his two sons would be jointly entitled to the debt, so that the position when the two separate promissory notes were executed was practically the same as the position in the present case, namely a joint debt in favour of two brothers superseded by two separate debts one in favour of each. The distinction on the basis of the disparity of the amount of the two promissory notes is a distinction which might possibly have force if the decision in (1941) 1 MLJ 39[1] had been influenced by the fact that the amounts of the two new promissory notes were unequal. But it does not appear to us that that was the basis of the decision at all. The basis for the decision was that a single debt was superseded by two new and separate debts each in favour of one of the two persons who were jointly entitled. No doubt, the fact that the new debts were for unequal amounts makes the danger of treating them as identical with the original debt more apparent, but the principle is the same whether the new debts are equal or unequal. We are of opinion therefore that the debtor is not entitled on the facts of the present case to treat the promissory note (Ex. A) as a renewal of the earlier promissory note (Ex. B). Exhibit A was executed on 29th September 1934 and it has to be scaled down under S. 9 of the Act. The revision petition is therefore allowed with costs and there will be a decree for the principal amount due under the promissory note with interest at 5 per cent. up to 22nd March 1938, credit being given to the two payments endorsed on the note as on the dates on which they were paid and for subsequent interest on the aggregate amount at six per cent. Proportionate costs will be allowed to the plaintiff in the lower Court.

C.R.K./G.N. *Petition allowed.*

1. ('41) 28 AIR 1941 Mad 356 : (1941) 1 M L J 39, Ramasubbier v. Rama Iyer.

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(28) A. I. R. 1941 Madras 629

PANDRANG ROW AND ABDUR RAHMAN JJ.

District Board, West Tanjore — *Appellant*

v.

Secretary of State — *Respondent.*

Appeals Nos. 215 and 216 of 1937 and 95 of 1938, Decided on 12th August 1940, against decrees of Sub-Judge, Tanjore, D/- 29th March 1937.

Madras Irrigation Cess Act (7 of 1865), S. 1— Whole inam villages in Government ryotwari tracts—Liability to cess — Liability depends on character and effect of inam settlement and on grant in each case.

The decision of the controversy as regards the ownership of rivers and the rights to irrigate free of charge between the Government and inamdars of whole inam villages in non-zamindari areas prima facie would depend on the character and effect of the inam settlement and also on the nature of the grant in each case, for, whenever the question of what passed at the time of an inam grant has to be decided, the particular grant in question has to be looked into and no general rule can be laid down that whenever an inam village is granted, particular rights of property invariably pass to the grantee : ('33) 20 AIR 1933 P C 169, *Discussed and Expl.;* ('32) 19 A I R 1932 P C 46, *Discussed;* ('28) 15 A I R 1928 Mad 97 ; ('36) 23 AIR 1936 Mad 58; ('21) 8 A I R 1921 P C 1 and ('17) 4 A I R 1917 P C 42, *Ref.* [P 632 C 1, 2]

T. R. Venkatarama Sastri and T. B. Balagopal for Appellant.

Government Pleader — for Respondent.

Pandrang Row J. — These connected appeals have been argued together and they raise the same point. All of them arise out of suits instituted by the District Board, Tanjore, against the Secretary of State for India in Council. The suits are for refund of water cess and land cess thereon collected by the Government from the District Board

in respect of certain lands in whole inam villages for different faslis. Appeal No. 215 of 1937 relates to the claim for refund of cess for ten years, i.e., faslis 1333 to 1342 and the claim is for over Rs. 43,000. Appeal No. 95 of 1938 relates to the water cess for fasli 1343 and Appeal No. 216 of 1937 to the water cess for fasli 1344. These suits however do not raise the claim in a general way, that is, not on the basis of any proprietary right claimed by the District Board, but on the basis of a certain compromise entered into between the parties in an earlier litigation of 1921. In other words, we have not to decide whether the District Board has the right to irrigate the lands in the villages without payment of water cess, but whether the event that was contemplated in the compromise of 20th September 1923 (EX. A) has happened. That event is, to use the words of the compromise,

if the Privy Council should decide in any case that may hereafter be taken to it that the decision in the *Urlam case*[1] is applicable to inam villages.

If this has happened, that is if the Privy Council has decided in any case taken to it subsequently to the compromise of September 1923 that the Urlam decision applies to whole inam villages, then the plaintiff's claim in the present suit can be said to be maintainable, subject of course to the decision on the other issues raised in these suits which have not been disposed of in the Court below. The point therefore that arises for decision in these appeals is only this, though it is made the subject-matter of no less than three issues in the Court below, namely issues 6 to 8 which run as follows:

(6) Has the contingency contemplated by the agreement of compromise happened?

(7) What are true terms of the compromise agreement referred to in the plaint?

(8) What is the effect of the Privy Council decision reported in 1933 M W N 559[2]? Has it held that the decision of *Urlam case*[1] applies to inam villages as well?

It will be seen that according to the plaintiff-appellant the decision of the Privy Council reported in 1933 M W N 559,[2] i. e., the decision in Privy Council Appeal No. 119 of 1931 delivered on 20th February 1933 held that the decision in the *Urlam case*[1] applies to whole inam villages. Though the point for decision is comparatively simple and short, the argument before us has ranged over a wide field, most of which on the appellant's side was intended to show that it follows from the *Urlam decision*[1] as explained and commented upon in a subsequent case, namely 55 Mad 268,[3] that the decision in *Urlam case*[1] is applicable to whole inam villages situated in non-zamindari areas. This argument was however only introductory to the real argument in the case, which was no doubt that the actual decision in *Urlam case*[1] was applied to inam villages in the case reported in 1933 M W N 559[2] which will be referred to for the sake of brevity as the *Viranvayal case.* We are not really concerned in these appeals to decide whether as a matter of fact the principles enunciated in 55 Mad 268[3] necessarily lead to the conclusion that the decision in *Urlam case*[1] which applied to zamindari lands including pre-settlement inams in a zamindari would apply to inam villages in Government ryotwari tracts as in the present case. That question has been decided in the affirmative in more cases than one by this High Court and it is enough to refer in this connexion to the cases reported in 53 M L J 769,[4] 69 M L J 552[5] and S. A. Nos. 309 and 310 of 1928, which are now pending in appeal before the Privy Council. What we have to decide is not whether as a matter of law it follows from the earlier decisions of the Privy Council in *Urlam case*[1] and in 55 Mad 268[3] that irrigation of lands in whole inam villages in ryotwari tract is governed by the same principles as are applicable to irrigation of lands within zamindari tracts, but whether as a matter of fact a decision to this effect was pronounced in *Viranvayal case.*[2]

The judgment in *Viranvayal case*[2] deals with two points, namely, (1) whether the river from which water was taken for irrigation belonged to the Government and (2) whether the water in question was supplied from works constructed by the Government. Both these points were found against the Government. There is no express decision in the judgment to the effect that the decision in the *Urlam case*[1] applies to inam villages in ryotwari tracts or to put it in a slightly different form, in non-zamindari tracts. There is no reference whatever to *Urlam case*[1] in the judgment of the Privy Council in *Viranvayal case.*[2] The judgment no doubt refers to 55 Mad

1. ('17) 4 A I R 1917 P C 42 : 41 I C 98 : 40 Mad 886: 44 I A 166 (P C), Bala Surya Prasada Row v. Secretary of State.
2. ('33) 20 A I R 1933 P C 169 : 143 I C 150 : 1933 M W N 559 (P C), Secy. of State v. Subramania Iyer.
3. ('32) 19 AIR 1932 P C 46: 136 I C 413 : 55 Mad 268 : 59 I A 56 (P C), Secretary of State v. Subbarayadu.
4. ('28) 15 A I R 1928 Mad 97 : 106 I C 377 : 53 M L J 769, Yahya Alli Sahib v. Secy. of State.
5. ('36) 23 A I R 1936 Mad 58 : 159 I C 354 : 69 M L J 552, Secy. of State v. Aiyanar Kone.

268[3] as having finally decided the question that where the riparian owner owns the bed of the stream upto the *medium filum*, the river could not be said to belong to the Government. Or, in other words, if the Government sought to establish that the stream belonged to them, they would have to show that they owned the whole bed of the river. In *Viranvayal case*[2] the fact that half the bed of river upto the *medium filum* belonged to the inamdar (the Rameswaram Devasthanam in that case) was not denied before their Lordships of the Privy Council who observed at the end of the discussion referred to above that,

> the claim of the Government to payment of cess, therefore failed in that respect and was not contended for before their Lordships.

The pleadings in that suit also show that ownership of half the bed and the demarcation of half the bed as part of the inam village were alleged in the plaint and were not denied by the Government, and indeed, in view of the decision of the survey authorities which was not attacked by the Government, could not be denied. It is thus clear that the decision of their Lordships of the Privy Council in *Viranvayal case*[2] on this point, namely, whether the river belonged to the Government was decided on the only ground that the Government could claim the river to belong to them only if they showed that they owned the whole bed of the river and not on the basis of any grant of lands abutting the river which carried with it easementary or riparian rights as in *Urlam case*[1] and in 55 Mad 268.[3] The contention of the Government has throughout been that *Viranvayal case*[2] has not settled the question of the applicability of the decision in *Urlam case*[1] to inam villages in non-zamindari areas and in particular to inam villages included in the inam settlement. Their case has been that at the inam settlement there was not grant by the Government, except where there was a new grant and that in the case of old grants, what the inam settlement did was merely to recognize the state of things which existed before, and to leave the rights of the inamdars in the same condition as they were before the settlement. This contention is indeed supported by Act 8 of 1869 which is referred to by their Lordships of the Privy Council in 44 Mad 421.[6] Their Lordships observed as follows in that case which was a case relating to a shrotriem village :

> It was rightly decided by the final appellate Bench of the High Court that the title deed of the Inam Commissioners conferred no higher title than was originally granted. There is language in the Act of 1862 that might possibly be read as having the effect for which the plaintiffs contend, but this was corrected by Act 8 of 1869, and it is now clear that though a larger interest was created, nothing done under the Inam Commission could vest in Inamdars a subject-matter not already belonging to them.

In the *Urlam case* itself, *vide* 40 Mad 886[1] at p. 908, their Lordships expressly stated that it was in their opinion unnecessary to consider the terms of the original inam grants or the effect of any subsequent inam settlement. This observation was made when dealing with the inam lands that were included in the subject-matter of that case. The appellant's advocate, Mr. Venkatarama Sastri relies almost entirely on the following sentence or part of a sentence in the judgment of their Lordships of the Judicial Committee in *Viranvayal case*[2]: "The facts in this case were that the temple authorities were riparian owners"; the sentence, however, continues as follows: "and that they owned the soil of the river *ad medium filum*." As observed already, the latter fact is itself sufficient to dispose of the contention that the river in question belonged to the Government which was the point that was being considered by their Lordships. It must also be observed that this sentence immediately follows the following two sentences :

> The first was as to whether this river from which the water was derived for irrigation belonged to the Government. That was a point which had been in controversy in principle for a considerable time in Madras.

Then comes the sentence extracted above which starts with the words: "the facts in this case were." It seems to us that the controversy in principle which had existed for a considerable time in Madras relating to this point was not actually decided in *Viranvayal case*[2] because the fact in that case which was established beyond doubt, viz., that the inamdar owned the soil of the river *ad medium filum*, made it unnecessary for their Lordships to decide this general controversy regarding the ownership of rivers in the Madras Presidency. It seems to us that it is not at all likely that their Lordships of the Judicial Committee decided or intended to decide a controversy of this importance by merely reciting the facts of the case before them; these two facts, and indeed only one of them could furnish sufficient ground for the decision of the point that arose in that case, namely that

6. ('21) 8 A I R 1921 P C 1 : 60 I C 230 : 44 Mad 421 : 48 I A 56 (P C), Secy. of State v. Srinivasachariar.

the temple authorities, i. e., the inamdars, were the riparian owners and that they owned the soil of the river *ad medium filum*. This statement of fact cannot, in our opinion, be regarded as a decision of a controversy which had existed in principle for a considerable time in Madras. Nor could it be deemed to decide the controversy which did exist as regards the ownership of rivers and the right to irrigate free of charge between the Government and inamdars of whole inam villages in non-zamindari areas. Prima facie the decision of that controversy would depend on the character and effect of the inam settlement and also on the nature of the grant in each case for whenever the question of what passed at the time of an inam grant has to be decided, the particular grant in question has to be looked into and no general rule can be laid down that whenever an inam village is granted, particular rights of property invariably pass to the grantee. It would appear from the statement of the Government in their reply to the District Board (EX. G) that in *Viranvayal case*[2] the Privy Council gave no ruling as to the applicability of *Urlam decision*[1] to whole inam villages, although counsel for the Government was specifically instructed to obtain a ruling on this point. No doubt this particular statement in the Government's order has not been sought to be established by evidence but the statement made by the Government cannot be entirely ignored, though if the judgment of their Lordships in *Viranvayal case*[2] contained a clear decision of the point, namely, the applicability of Urlam decision to whole inam villages, the Government's statement contained in EX. G, could not be given any weight whatsoever.

But where the judgment itself so far as it relates to this point is even according to the appellant's own counsel limited to one sentence or is to be found in one single sentence, it becomes necessary to consider whether the Government's statement is not perhaps a statement of what actually happened, because if their Lordships intended to pronounce a decision on this point, they would have done so expressly and after some discussion than in the manner in which it is suggested to us on behalf of the appellant that their Lordships did in *Viranvayal case*.[2] We find ourselves unable to assent to the view pressed upon us on behalf of the appellant, namely, that as a matter of fact the decision of their Lordships of the Privy Council in *Viranvayal case* reported in 1933 M W N 559[2] actually decided that the decision in *Urlam case*[1] is applicable to inam villages. In other words, we are not satisfied that the judgment of the lower Court on this point is erroneous. The appeals therefore fail and are dismissed with costs.

N.K./R.K. *Appeals dismissed.*

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(28) A. I. R. 1941 Madras 632

SOMAYYA J.

In the matter of S. P. S. A. L. Ramaswami Chetty — Insolvent.

Insolvency Petn. No. 419 of 1932, Decided on 10th January 1941.

Insolvency — Official Assignee or Official Receiver — Costs — He is not to be made personally liable for costs as between him and the estate unless he is guilty of gross misconduct— It is for the Insolvency Court and not civil Court to say whether he can take costs from estate or not.

When the Official Assignee or the Official Receiver files a suit in a Court other than the Insolvency Court of which he is the insolvency officer, the Court trying the suit or the application may dismiss the suit or the application with costs. In such a case, the plaintiff or the applicant, that is, the Official Assignee or the Official Receiver is always personally liable for costs. But where the Official Assignee or the Official Receiver is a defendant or a respondent, the position is different. In such a case he has to defend the action or at least to put the plaintiff or the applicant to proof of his claim and to watch the proceedings to see that the claim is properly proved. In such a case there is no justification whatever for the Court to make the Official Assignee or the Official Receiver personally liable to the plaintiff. Even if he had remained ex parte some costs would have to be paid to the plaintiff or the applicant and that can only be out of the estate. So where the Official Assignee or the Official Receiver appears and is not guilty of gross misconduct in his defence, the usual rule ought to be that the costs should come out of the estate. [P 633 C 2]

In any case the Court before which the suit or the application comes on, has no jurisdiction to say whether the Official Assignee or the Official Receiver should or should not debit it as against the estate which he represents. That is a matter for the Insolvency Court of which he is the officer. It is open to the Official Receiver to reimburse himself out of the estate even without an order of the Insolvency Court and as between himself and the estate, he shall not be liable for costs unless the Insolvency Court by a specific order so directs : ('29) 16 A I R 1929 Mad 105, *Rel. on ; English cases referred.* [P 633 C 2; P 635 C 1]

V. Thyagaraja Iyer, Official Assignee — In person.

Order. — The decree in O. S. No. 13 of 1925 was being executed by the Official Assignee of Madras in the Sub-Court of Devakottah. Meanwhile another person who obtained a decree in O. S. No. 56 of 1931

brought certain properties to sale in execution of his decree. Some properties were sold in execution of that decree and the deposit of one-fourth of the purchase money was made on 23rd September 1940. Mr. R. Rama Ayyar, advocate, Devakottah, who was appearing for the Official Assignee of Madras wrote on 24th September 1940 intimating the proceedings in O. S. No. 56 of 1931. He advised the Official Assignee that an application for rateable distribution must be filed and stated that the matter was urgent. This was in view of the fact that the application for rateable distribution, if any, should be filed before the purchaser paid the balance of the purchase money into Court. On 26th September 1940 the Official Assignee sent the necessary papers and the application was filed in the Sub-Court of Devakottah. In the course of the hearing of that application it transpired that at a prior stage in the course of execution of the decree in O. S. No. 56 of 1931, the judgment-debtor gave a charge to the decree-holder over some of the properties for the purpose of obtaining time for payment of the decree amount. It was those properties that were brought to sale and the money in Court represented the sale proceeds of those properties. Taking the view that the proceeds realised from the sale of those properties were not available for the purpose of rateable distribution under S. 73, Civil P.C., the Subordinate Judge rejected the application of the Official Assignee with costs. Then he made the following direction :

> Having regard to the facts of this case, I think that I must also state in this application that the costs of this application shall not be debitable to the estate of the insolvent whom the petitioner is said to represent.

The Official Assignee after getting the necessary information from his advocate files this report and requests that he should be authorised to pay the costs which he himself incurred and which he was directed to pay to the opposite side in this application from out of the estate which he represents. I see absolutely no justification for the direction made by the Subordinate Judge. Further I doubt very much whether he had any jurisdiction to make this direction. The Official Assignee in the City of Madras or the Official Receiver in the mofussil is an officer of Court discharging his function to the best of his ability. Some are salaried officers and some are remunerated otherwise. They ought not to be made personally liable for costs as between them and the estate which they represent, unless they are guilty of gross misconduct in taking the action which they take.

When the Official Assignee or the Official Receiver files a suit in a Court other than the insolvency Court of which he is the insolvency officer, the Court trying the suit or the application may dismiss the suit or the application with costs. In such a case, the plaintiff or the applicant, that is, the Official Assignee or the Official Receiver is always personally liable for costs. Before filing the suit or the application he ought to see whether there are funds in the estate and in cases where there are no funds, it is his duty to take an indemnity from someone before filing the suit or the application. Even in such cases the Court trying the suit or the application may say that the costs should come out of the estate, but unless it is so said, the plaintiff or the applicant will always be personally liable to the successful party. But where the Official Assignee or the Official Receiver is a defendant or a respondent, the position is different. In such a case he has to defend the action or at least to put the plaintiff or the applicant to proof of his claim and to watch the proceedings to see that the claim is properly proved. In such a case there is no justification whatever for the Court to make the Official Assignee or the Official Receiver personally liable to the plaintiff. Even if he had remained ex parte some costs would have to be paid to the plaintiff or the applicant and that can only be out of the estate. So where the Official Assignee or the Official Receiver appears and is not guilty of gross misconduct in his defence, the usual rule ought to be that the costs should come out of the estate. In any case the Court before which the suit or the application comes on, has no jurisdiction to say whether the Official Assignee or the Official Receiver should or should not debit it as against the estate which he represents. That is a matter for the insolvency Court of which he is the officer. It is not merely the costs payable to the other side that are involved. He incurs some expenses in addition to those which he is obliged to pay to the other side. Even where he is successful, what he gets from the other side may not represent all that he spends. In all those cases, the usual rule is that he is entitled to debit it to the estate which he represents. In cases where his action is grossly unfair and loss is occasioned to the estate by his negligent conduct, there is ample provision in the Insolvency Act to make the Official Assignee or the Official Receiver per-

sonally liable for all the loss caused to the estate by his negligence or misconduct. But that is for the Insolvency Court to say whether he ought to debit it against the estate or not. The Court trying the suit or application has, in my opinion, no jurisdiction to say anything on this matter. In (1881) 6 A C 482[1] the Judicial Committee said :

> In an action at law a trustee in bankruptcy would be liable in the same way as any other plaintiff. In a case where a trustee makes an application the success of which is doubtful, he ought, before making it, to get from the creditors an indemnity against the costs if he knows that there are no assets out of which they can be paid .... In every case of that kind, of course, the question may arise whether the trustee having had to pay costs to the party aggrieved by an unsuccessful and improper claim, may not, if he acted bona fide, have a case for recouping himself out of the bankrupt estate if there are funds. That is a question to be determined in a Court of Bankruptcy in an administration of the bankrupt estate. Any order of their Lordships here against La Fontaine, would of course, leave that question open. It is a question with which their Lordships have nothing to do and on which they express no opinion. But it is clear that whatever La Fontaine's rights in that respect may be, it affords no reason for depriving Mr. Pitts of that which the order gave him and gave him consistently with the general law.

In cases where he is a defendant and he does not appear, no costs ought to be given against him personally. In (1908) 2 Ch 127[2] the Court of Appeal laid down that where the trustee in bankruptcy is a defendant, costs ought not to be given against him personally:

> In the present case, the matter is additionally complicated by the fact that the defendant Snell became bankrupt, and the proceedings were ordered to be carried on as against his trustee in bankruptcy, but the trustee entered no appearance. Under those circumstances I think the costs ought not to be given against him personally.

The reason is also obvious. He is brought into Court against his wish and he does not take any part in the proceedings other than watching the proceedings. In a case where he is made a defendant, the proper thing for the Official Assignee to do is merely to see that the claim is properly proved and to watch the proceedings unless there are funds in the estate to pay the plaintiff's costs or he is indemnified by a creditor to put forward defences and fight the plaintiff. He is entitled and indeed, he is bound in my opinion, to appear for the purpose of seeing that the claim is properly proved and if he does no more than that, the principle laid down by the Court of Appeal in the case just referred to should apply. In (1875) 10 Ch D 586,[3] the Court of appeal decided that a trustee in bankruptcy who is a respondent to a successful appeal will not be ordered to pay costs personally, that is, if he is only a respondent and not the appellant, even if the appeal succeeds, the order will not be made for costs personally but the order will be for payment of costs out of the estate. James L. J. said :

> The order will be for payment of the costs out of the estate, not by the trustee personally. He is not the appellant.

No doubt that is not an inflexible rule, and in a proper case an order for costs against him personally might be made. In (1899) 2 Q B 566,[4] Lindley M. R. dealing with the request that the respondent who was the trustee in bankruptcy should not be made personally liable said this as regards the decision in (1875) 10 Ch D 586[3] :

> I do not think the practice is so settled as that. The Court must consider what is the trustee's right in each particular case. Our order now is that the appeal must be allowed with costs.

Wallace and Thiruvenkatachariar JJ. pointed out in 52 Mad 263[5] that when the matter arises not in the Bankruptcy Court but in the ordinary civil Court and the order is that the plaintiff or defendant (appellant or respondent) is directed to pay costs, it means that he is to pay the costs personally even when he is the Official Receiver but there they were dealing with the construction of an order which had already been passed against the Official Receiver in a civil suit. At p. 267 this is what they say :

> It follows that in a case like the present, in which we are concerned with a decree in an ordinary action, the party mulcted in costs is personally liable for those costs and the Official Receiver is therefore under the decree in question, personally liable for the costs. It is open to him to apply to the Insolvency Court for an order that he may reimburse himself out of the estate. It may, even, be open to him to reimburse himself out of the estate, without an order of the Court; and, as between himself and the estate, he shall not be liable for costs unless the Insolvency Court by a specific order so directs.

That even a civil Court may in a proper case order costs to come out of the estate and not pass an order against the Official Receiver personally is recognized on p. 274. So the result is that the ordinary civil Court may as between the parties to that

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1. (1881) 6 A C 482 : 50 L J P C 8 : 42 L T 519, Pitts v. La Fontaine.
2. (1908) 2 Ch 127 : 77 L J Ch 352 : 98 L J 830 : 15 Manson 134 : 25 R P C 421, Dansk Rekylriffel Syndicate v. Snell.
3. (1875) 10 Ch D 586 : 40 L T 14 : 27 W R 327, Ex parte Stapleton, In re Nathan.
4. (1899) 2 Q B 566 : 68 L J Q B 1003 : 81 L T 214 : 6 Manson 413 : 15 T L R 526, In re Neil Mackenzie, Ex parte Sheriff of Hertfordshire.
5. ('29) 16 A I R 1929 Mad 105 : 114 I C 825 : 52 Mad 263 : 55 M L J 873, Balakrishna Menon v. Uma.

action give costs against the Official Receiver without limiting it to the estate in his hands. In such a case he will be personally liable whether as a plaintiff or as a defendant. But in doing so, the Courts will be guided by what I have stated above as to the rules which should guide the Court before passing a decree of the one kind or the other. But it is not the province of the civil Court to say whether the Official Assignee or the Official Receiver can, as between himself and the estate which he represents, take the costs out of the estate or not. In the words of Wallace J. in the case just referred to :

> It is open to the Official Receiver to reimburse himself out of the estate even without an order of the Insolvency Court and as between himself and the estate, he shall not be liable for costs unless the Insolvency Court by a specific order so directs.

The request of the Official Assignee is granted.

C.R.K./K.S. *Petition granted.*

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(28) A. I. R. 1941 Madras 635

LEACH C. J. AND HAPPELL J.

Sri Raja Venkatadri Apparao Bahadur Zamindar Garu — Appellant

v.

Timmaraju Venkata Kutumbarao — Respondent.

Letters Patent Appeal No. 15 of 1940, Decided on 25th February 1941, against judgment of King J., D/- 4th March 1940, in S. A. No. 33 of 1937.

Contract Act (1872), Ss. 72 and 15 — Word 'coercion' in S. 72 is used in its general and ordinary sense—It is not controlled by S. 15— Person compelled to make deposit under O. 21, R. 89, Civil P. C., to save his property by getting its sale set aside — Deposit is made not voluntarily but subject to coercion within meaning of S. 72 — Depositor can sue to recover consideration for sale.

The word 'coercion' in S. 72 is used in its general and ordinary sense as an English word. Its meaning is not controlled by the definition in S. 15 : 40 Cal 598 (PC), *Foll.* [P 636 C 1]

Hence a person who is compelled to make a payment under O. 21, R. 89, Civil P. C., in order to save his property by getting the sale thereof set aside does not make the payment voluntarily but is subject to coercion within the meaning of S. 72, and therefore is entitled to sue to recover the consideration for the sale : ('31) 18 A I R 1931 Mad 753, *Foll.*; ('35) 22 AIR 1935 Mad 842 (FB). *Expl., and Disting.* [P 636 C 1]

Y. Govindarajulu and B. Lakshminarayana — for Appellant.

M. S. Ramachandra Rao — for Respondent.

Leach C. J. — The appellant is the zamindar of Vuyyur and was the defendant in the suit out of which this appeal arises. It was filed by the respondent to recover damages for an alleged wrongful attachment of his property. The trial Court (the Court of the District Munsif of Bezwada) decided against the respondent and dismissed the suit, but on appeal the Subordinate Judge of Bezwada reversed the decision of the District Munsif and granted the respondent a decree for Rs. 23-12-2. The appellant appealed to this Court, but his appeal was dismissed by King J., who agreed with the judgment of the Subordinate Judge, but gave a certificate which permitted the filing of this appeal under cl. 15, Letters Patent. The real question involved in this appeal is whether the case is governed by the decision of the Full Bench in 58 Mad 972[1] or by the judgment in 34 M L W 399,[2] which was decided by a Division Bench. The learned Judge held that 34 M L W 399[2] applied.

Before referring to the authorities, it will facilitate the appreciation of the argument if the facts in the present case are stated. In S. C. S. No. 200 of 1926 of the District Munsif's Court of Nuzvid at Bezwada, the appellant sued for a decree against his tenant, Rangamma, for the rent owed by her in respect of Fasli 1332. He obtained a decree and on 15th March 1930 applied for the attachment of the land leased to Rangamma. The order of attachment was issued on 16th July 1930, but before this was obtained—to be exact, on 16th June 1930—Rangamma sold her tenant's interest to the respondent. On the passing of the order of attachment, the respondent applied to have it set aside, but his petition was dismissed and on 8th December 1930 the property was sold in execution proceedings. The respondent did not institute a suit to challenge the order passed on this application, but on 5th January he filed an application for the setting aside of the sale under O. 21, R. 89, Civil P. C., and as he deposited the required amount the sale was set aside. Rangamma was also in arrears with her rent for Faslis 1333 and 1334. To enforce payment the appellant filed S. C. S. No. 201 of 1926. He obtained a decree and an order of attachment in the subsequent execution proceedings. Notwithstanding his failure in the previous proceedings, the respondent applied for an order setting aside the attachment and on this occasion he was successful. The appellant

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1. ('35) 22 AIR 1935 Mad 842 : 158 I C 207 : 58 Mad 972 : 69 M L J 349 (FB), Krishna Iyer v. Arunachalam Chettiar.
2. ('31) 18 AIR 1931 Mad 753 : 135 I C 24 : 34 M L W 399, Kotla Satyam v. Perraju.

did not challenge the validity of this finding by suit, as he could have done, and his failure to do so meant that the respondent's title was established.

We consider that the present case does not come within the judgment in 58 Mad 972.[1] The decision there was that once the proper amount has been deposited in Court on an application under O. 21, R. 89, made by a person entitled to present it, the Court has no power to entertain or proceed with hearing of an application under R. 90, but must set the sale aside under R. 89. The Court observed that

> the reported cases where claimants made payments to avert sales of property and the payments were therefore payments made under coercion are of no real assistance in this case.

The Court was not considering a case like the present one where a person is suing to recover the amount which he deposited in an application under R. 89 on the ground that he was compelled to make the deposit in order to save what he claimed to be his property. In 34 M L W 399,[2] it was held that a person, who, in order to get a sale set aside, filed an application under R. 89 and under protest made the required deposit was entitled to sue to recover the consideration for the sale on the ground that it was a payment made under coercion within the meaning of S. 72, Contract Act. The payment which the respondent made into Court when he applied for an order setting aside the sale of 8th December 1930 was not made under protest, but we consider that there was coercion within the meaning of S. 72. Unless he made the deposit, he could not get the sale set aside and the title to it would consequently vest in the appellant. In 40 Cal 598,[3] the Privy Council held that the word 'coercion' used in S. 72 is used in its general and ordinary sense as an English word and that its meaning is not controlled by the definition in S. 15. A person who is compelled to make a payment in order to save his property being sold in circumstances such as we have here does not make the payment voluntary but is subject to coercion within the meaning of S. 72, Contract Act. For these reasons, we agree with the decision of King J. and dismiss the appeal with costs.

C.R.K./G.N. *Appeal dismissed.*

3. ('13) 40 Cal 598 : 18 I C 949 : 40 I A 56 : 17 C L J 478 : 17 C W N 541 (PC), Kanhaiyalal v. National Bank of India Ltd.

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(28) A. I. R. 1941 Madras 636

WADSWORTH J.

J. Austen Byers — Petitioner

v.

Municipal Council, Trichinopoly — Respondent.

Civil Revn. Petn. No. 1574 of 1939, Decided on 19th April 1940, to revise decree of Small Cause Court, Trichinopoly, in S. C. S. No. 1089 of 1938.

Madras District Municipalities Act (5 of 1920 as amended by Act 10 of 1930), S. 93 (1) and (2) — Construction — Assessee residing outside Municipality but holding appointment inside Municipality from 1st to 14th April 1935 — On 15th April 1935, assessee ceasing to hold appointment having been granted leave with permission to be absent from duty during ensuing summer vacation and spending whole leave outside India—Assessee re-appointed on 22nd June 1935 and holding appointment up to 9th September 1935 — Assessee held taxable only under S. 93 (1) (a) (i) in respect of his income from total period of duty, namely 3 months and 2 days and not on his professional income for rest of half year, namely period of his absence on leave.

Section 93 (2) makes a person chargeable to profession tax under a class appropriate to his aggregate income from any source of income with reference to which he can be deemed to be taxable having regard to the terms of S. 93 (1) (a) and (b). That is to say if a person is taxable by reason of his residence, then he comes both under S. 93 (1) (a) (ii) and under S. 93 (1) (b) and he would be taxable both in respect of any profession or appointment exercised outside the Municipality and also on any pension or income from investments. If, on the other hand, a man becomes taxable only by reason of the practice of a profession or the holding of an appointment within the Municipality, then the only source in respect of which his income can logically be calculated is the profession or appointment within the Municipality which brings him under the Act. [P 638 C 1]

From 1st April 1935 to 14th April 1935 the assessee held the appointment of District and Sessions Judge, Trichinopoly. On 15th April 1935 he ceased to hold that appointment having been granted leave with permission to be absent from duty during the ensuing summer vacation. He spent his period of leave and vacation outside India. On 22nd June 1935 he was re-appointed District and Sessions Judge, Trichinopoly, and held that appointment up to 9th September 1935 when he again took leave and his connexion with Trichinopoly ceased. The total period of his duty as District and Sessions Judge, Trichinopoly, during the half year in question was thus 3 months and 2 days and during this period though he worked inside the Municipality he resided outside the Municipality. The assessee paid the profession tax which would be due from him on the income earned by the exercise of his profession during this period of 3 months and 2 days. The Municipality however claimed that he was taxable not only on the pay of his appointment during the period for which he held an appointment within the Municipality but also on his professional income for rest of half year, i. e., the periods of his absence from Trichinopoly :

Held that the assessee was taxable only under S. 93 (1) (a) (i) by virtue of having held an appointment within the Municipality; that appointment within the Municipality was the sole source of income in respect of which tax was leviable and in calculating his income for the half year only the income from the taxable source could be taken into consideration: ('38) 25 A I R 1938 Mad 462, *Disting.* [P 638 C 2]

A. V. Narayanaswamy Iyer — for Petitioner.

B. Sitarama Rao — for Respondent.

Order.—This petition raises a question of liability to profession tax under S. 93, Madras District Municipalities Act. The petitioner was the defendant in the lower Court and there is no dispute about the facts. From 1st April 1935 to 14th April 1935 petitioner held the appointment of District and Sessions Judge, Trichinopoly. On 15th April 1935 he ceased to hold that appointment having been granted leave with permission to be absent from duty during the ensuing summer vacation. He spent this period of leave and vacation outside India. On 22nd June 1935 he was re-appointed District and Sessions Judge, Trichinopoly and held that appointment up to 9th September 1935 when he again took leave and his connexion with Trichinopoly ceased. The total period of his duty as District and Sessions Judge, Trichinopoly, during the half year with which we are concerned was thus 3 months and 2 days and it is common ground that during this period, though he worked inside the Municipality, he resided outside the Municipality. The petitioner has paid the profession tax which would be due from him on the income earned by the exercise of his profession during this period of 3 months and 2 days. The Municipality however filed a small cause suit claiming that he was taxable not only on the pay of his appointment during the period for which he held an appointment within the Municipality but also on his professional income for rest of the half year, i. e., the periods of his absence from Trichinopoly. Section 93, Madras District Municipalities' Act, makes a person liable for profession tax if:

(a) he exercises a profession, art or calling or transacts business or holds any appointment, public or private: (i) within the Municipality for not less than 60 days in the aggregate, or (ii) without the Municipality but who resides in the Municipality for not less than 60 days in the aggregate;

(b) resides in the Municipality for not less than 60 days in the aggregate and is in receipt of any pension or income from investments.

Such a person is required to pay a half-yearly tax assessed in accordance with the rules in Sch. 4. Rule 16 of Sch. 4 divides taxable persons into twelve classes according to the amount of their half yearly income and prescribes the appropriate taxes. Sub-section (2) of S. 93 prescribes that a person shall be chargeable under the class appropriate to his aggregate income from all the sources specified in sub-s. (1) as being liable to the tax. Now it is possible to read this clause in several different ways. It could be given a very wide interpretation and made to mean that anyone who became taxable under any of the qualifications in sub-cls. (1) (a) and (b) would be chargeable in respect of any income derived from any of the sources therein set forth. Under this interpretation, a man who qualified for the tax merely by holding an appointment for sixty days within the municipality where he did not reside could be made to pay tax on the income which is expressly made taxable only on the basis of residence. That is to say, he could be made to pay tax on his income from investments or his pension or on the income from an appointment held outside the municipality. I do not think that this is the correct interpretation of this clause and it has not been seriously contended before me that such a wide meaning should be given to it. Another possible interpretation is that when a person is taxable under either the first or second parts of sub-cl. (a) he becomes chargeable in respect of income during the half-year from any profession or appointment wherever exercised. This is the interpretation for which the learned Government Pleader has contended. It involves the reading of the first part of sub-cl. (a) as dealing only with the sources of income and treating the qualifying words in parts (i) and (ii) as having relation only to the conditions giving rise to taxability. It seems to me that this method of construction involves a strain on the language of the section. The first part of sub-cl. (a) is really one single sentence: a person exercising a profession or holding an appointment within the municipality for not less than sixty days in the aggregate. The second part is really another sentence dealing with those who exercise a profession or hold an appointment without the municipality but reside in the municipality for not less than sixty days. With reference to the first class of persons the source of income is surely not the appointment whatever and wherever it may be but the appointment within the municipality. With reference to the second class of persons the source of income is clearly the appointment or profession outside the municipality which is made taxa-

ble by the qualification of residence within the municipality.

It seems to me that the intention of sub-s. (2) of S. 93 is to make a person chargeable to profession tax under a class appropriate to his aggregate income from any source of income with reference to which he can be deemed to be taxable having regard to the terms of sub-cls. (a) and (b) of cl. (1). That is to say, if a person is taxable by reason of his residence, then he comes both under sub-cl. (a) (ii) and under sub-cl. (b) and he would be taxable both in respect of any profession or appointment exercised outside the municipality and also on any pension or income from investments. If, on the other hand, a man becomes taxable only by reason of the practice of a profession or the holding of an appointment within the municipality, then the only source in respect of which his income can logically be calculated is the profession or appointment within the municipality which brings him under the Act. Not being a resident within the municipality he cannot be taxable on income from sources which are only taxed on the basis of residence. There is no precise authority on the subject. My attention has however been drawn to the decision in A I R 1938 Mad 462[1] which on the facts bears a superficial resemblance to the present case. That was a case of a Government servant who spent a portion of the half-year at Vellore where he was the Collector. For rest of the half-year he was on leave outside India. The report does not precisely state that he resided in Vellore where he held his appointment. But there is nothing stated to the contrary and one may infer that he lived, as most people do, in the town where he worked. On these facts, it was held that he was taxable on the total income from his appointment during the half-year. Assuming that he lived within the municipality it seems to me that this decision is in accordance with the view which I have suggested; for he would be taxable under sub-cl. (a) (ii) of cl. (1) as a person residing in the municipality who is taxable in respect of extra municipal income and he would also be taxable as a person holding an appointment within the municipality for a portion of the half-year. These two categories of liability together cover the whole of the half year for which the tax was claimed. The present case however presents different facts. The petitioner is taxable to my mind only under sub-cl. (a) (i) by virtue of having held an appointment within the municipality; that appointment within the municipality is the sole source of income in respect of which tax is leviable and in calculating his income for the half-year, I am of opinion that only the income from the taxable source should be taken into consideration. In this view I allow the petition and dismiss the suit with costs throughout.

C.R.K./G.N. *Petition allowed.*

1. ('38) 25 A I R 1938 Mad 462: 177 I C 605, In re Hilton Brown.

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(28) A. I. R. 1941 Madras 638

WADSWORTH J.

Kuntamukkala Venkateswara Rao — *Petitioner*

v.

Sree Raja Kunduru Lakshmikantharao Bahadur Zamindar Garu and others — *Respondents.*

Civil Revn. Petn. No. 252 of 1939, Decided on 17th February 1941, to revise decree of Dist. Munsif, Bezwada, D/- 24th September 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 9, 19 and 15 — Pronote executed for arrears of rent — Character of liability changes and it ceases to be rent — Suit on pronote — Defence that amount is not due as it represented rent which must be deemed to be discharged under S. 15 is not open.

On the execution of a pronote for arrears of rent the character of the liability changes and it ceases to be rent. A decree on such a pronote is a decree for debt and not a decree for rent. Consequently in a suit on the pronote the defence that the amount was not due as it represented rent which must be deemed to be discharged by reason of S. 15 is not open: ('32) 19 A I R 1932 Mad 436 (S B), *Rel. on*; ('41) 28 A I R 1941 Mad 116, *Expl. and Rel. on.*

[P 638 C 2; P 639 C 1]

Ch. Raghava Rao — for Petitioner.

S. Venugopala Rao — for Respondents.

Order.—Petitioner contended in defence to a suit on a promissory note that the amount was not due because it represented rent which must be deemed to be discharged by reason of S. 15 of Act 4 of 1938. A Bench of which I was a member held in (1940) 2 M L J 825,[1] following 55 Mad 830,[2] that a decree on a promissory note for arrears of rent is a decree for a debt and not a decree for rent and that it is to be scaled down under Ss. 9 and 19 and not under S. 15. An attempt has been made to distinguish that decision on the ground that it related

1. ('41) 28 A I R 1941 Mad 116 : (1940) 2 M L J 825, Ramadoss Reddiar v. Munuswami Reddiar.
2. ('32) 19 A I R 1932 Mad 436 : 138 I C 289 : 55 Mad 830 : 63 M L J 20 (S B), Commissioner of Income-tax, Madras v. Rajagopala Venkata Narasimha.

to a decree, whereas, here, we are concerned with a suit on a promissory note to which a plea of failure of consideration may be raised. The distinction made is, in my opinion, fallacious. The basis of our decision was that on the taking of the note the character of the liability changed and that it ceased to be rent. Granted that the promissory note would operate only as a conditional discharge of the liability for rent and that if it was found to be defective the promisee might (if it was not barred) fall back on the original right to claim rent. I do not think that it follows that the debtor can compel the promisee to treat his claim as one for rent whereas in fact it is nothing of the kind, or that he can treat the note which was in substitution for a liability for rent as being without consideration, because a claim based on the liability for rent, which has not been made, would be met by a defence under S. 15. In this view I dismiss the petition with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 639

WADSWORTH AND PATANJALI SASTRI JJ.

In re Bendapudi Venkataratnam and others — Appellants.

S. R. Nos. 33204, 33470, 30289 and 33198 of 1940, Decided on 24th March 1941, against order of Sub-Judge, Rajahmundry, D/- 11th September 1940.

(a) Interpretation of statutes — Fiscal enactment — Rules framed under rule making power conferred by Act ambiguous as to applicability of fiscal enactment — Court cannot from presumed intention of rule making authority draw inference adverse to party who has to pay tax.

In the case of a fiscal statute such as the Court-fees Act, the Court cannot, in the presence of, an ambiguity in the rules framed under the rule making power conferred by an Act as to the applicability of the fiscal statute guess at the meaning of the authority which enacts the rules and draw from the presumed intentions of that authority an inference which is adverse to the party who has to pay the tax. [P 640 C 2]

(b) Court-fees Act (1870 as amended in Madras), Sch. 2, Arts. 11 and 17A — Statute making order appealable as if it were decree — Sch. 2, Art. 11 applies and not Art. 17A—Appeal under R. 9 of rules under Madras Agriculturists' Relief Act falls under Sch. 2, Art. 11.

Schedule 2, Art. 11, Court-fees Act, applies to cases in which the statute provides that an order shall be subject to an appeal as if it were decree. Article 17A has no application. Consequently, an appeal under R. 9 of the rules framed under the Madras Agriculturists' Relief Act falls under Sch. 2, Art. 11, Court-fees Act : 21 M L J 481; 28 Cal 723 (F B) and 16 Bom 408, *Expl., and Rel. on*; ('34) 21 A I R 1934 Lah 958, *Ref.*; ('40) 27 A I R 1940 Mad 635 and ('29) 16 A I R 1929 Mad 334, *Disting.* [P 640 C 2]

N. Narasimham, A. Lakshmayya, Y. Suryanarayana and V. Rangachari — for Appellants.

Government Pleader — for the Crown.

Wadsworth J.—The question which we have to decide relates to the court-fee payable on an appeal filed under R. 9 of the rules framed under the Madras Agriculturists' Relief Act, (4 of 1938) and issued under G. O. No. 2634. These rules provide for an application either by the debtor or by the creditor for a declaration as to the amount of the debt due. It is expressly provided that the application shall not be maintainable under the rules if a suit for the recovery of the debt be pending and it is also provided that every such application shall bear a court-fee stamp of the value of 12 annas. Rule 9 states that the order of the Court declaring the amount of the debt under R. 7 shall be "subject to appeal and second appeal as if it were a decree in an original suit" and it was the view of the office that the effect of this provision is to make appeals preferred against orders declaring the amount of a debt taxable as appeals from declaratory decrees under Art. 17A, Court-fees Act, as amended in Madras. The authority relied upon for this view is a decision of Burn J., on the effect of a similar provision in S. 50 (2), Malabar Tenancy Act, which provides that appeals shall lie from orders made under S. 12, etc., as if they were decrees in suits. It is evident that the orders against which appeals are filed in these cases are very much to the same effect as decrees in declaratory suits. They finally decide as between the parties the amount due on the debt; these decisions will be binding in future litigation and they cannot of themselves be executed. There is no specific article in the Court-fees Act laying down what shall be the court-fee payable on appeal from an order which is appealable "as if it were a decree," but questions similar to that which we have now to decide have come before the Courts on numerous occasions. Under O. 21, R. 50 (3), Civil P. C., the Court is concerned with an order which shall "have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree" and it has been held that under this provision the appeal is to be stamped with an ad valorem fee as an appeal from a decree. But then it must be noticed that the words "or otherwise" show that the order which is to have the force of

a decree is to be governed by the same conditions not only with reference to the procedure in appeal but also in other respects. One of such decisions is 15 Lah 893.[1]

There are two cases which have been cited before us which deal with statutory provisions that an order shall be subject to appeal as if it were a decree. One is 16 Bom 408,[2] in which it was held that though the procedure in appeal was that for an appeal from a decree, the appeal was not governed by the provisions of the Court-fees Act relating to appeals from decrees and that it must be treated as a mere application falling under Art. 1 of Sch. 2. A similar view was taken by a Full Bench of the Calcutta High Court in 23 Cal 723.[3] Both of these cases have been quoted with approval by a Bench of this Court in 21 M L J 481,[4] which, though concerned with a rather different matter, had to consider what is the proper article of the Court-fees Act to apply.

The learned Government Pleader has relied on decisions mainly relating to proceedings in execution under special statutory provisions rendering an order under the special statute executable as a decree and these decisions have held that such a provision attracts all the procedure including the right of appeal laid down for execution petitions in the Code of Civil Procedure and also attracts the law of limitation for the execution of decrees and orders of a civil Court under Art. 192, Limitation Act. An instance of such a decision under the Co-operative Societies Act, is (1940) 1 M L J 268.[5] 52 Mad 388[6] is one of a number of cases which have been quoted before us under the Madras Hindu Religious Endowments Act. It seems to us that these decisions have no direct bearing on the point which we have to decide. Granted that when it is laid down that an order shall result in a certain procedure the whole of that procedure will be applicable including the law of limitation and the law relating to appeals, it does not necessarily follow that a fiscal statute such as the Court-fees Act shall be applied as if the order under appeal were that which it is expressly not. If in fact the declaration under R. 7 were a decree, it would be unnecessary to enact R. 9 which provides that it shall be appealable as if it were a decree. The rules proceed on the basis that there is a mere application resulting in a declaratory order which is not a decree, but which for purposes of appeal is to be treated as if it were a decree. It is contended that if this order is to be treated for purposes of appeal as if it were a decree, it must necessarily attract the provisions of the Court-fees Act for appeals from decrees. We are unable to accept this contention in the absence of any specific provision in the rules attracting the provisions of the Court-fees Act governing appeals from decrees. The Court-fees Act being a fiscal statute, we cannot in the presence of an ambiguity guess at the meaning of the authority which enacts the rules and draw from the presumed intentions of that authority an inference which is adverse to the party who has to pay the tax.

Article 17A applies in terms to a plaint or memorandum of appeal in a suit. We are not concerned with a memorandum of appeal in a suit. We are concerned with a memorandum of appeal in an application, the order in which is made appealable as if it were a decree. It seems to us that Art. 11 of Sch. 2 directly covers an appeal of this kind. Article 11 applies to a memorandum of appeal when the appeal is from an order inclusive of an order determining any question under S. 47 or S. 144, Civil P. C. This article was not applied in the two cases cited above, 16 Bom 408[2] and 23 Cal 723,[3] apparently because of the different wording of the Article of the Court-fees Act with which the learned Judges were concerned. But there is nothing in Art. 11 of Sch. 2 as amended in Madras which would exclude the applicability of that article to cases such as these. We are therefore of opinion that the proper article of the Court-fees Act to apply to these cases is Art. 11 of Sch. 2.

C.R.K./G.N. *Order accordingly.*

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1. ('34) 21 A I R 1934 Lah 958 : 155 I C 639 : 15 Lah 893 : 35 P L R 565, Jugal Kishore Gulab Singh v. Dina Nath Sriram.
2. ('92) 16 Bom 408, Jamsang Devabhai v. Goyabhai Kirkabhai.
3. ('96) 23 Cal 723 (F B), Upadhya Thakur v. Pershidh Singh.
4. ('11) 21 M L J 481 : 9 I C 538 : (1911) 1 M W N 237 : 9 M L T 314, Rodrigues v. Mathias.
5. ('40) 27 A I R 1940 Mad 635 : 191 I C 226 : I L R (1940) Mad 649 : (1940) 1 M L J 268, Subbarao v. Calicut Co-operative Urban Bank Ltd., Calicut.
6. ('29) 16 A I R 1929 Mad 334 : 115 I C 157 : 52 Mad 388 : 56 M L J 373, Sundara Iyer v. Commissioners, Hindu Religious Endowments Board, Madras.

(28) A. I. R. 1941 Madras 641

PANDRANG ROW AND SOMAYYA JJ.

M. & S. M. Ry. Co., Ltd. — *Appellant*

v.

Municipal Council, Bezwada —

Respondent.

Appeals Nos. 240 and 297 of 1937, Decided on 29th January 1941, against decrees of Sub-Judge, Bezwada, D/- 31st March 1937.

(a) Madras District Municipalities Act (5 of 1920), S. 82 (2)—Lands which cannot ordinarily be let — Rating authority under S. 82 (2) is not confined to one method of taking 6 per cent. of capital value as rental value—It can find rental value by any method known to law which is appropriate to particular case such as capital value basis, profit basis or some other method — Vacant lands belonging to railway — Rating authority holding capital value method as appropriate — It cannot be said to be acting ultra vires of its powers.

In the case of lands which cannot ordinarily be let, S. 82 (2) does not confine the rating authority to the one method, namely of taking 6 per cent. of the capital value as the rental value, but it leaves it to the rating authority to find the rental value by any of the methods known to law and apply that test which is applicable to the facts of a particular case. The rating authority may take the capital value basis or it may take the profit basis or it may find the rental value by some other method. It is left free to adopt that method which is suitable to the facts of each case. Consequently, the rating authority cannot be said to have acted ultra vires of its powers if it was satisfied that resort to the capital value method was the appropriate method in the case of vacant lands belonging to the railway company: *English case law relied on.* [P 648 C 2]

(b) Madras District Municipalities Act (5 of 1920), S. 81 (3), Proviso—According to instructions of Local Government under S. 81 (3) Proviso committee appointed to make assessment —Municipal Chairman adopting valuation fixed by committee as his own when issuing demand notice—Chairman must be taken to have levied tax and not committee — Fact that assessee company invited resort to committee procedure does not preclude it from challenging tax on ground that it was not levied by chairman but by some one else.

Where the tax fixed by the Valuation Committee appointed in accordance with the instructions of the Local Government under S. 81 (3) proviso is adopted by the Municipal Chairman as his own when issuing demand notices to the assessee company the tax must be deemed to have been levied by the chairman and not by the committee. But the fact that the assessee company invited a resort to the committee procedure cannot prevent the company from objecting to the tax on the ground that the tax was not levied by the Municipal Chairman but by some one else, namely the committee. [P 648 C 2; P 649 C 1]

(c) Madras District Municipalities Act (5 of 1920), S. 81 (3) — Lands falling under S. 81 (3) — Local Government prescribing rules for determining capital value — Government have no power to restrict application of rules to vacant lands other than railway lands.

No doubt it is open to the Local Government not to frame any rules relating to the manner in which the capital value of lands falling under S. 81 (3) should be determined; but once they prescribe the manner in which the capital value of the lands coming under S. 81 (3) should be determined, it is doubtful whether they have the power to restrict the application of those rules to vacant lands other than railway lands. [P 649 C 1]

(d) Madras District Municipalities Act (5 of 1920), S. 81 (3)—Omission by Local Government to frame rules prescribing manner of determining capital value does not debar Municipal Council from levying tax on capital value basis.

The omission by the Local Government to frame rules prescribing the manner in which the capital value is to be determined does not deprive the Municipal Council of the power of levying the tax on the capital value basis under S. 81 (3): (1927) A C 674, *Disting.* [P 649 C 2]

(e) Madras District Municipalities Act (5 of 1920), Ss. 81 (3) and 82 (2)—Resort to S. 81 (3) is justified to support tax levied under S. 82 (2) *(Obiter).*

Resort to S. 81 (3) would be justified by way of supporting the levy of the tax under S. 82 (2): (1925) A C 458, *Disting.* [P 650 C 1]

(f) Madras District Municipalities Act (5 of 1920), Ss. 82 (2) and 81 (3) — Fixing of rateable value — Present state of property should be considered.

It is not the property as it was or the property as it might become in future but it is the property as it is in its present state, that has to be considered in fixing the rateable value: (1893) A C 562, *Rel. on.* [P 646 C 2]

T. R. Venkatarama Sastri — for Appellant.

Sir A. Krishnaswami Ayyar and P. Satyanarayana Rao — for Respondent.

Somayya J. — These are two appeals filed against the decrees of the Court of the Subordinate Judge, Bezwada, in two suits filed by the appellant against the respondent for refund of certain taxes which were alleged to have been illegally levied under the Madras District Municipalities Act (Madras Act, 5 of 1920) on the vacant lands belonging to the appellant. The appellant is the Madras and Southern Mahratta Railway Company owning several buildings and vacant sites within the limits of Bezwada Municipality and the Municipal Council of Bezwada is the respondent. The respondent council levied certain taxes under the Madras District Municipalities Act on the appellant's vacant lands from 1929 to 1935. The plaint in O. S. No. 41 of 1935 was filed for recovery of Rs. 22,092-13-0 which was the tax levied for the year 1931-32. The other suit O. S. No. 61 of 1935 was filed for recovery of a sum of Rs. 76,706-10-4 made up of various sums which were levied for the years 1929-30, 1930-31, 1932-33, 1933-34 and 1934-35, i. e., for five years. The Subordinate Judge

tried the two suits together, dismissed O. S. No. 41 of 1935 and decreed O. S. No. 61 of 1935 in part ordering a refund of the sums claimed in respect of 1929-30 and 1930-31 and dismissing the rest of the claim. The plaintiff appeals. A. S. No. 297 of 1937 is the appeal against the decree in O. S. No. 41 of 1935 and A. S. No. 240 of 1937 is the appeal against the decree in O. S. No. 61 of 1935. The main judgment was delivered in O. S. No. 61 of 1935 and the relevant papers are printed in the appeal against that decree. In both the suits substantially the same question arises for consideration viz., whether the levy of the tax is legal.

To understand the questions raised in these suits, certain provisions of the Railways Act and of the Madras District Municipalities Act have to be referred to. Under the Indian law, railway companies are not liable to pay any tax to any local authority unless the Governor-General in Council notifies under S. 135, Railways Act that the railway company is liable to pay and the railway company is then bound to pay the taxes mentioned in the notification. In this case a notification was issued on 14th February 1929 under the above section by which the appellant company was declared liable to pay in aid of the funds of the respondent municipality, the general property tax, and a water and drainage tax. There were prior notifications with which we are not concerned as the notification of 14th February 1929 was in supersession of all prior notifications. Under S. 78, District Municipalities Act, every Municipal Council may levy among other things a property tax. Under S. 81 (1) of the said Act, the Municipal Council may by a resolution levy property tax on all buildings and lands situated within the municipality subject to certain exceptions and the property tax may comprise among other things (1) a tax for general purposes and (2) a water and drainage tax. Section 81 (2) provides that these taxes shall be levied at such percentages of the annual value of the lands or buildings or both as may be fixed by the Municipal Council. Under S. 81, cl. (3), the Municipal Council may in the case of lands which are not used exclusively for agricultural purposes and which are not occupied by or adjacent and appurtenant to buildings, levy these taxes at such percentages of the capital value of such lands or at such rates with reference to the extent of such lands as it may fix. This power is subject to a certain proviso which will be mentioned later on. Section 82 provides for the method of assessment. Under cl. (2) of this section the annual value of the lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year subject to certain deductions. The proviso to the sub-section says that in the case of Government or railway buildings or buildings which are of a class not ordinarily let, the gross annual rent of which cannot, in the opinion of the executive authority, be estimated, the annual value of the premises shall be deemed to be six per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building subject to certain deductions for depreciation. The taxing authority under this Act is the executive authority and in the years with which we are concerned, the Chairman of the Municipality was the executive authority empowered to levy the tax. One another section of the Railways Act must be referred to and that is S. 135 (2) which runs thus :

> While a notification of the general controlling authority under cl. (1) of this section is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the general controlling authority may, having regard to all the circumstances of the case, from time to time, determine to be fair and reasonable.

The Collector of the District has been appointed by the Governor-General in Council as the officer authorized to act under this sub-section. For the years 1929-30 and 1930-31, the Collector of Kistna district fixed a particular amount as payable to the Municipality and the Municipal Council levied a sum in excess of the amount fixed by the District Collector. The lower Court held that this was illegal and decreed a refund of the sums collected for the years 1929-30 and 1930-31 and there is no appeal by the Municipal Council. As regards the other four years the railway company challenges the levy chiefly on the ground that in making the assessment, the provisions of S. 82 (2) proviso were applied and they point out that those provisions apply to certain cases of buildings only. They also say that the Municipal Chairman did not determine the assessment but that a certain committee of three did it. Next it is said that owing to certain rules not being framed, they are not assessable at all. The defendant repelled the contentions of the plaintiff and stated that the tax was properly levied, that the Municipal Chairman actually levied the tax and

that the committee referred to in the plaint was only an advisory body. It was also stated that the provisions of the Act were in substance and in effect complied with and that therefore under S. 354 (2) of the Act, no suit can be brought to recover any sum of money collected under the authority of the Act on account of assessment.

The question for decision is whether the provisions of the District Municipalities Act have been in effect complied with by the respondent in levying the tax in question. It is common ground that under S. 81 (1) the respondent council passed a resolution that a property tax for general purposes and a water and drainage tax shall be levied for all the years in question on all buildings and lands within the municipal limits except those which are exempted. The lands in question are not claimed to come under this exemption and therefore became liable to pay a tax for general purposes and a water and drainage tax. Under cl. (2) of the said section, which provides that these taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the Municipal Council, it is agreed that the council fixed 16½ per cent. of the annual value as the tax payable. It is also agreed that under S. 81 (3) of the Act which applies to vacant lands which are not agricultural lands and which are not adjacent and appurtenant to buildings, the Municipal Council passed a resolution that on such lands the tax should be levied at the rate of one per cent. on their capital value. There is a proviso to sub-s. (3) of S. 81 which runs thus :

> Provided that such percentages or rates shall not exceed the maxima, if any, fixed by the Local Government and that the capital value of such lands shall be fixed in such manner as may be prescribed.

And the word "prescribed" is defined under S. 3, cl. (19) as meaning "prescribed by the Local Government by rules made under this Act." It appears that when framing rules under this proviso for the manner in which the capital value is to be fixed by the municipal authorities, the Local Government confined their operation to vacant lands not belonging to a railway company and expressed the view that in the case of vacant lands belonging to a railway company, the assessment should be made on the annual value basis and not on the capital value basis. The procedure adopted by the respondent council in fixing the tax was this. A committee was convened in accordance with the instructions given by the Local Government on 15th March 1929, which is Ex. A-6, printed on p. 21 of the exhibits book. The relevant portion of Ex. A-6 runs as follows :

> With the concurrence of the Government of India the Local Government are pleased to issue the following instructions for the assessment of railway buildings and lands to property tax in municipalities. Chairmen of Municipal Councils and the Commissioner of the Madras Corporation are requested to follow the instructions with effect from 1929-1930 . . . . (i) the "annual" value of buildings of a class not ordinarily let shall be deemed to be 6 per cent. of their book value for a period of five years after their first constructions. (ii) In the case of other buildings and lands after a period of five years after construction in the case of buildings mentioned in sub-para. (1) above, the "annual value" shall be fixed once in five years in accordance with S. 82, Madras District Municipalities Act, 1920, by a committee consisting of (a) the Chairman of the Municipal Council in the case of muffassal municipalities and the Commissioner in the case of the Madras City Municipality; (b) the executive engineer of the division, and (c) one representative of the railway administration concerned to be chosen by its agent.

A committee was formed which fixed the capital value and the annual value of the lands and Municipal Chairman adopted it and levied the tax on the annual value so arrived at. This procedure is now attacked by the appellant as illegal and it is also said that in taking the capital value as the basis of assessment, the assessing authority followed a provision enacted for a different class of properties. It is now conceded that this committee has no legal status under the Act to make any assessment. It can only be taken to be an advisory body to help the authority empowered under the Act to fix the tax. However, all the parties proceeded upon the footing, that a committee should be convened in accordance with this notification. It appears that the appellant company was very anxious that the committee procedure should be followed and notified the municipality to convene a committee. On 8th February 1930, the Municipal Council sent Ex. B-2 (p. 55) calling upon the railway company to pay a sum of Rs. 17,558-6-0 as the tax for the vacant lands of the railway company for the year 1929-1930. Thereupon the railway company replied by Ex. B-4, dated 19th February 1930 (pp. 59 and 60) objecting to the assessment of the vacant lands at Rs. 17,558-6-0. The letter winds up by saying :

> I also beg to refer you to G. O. No. 4894 L and M, dated 29th October 1929 issuing instructions to the Municipal Councils that railway lands should be assessed on their annual value and that the Chairman should, in fixing the annual value of the properties of the railway administration.

follow strictly the procedure laid down in para. 2 of G. O. No. 1258, L and M dated 15th March 1929.

Thus, the railway company asked the municipality to follow the committee procedure laid down in EX. A-6. The Municipal Council replied by EX. C-3 dated 20th August 1930 and said that the Municipal Council resolved by its resolution dated 5th August 1930 that a committee referred to in EX. A-6 should be called for, for revision of taxes on vacant lands belonging to the company and asked for the name of the official who would attend the meeting on behalf of the railway company. The third member under EX. A-6 is the executive engineer of the division who is a Government official. The Municipal Chairman, the executive engineer of the division and the official nominated by the railway company are the three persons to constitute the committee and by EX. C-3 the Municipal Council asked the railway company to mention the name of the official to represent the company. The district engineer, Bezwada, was chosen by the railway company and the same was communicated by EX. C-4 dated 6th September 1930. The committee so constituted met on 15th December 1930 and a copy of the proceedings of the committee is EX. C-9 (p. 65). In this document the committee says :

> It is agreed that there has been an exceptional rise in land values during the last few years in Bezwada, anything from three to six times.

The executive engineer of Kistna district suggested in view of the exceptional rise in land values that Rs. 150 an acre should be taken to be the annual rental value and that that rate should prevail until 31st March 1931. The Municipal Chairman and the railway representative agreed subject to the approval of the Municipal Council and the railway agent. According to the annual rental value fixed in this document the railway company had to pay a sum of Rupees 2154-15-6 for each year. The assessment for the prior years was Rs. 887-12-0. For the years 1929-30 and 1930-31 the Municipal Council demanded Rs. 2154-15-6 a year in accordance with the decision of the committee dated 15th December 1930. The railway company objected to this valuation and addressed EX. D-1 to the District Collector of Kistna asking that Rs. 50 per acre should be fixed as the annual rental value of these lands. This was evidently a request for action being taken under S. 135 (2), Railways Act. The Collector by his proceedings dated 30th June 1931 (EX. D-11) said as follows :

> As observed by the Collector, Mr. Stewart, while fixing the assessment in the year 1925, it is very difficult to determine the annual value of railway lands especially of those occupied by embankments, cuttings, sidings, level crossings, culverts, etc., and I therefore direct that the method and rate of assessment adopted by the Collector in 1926, namely the levy on the basis of extent at one third of the tax payable by an ordinary taxpayer for general purposes as well as water and drainage purposes, should continue.

This order was varied by that of another District Collector who restored the value suggested by the committee's resolution of 15th December 1930. So the Municipal Council collected from the railway company taxes at the rate of Rs. 2154-15-6 a year for the years 1929-30 and 1930-31. It was held by the Court below that once action was taken by a Collector under S. 135 (2) it was not open to revision and on this ground a decree has been passed by the lower Court for refund of the excess levy in respect of 1929-30 and 1930-31, and as mentioned before there is no appeal by the Municipal Council in respect of that amount. For the years 1931-32 onwards, another valuation committee was convened by the Municipal Council by its letter dated 12th March 1932 (EX. D-12). The railway district engineer, Bezwada division, was deputed by the railway company by its letter dated 16th March 1932 (EX. D-13). The committee met on 19th March 1932 and the proceedings of the committee are evidenced by EX. D-15 (pp. 81 and 82). The committee took the capital value of the vacant lands and fixed six per cent. of the capital value as the gross annual rental value. It winds up by the note on p. 82 : "the annual value will be calculated at six per cent. of the capital value as arrived at by the committee." All the three agreed and signed this document. In accordance with this valuation, the tax payable by the railway company was levied by the Municipal Chairman. Exhibit D-14, dated 21st March 1932, is a letter calling upon the railway company to pay the tax for the year 1931-32. Fortysix demand notices, evidently one for each separate plot, were enclosed and a statement showing the particulars was also enclosed. This statement is EX. D-16, and it was sent as an enclosure to EX. D-14. The validity of EXS. D-16 and D-14 is a point to be determined in these appeals. Similar demand notices were issued for the successive years and they all proceeded upon the same valuation which was adopted for the year 1931-32, and in fact as would be noticed from EX. A-6 set out already, the value of buildings and lands should be fixed once in five years by the committee mentioned therein. So for the quinquenium

beginning with 1931-32 the Municipal Council levied tax on the annual value fixed in Ex. D-15.

The railway company made various attempts to get this amount reduced. They approached the Collector of the District but the Collector declined stating that what he considered to be an appeal in the ordinary course was not filed before him. The Municipal Council was asked to revise the tax and they pointed out by Ex. E-3 dated 25th March 1932 that it was open to the railway company to appeal to the Collector under S. 135 (2), Railways Act. Representations to the Local Government and the Railway Board proved infructuous and these suits were then filed objecting to the levy of the tax on the basis of Ex. D-15. Thus the questions that arise are whether the procedure followed by the Municipal Council is a substantial compliance with the provisions of the Act within the meaning of S. 354 (2) which says that if the provisions of the Act have been in substance and in effect complied with, no suit can be brought to recover any sum of money collected under the authority of this Act on account of any assessment.

The chief contention of the appellant is that the Municipal Council followed the procedure fixed in S. 82 (2) proviso which is enacted for quite a different class of property and that in doing so the council violated the express provisions of S. 82 (2) which says that the annual value should be fixed by taking the gross annual rent at which they may reasonably be expected to let from month to month or from year to year. It is said that no attempt at all was made by the Municipal Council to find out the gross annual rent at which these lands may reasonably be expected to let and that instead of doing so, they followed the procedure which is fixed for another class of property, namely buildings belonging to Government or a railway company or of a class not ordinarily let. It is urged that by enacting the capital value method in the case of buildings covered by the proviso, the Legislature has, by implication, prohibited the use of that method for the lands in question. It is said that the annual value should be fixed by taking only the gross annual rent, whatever might be the difficulties in arriving at that rent and that in so doing the capital value procedure is by implication excluded by the proviso to S. 82 (2). It is then said that even apart from the implied prohibition of the capital value method, the committee in this case made no attempt whatever to get at the gross annual rent and that it is clear from Ex. D-15 that they simply followed the capital value method provided for a particular class of buildings. The next objection advanced is that if the levy is taken to have been made under S. 81 (3), the Local Government expressly declined to make any rules for fixing the capital value of the vacant lands belonging to a railway company and directed that such lands should be assessed on the annual value basis and not on the capital value basis. It is said that even if this view of the Government is wrong, inasmuch as no rules have been framed under the proviso to cl. (3) of S. 81, the power given to the Municipal Council in cl. (3) to levy the taxes at a percentage on the capital value cannot be exercised in the case of railway vacant lands. It is also said that the valuation committee did not adopt a percentage on the capital value which in this case has been fixed by the Municipal Council at 1 per cent. of the capital value but as Ex. D-15 shows they followed the procedure under the proviso to S. 82 (2), i. e., after taking the capital value they took 6 per cent. of the capital value as the annual rental value and fixed 16½ per cent. thereon as the tax. The tax actually levied does not come to 1 per cent. of the capital value but amounts to a sum which is slightly less than 1 per cent. And the last objection is that the valuation committee determined the capital value and the annual value, that the committee has no legal existence, and that the chairman who is the only authority to fix the tax has not done so and that therefore the levy is illegal as made by a person who had no authority to do so.

These contentions are met by the learned Advocate-General who appears for the respondent by pointing out that in the case of lands with which we are now concerned, it is not possible as the Kistna Collector observed, to find the annual rental value, that they cannot, as they are, be let to anyone and that it is practically impossible to fix with any degree of accuracy the gross annual rent at which they may reasonably be expected to let. He urges that in such cases the gross annual rent at which the property may reasonably be expected to let may be fixed by what is known as the capital value method by taking the value of the land and by fixing a percentage of that value as the rental value. Reference is made to the analogous provisions of the English rating statutes and the decisions thereunder which

it is said, establish that a resort to the capital value method is not absolutely ruled out when the gross annual rental value has to be fixed. He says that in this case EX. D-15 contains only the final conclusion of the committee, that it is a fair and reasonable inference to draw that as gentleman having wide experience in such matters and having presumably known prior proceedings, the committee members all felt that they could not with any fairness to either party fix any sum as the rent at which these lands could be expected to let and that therefore they resorted to the capital value method. If this is correct, there is no doubt that the provisions of the Act would have been substantially complied with and that the appellant would have no case.

It is then urged that the levy can be justified even under S. 81 (3). In this case the Municipal Council has issued notifications under S. 81 (3) and the notifications say that on vacant lands of the kind coming under S. 81 (3) the tax would be levied at one per cent. of the capital value. It is urged that by its omission or refusal to frame rules for the determination of the capital value of the railway vacant lands the Local Government cannot deprive the Municipal Council of its power to levy a tax under S. 81 (3). He says that if the Local Government does not choose or refuses to make the necessary rules, the Municipal Council may levy it in such manner as it thinks fit. As regards the objection that EX. D-15 shows that it was not on the basis of one per cent. of the capital value that the tax was fixed but that six per cent. of the capital value was first taken as the annual value and that 16½ per cent. thereon was fixed as the tax, the answer is that the amount which is so levied is less than what would have been leviable under S. 81 (3) and that therefore the railway company has no grievance. And lastly it was said that it was the Municipal Chairman who levied the tax, that the committee procedure was followed in accordance with the rules issued by the Local Government, that the chairman did not surrender his judgment to the committee and that by adopting the conclusions of the committee finally the levy is his and not that of the committee. He also says that it was the railway company that wanted the committee procedure to be followed. No authorities of the Indian High Courts have been brought to our notice by either side. The learned Advocate-General relies on certain decisions on the construction of the term "gross value" as defined in the English rating statutes and urges that the language of the English Act and of the Act under consideration is similar and that therefore the decisions of the English Courts would be helpful. Before referring to the decisions, we may refer to the statutes mentioned. There are certain rating statutes in England under which rates and taxes are fixed on the gross value of hereditaments, and the "gross value" is defined to be the gross annual rent. The term "gross value" is defined in the Valuation (Metropolis) Act, 1869 (32 and 33 vict. Chap. 67) thus :

> The term 'gross value' means the annual rent which a tenant might reasonably be expected taking one year with another to pay . . . for a hereditament . . . .

The Rating and Valuation Act, 1925 defines the term "gross value" thus : 'Gross value' means the rent at which a hereditament might reasonably be expected to let from year to year . . . " The latter definition approximates very nearly to the language used in S. 82 (2) of the Indian Act. The definition in the Act of 1925 is practically equivalent to that contained in the Act of 1869 : *see* Halsbury's Complete Statutes of England, Vol. 14, pp. 553 and 554. In (1893) A C 562[1] at p. 600, the definition as given in the 1869 Act is set out on p. 587. Then they say at the top of p. 588 :

> "The annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament" is the same thing as 'the rent at which the same might reasonably be expected to let from year to year.'

Then on p. 600, the Lord Chancellor says this :

> Lush J. stated that the rateable quality of land was not to be determined by what once it was, or by what it might thereafter become, but by what it was at the time the rate was made. I quite agree with this.

So we have to decide the rateable quality of the vacant lands in question as they stand at present. As pointed out in (1936) A C 266:[2]

> The foundation of our rating law is the Poor Relief Act of 1601 . . . In 1836 the Parochial Assessment Act of that year provided by S. 1 that the rate was to be based 'upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year . . . . Substantially the same language is

1. (1893) 1893 A C 562: 63 L J M C 9: 6 R 22: 69 L T 725: 42 W R 330: 57 J P 821, London County Council v. Erith Overseers.
2. (1936) 1936 A C 266: 105 L J K B 115: 154 L T 314: 24 Traff Cas 86: 100 J P 123: 34 L G R 103: 80 S J 223: 52 T L R 237: (1936) 1 All E R 26, Railway Assessment Authority v. Southern Railway Co.

used in the Parochial Assessment Act, 1862 and in the Valuation of Property Metropolis Act, 1869 with regard to London. My Lords, this method of assessing liability for rates was no doubt very suitable for the simple conditions which prevailed in the reign of Queen Elizabeth; but when it was sought to apply it to modern conditions, and especially to the assessment of great public utility undertakings, such as railways, waterworks, gasworks and the like, whose operations might easily extend over great areas, stretching far beyond the limits of any individual parish, the greatest difficulty was found in adopting the statutory provisions to the facts of such a case. . . . Unfortunately, the Legislature did not see its way to intervene and the Courts were compelled to evolve a system of calculation, with the assistance of the expert advisers to the rating authorities and to the undertakings, which involved a number of very difficult assumptions, but which received the approval of your Lordships' House on a number of occasions, and which became recognized as the standard method of assessing the rateable value of hereditaments in these cases . . . . . .

As pointed out herein owing to frequent changes in the conditions of modern life, great public utility undertakings such as railways, waterworks and gasworks and the like have come into existence in several places. On some of the lands acquired by these concerns buildings are erected and the rest are kept vacant. In the cases of both the buildings and the vacant sites, great difficulty arose as to how the gross value or the annual rental value was to be arrived at. In solving the difficulty, English Courts took two alternative methods of arriving at the gross value or the annual rental value (1) capital value basis or contrator's method, (2) profit basis. Two classes of cases frequently arose for consideration (a) lands occupied by profit earning concerns and (b) those occupied by concerns which were not of a profit earning character. Under the latter category come school buildings, waterworks and sewage farms and under the former come railways, etc. The law is well discussed in (1899) 2 Q B 14[3] at p. 20. It was a case of a waterworks concern. The following passage occurs on pages 20 and 21 :

It is familiar law that, where a hereditament can be compared with other hereditaments of a like nature which are the subject of letting, its rateable value may be arrived at by showing what rent tenants from year to year will in fact give for such hereditaments; but a difficulty in rating law arises with regard to hereditaments which cannot be compared with other similar hereditaments so as to ascertain the rent which a tenant will actually give for them. Therefore, inasmuch as a rateable hereditament cannot be allowed to escape from being rated because no such comparison can be made, in such cases it has come to be a recognized position that the rent which a hypothetical tenant would give for the hereditament must be estimated in some other way. In a case like the present, where no profits are earned in the parish by use of the hereditament, a rough way of arriving at the rateable value by rule of thumb, there being no other way available, is to see what the site and the construction of the works cost, and take a percentage on the capital amount so expended as representing the rent which a tenant would give.

In (1912) 1 K B 270[4] the Liverpool Corporation who were owners and occupiers of a system of reservoirs and waterworks purchased 1165 acres of land to serve as a gathering ground for the water flowing into the reservoirs. The Corporation raised plantations on 306 acres of the said land and the remaining 859 acres were kept as moorland. The question was whether the Corporation could be rated in respect of the said land. The Court of appeal held it was. On p. 293 of the report, Kennedy L. J., observes :

The only other question, therefore . . . . is whether or not evidence of the price paid by the Corporation is admissible as a basis for calculating the assessment for rating purposes, or, in other words, whether the interest upon that price is some evidence of the rent which an occupying tenant of the gathering ground would pay. I think it is. The law appears to me to be correctly stated by Mr. Ryde at p. 176 of the second edition of his work on Rating. He says: 'The measure of rateable value is defined by statute as the rent which may reasonably be expected; interest on cost or on capital value cannot be substituted for the statutory measure, but can be looked at as prima facie evidence in order to answer the question of fact what rent a tenant may reasonably be expected to pay.'

This decision was taken up in appeal on another point and the House of Lords confirmed the decision in (1913) A C 197.[5] Lastly in (1936) A C 266,[2] both the contractor's method and profit basis are referred to. On p. 274 Viscount Hailsham, Lord Chancellor points out that so far as the railways are concerned, the method adopted was to divide the undertaking into those portions which were regarded as directly productive of profit such as permanent way and those portions which were regarded as only indirectly productive such as stations and other hereditaments of that kind. Then the Lord Chancellor points out that in the later case, what he refers to as "contractor's basis" was applied. Next as regards directly productive portions, he points out on page 275 that :

The method of assessment of the rateable value which was in fact adopted was the method which

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3. (1899) 2 Q B 14 : 68 L J Q B 762 : 80 L T 667 : 63 J P 452 : 15 T L R 349, Liverpool Corporation v. Llanfyllin Assessment Committee.

4. (1912) 1 K B 270 : 81 L J K B 426 : 106 L T 205 : 76 J P 161 : 28 T L R 177 : 56 S J 187 : 10 L G R 165, Liverpool Corporation v. Chorley Assessment Committee.

5. (1913) 1913 A C 197 : 82 L J K B 555 : 108 L T 82 : 77 J P 185 : 11 L G R 182 : 57 S J 263 : 29 T L R 246, Liverpool Corporation v. Chorley Union Assessment Committee.

was commonly described as profit basis .... It is not known who first applied this system, but it certainly was in common use by the middle of last century, and it was the system invariably adopted from that time till the outbreak of the Great War.

Lands covered by culverts, embankments, etc., cannot be compared with other similar hereditaments because there are none such in the neighbourhood. As pointed out in (1893) A C 562[1] at p. 587 to which reference has been made already, it is not the property as it was or the property as it might become hereafter, but is the property as it is in its present state, that has to be considered in fixing the rateable value. Then as pointed out in (1899) 2 Q B 14[3] inasmuch as a rateable hereditament cannot be allowed to escape from being rated because no such comparison can be made, in such cases it has come to be a recognised position that the rent which a hypothetical tenant would give for the hereditament must be estimated in some other way. As pointed out in all these cases, where no profits are earned by the use of the hereditament, a rough way of arriving at the rateable value is to see what the site and the construction of the works cost, and take a percentage thereof as representing the rent which a tenant would give.

Mr. Venkatarama Sastri urges that these decisions deal with buildings and lands occupied by buildings and lands which are appurtenant to them. But even in the case of such buildings and site there was only one rule enacted in the Act of 1869, viz., that the gross or annual value, i. e., the annual rent which a tenant might be expected to pay for it, should be taken as the basis of assessment. And when determining the "gross value" in the cases of buildings belonging to such concerns it is pointed out that the rule of thumb as they call it of taking the capital value and then fixing a percentage thereon is not unwarranted. We may also point out that in the case that went upto the House of Lords in (1893) A C 562[1] some of the lands with which they were concerned consisted of outfall works, sewage works and appurtenances thereto and that on 34 acres of land there were no buildings. In (1912) 1 K B 270[4] the land consisted of 1165 acres of moorland and plantations. In these cases also the same rule was applied.

Therefore, if under the Valuation (Metropolis) Act resort to the method of capital value or the contractor's method as it is called is permissible in a case where there are no similar hereditaments with which to compare that which has to be taxed, then the same conclusion ought to follow in considering the construction of S. 82 (2) of our Act, which says that the annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let. It is no doubt true that this rule has been statutorily recognised in the case of railway and Government buildings and buildings of a class not ordinarily let and in these cases the statute provides that six per cent. of the capital value less certain deductions must be taken as the annual value. Even here it will be seen that the amount arrived at in the way indicated by the proviso is stated to be the annual value of the premises. This only means that in certain specified cases six per cent. of the capital value less certain deductions is the exclusive method of arriving at the annual value and it does not mean, as Mr. Venkatarama Sastri asks us to say, that in no other case the capital value method is to be resorted to. It would have been easy for the Legislature to say so if that is what it meant. In S. 82 (2) the language is general and approximates very nearly to the language used in the English Act of 1869. In the case of lands which cannot ordinarily be let, the Legislature does not evidently wish to confine the rating authority to the one method, namely of taking six per cent. of the capital value as the rental value, but it leaves it to the rating authority to find the rental value by any of the methods known to law and apply that test which is applicable to the facts of a particular case. The rating authority may take the capital value basis or it may take the profit basis or it may find the rental value by some other method. It is left free to adopt that method which is suitable to the facts of each case. We must take it that as business men, the members of the committee were satisfied that resort to the capital value method was the appropriate method in this case. We are therefore of opinion that the rating authority did not act ultra vires of its powers.

We find no substance in the argument that the Municipal Chairman abdicated his functions and that the tax was fixed by the valuation committee. It is urged on behalf of the respondent that originally it was the railway company that invited a resort to the committee procedure, but this cannot prevent the appellant company from urging the objection that if really the tax was levied not by the chairman but by someone else, the levy is illegal. But, in this case, we find that it was the chairman who levied the

tax ultimately. No doubt as directed by the Local Government and as requested by the railway company he convened a meeting and took the sense of the committee, but ultimately he adopted it as his own when issuing the demand notices evidenced by the covering letter EX. D-14. As the Railway Board has recognized in EX. VI (c), this committee has no legal existence. Resort to the committee procedure gives rise to arguments that the levy itself is illegal. The learned Advocate-General does not say that there is any foundation in the Act for resort to this procedure. Where the chairman differs and is in a minority, it might well be urged that the levy was made by the committee and not by the chairman. Seeing that it can only lead to complications, the Local Government might well withdraw EX. A-6 or put it on a statutory basis.

The next argument is that the vacant lands in question can only be assessed under S. 81 (3) and that the Local Government not having framed any rules, the railway company escapes altogether. We cannot accept the contention of the appellant that merely because the Local Government has not prescribed the manner in which the capital value should be determined, the Municipal Council is deprived of the power of levying the tax under S. 81 (3). There is, in this case, a notification under S. 81 (3) by the respondent council by which the council notified that the lands of the category falling under cl. (3) would be assessed at one per cent. of the capital value. The Local Government refused to frame rules for the vacant lands belonging to railways and they purport to confine the rules which they did prescribe to other vacant lands coming under cl. (3). We doubt very much whether the Local Government can restrict the rules which they frame in the manner in which they have done. It is open to them not to frame any rules relating to the manner in which the capital value of lands falling under S. 81 (3) should be determined; but once they prescribed the manner in which the capital value of the lands coming under cl. (3) should be determined, it is doubtful whether they have the power to restrict the application of those rules to vacant lands other than railway lands.

Even otherwise, the omission of the rule making authority to frame rules cannot take away the right of the Municipal Council to levy tax at the rate mentioned in the notification issued under cl. (3). If, for instance, the Local Government refrained from prescribing the manner in which the value of such lands should be determined, it cannot, we think, be said that the Municipal Council have no power at all to levy the tax at a percentage of the capital value merely because the method of determining the capital value has not been prescribed by the Local Government. If the Local Government does not prescribe it, then the municipal authority is free in our opinion to fix it in any manner it chooses. We have not been referred to any decision on this point except that of the Judicial Committee in (1927) A C 674,[6] but it is doubtful how far that decision applies to the circumstances of this case. We therefore do not propose to rely upon that decision. No other authority has been brought to our notice by either side. We think it is not correct to say that the omission by the Local Government to prescribe the manner in which the capital value is to be determined deprives the Municipal Council of the power of levying the tax on the capital value basis.

Lastly it was urged that the Municipal Council cannot seek to justify the levy under S. 81 (3) if really the levy was not justified under S. 82 (2). Our attention was called to the decisions in (1925) A C 458,[7] a decision under the Income-tax Act. We do not think it profitable to go into these cases because, in our opinion, the levy under S. 82 (2) is perfectly justified. But we may point out that there seems to be a vast difference between the provisions of the Income-tax Act, and the provisions of the Act under consideration. Here it is the levy of the property tax that is objected to. Even if resort to S. 81 (3) is necessary, it might well be said that the Municipal Council is not seeking to justify the levy of the tax under a different schedule or different category but that justification is sought by relying on another rule under the same class of property tax. In the Municipalities Act there are various categories of taxes: property tax, profession tax, tax on companies, tax on animals, etc., and they are set out in S. 78 (1). If a particular amount is levied from an individual as property tax and if his property is not taxable, then the Municipal Council cannot justify it on the ground that he is following a profession for which he would be liable to pay the same

6. (1927) 1927 A C 674 : 96 L J P C 88 : 1927 Ir R 285 : 137 L T 460 : 43 T L R 457, Wigg v. Attorney General for Irish Free State.
7. (1925) 1925 A C 458 : 94 L J K B 418 : 133 L T 5 : 9 Tax Cas 262 : 69 S J 410 : 41 T L R 323, Foulsham v. Pickles.

amount as and by way of profession tax. It looks to us that the decisions relied on by the learned advocate for the appellant would apply to such cases and not to a case like the present where the same amount of property tax is leviable under one rule or the other. Whether S. 81 (2) read with S. 82 (2) is adopted or whether S. 81 (3) is adopted, in either case it is property tax that is levied and we think, though we do not wish to express a final opinion on it, that resort to S. 81 (3) would be justified by way of supporting the levy that has been made in this case. In the view we take, we do not think it necessary to deal with the applicability of O. 2, R. 2 to the claim made in O. S. No. 61 of 1935. Both the appeals are therefore dismissed with costs.

C.R.K./G.N. *Appeals dismissed.*

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(28) A. I. R. 1941 Madras 650

VENKATARAMANA RAO J.

Madura Municipality through its Executive authority, Commissioner — *Appellant*

v.

K. Nataraja Pillai and another — *Respondents.*

Second Appeal No. 594 of 1937, Decided on 3rd March 1941, against decree of Dist. Court, Madura, in A. S. No. 63 of 1936.

(a) Civil P. C. (1908), S. 100 — Finding that erection of latrine is nuisance is one of fact.

A finding that the erection of a latrine is a nuisance to a party being one of fact cannot be challenged in second appeal. [P 650 C 2]

(b) Madras District Municipalities Act (5 of 1920), S. 145—Obligation imposed by S. 145 to provide public latrines does not empower Municipality to erect latrines in such way as to create nuisance.

The obligation imposed upon the Municipality by S. 145 to provide and maintain public latrines in convenient places does not empower them to erect latrines in such a way as to create a nuisance. The mere use of the word "shall" in S. 145 does not authorise the Municipality to commit nuisance : (1881) 16 Ch D 449, *Rel. on* ; (1886) 11 A C 45 and (1881) 6 A C 193, *Expl.*; (1863) 33 L J Ch 411, *Disting.*; 25 Mad 118, *Doubted.* [P 651 C 1]

(c) Interpretation of statutes—Intention of Legislature in particular Act is question of construction of Act.

What was the intention of the Legislature in any particular Act is a question of the construction of the Act : (1881) 6 A C 193, *Rel. on.* [P 651 C 1]

K. Rajah Ayyar and C. S. Rama Rao Sahib — for Appellant.

A. Ramaswami Ayyar and N. Sivaraj — for Respondents.

Judgment. — This second appeal arises out of a suit for an injunction to restrain the defendant Municipality from constructing a public latrine behind the plaintiff's fruit stall in Madura. Both the lower Courts have concurrently found that the erection of a latrine would constitute a nuisance to the plaintiff and held that the plaintiff was entitled to the relief claimed. Hence this appeal by the Municipality. The finding that the erection of a latrine is a nuisance to the plaintiff is a finding of fact and cannot, therefore, be challenged in second appeal. The contention of Mr. Rajah Iyer who appeared for the appellant is that under the District Municipalities Act the Municipality is empowered to construct public latrines in suitable places and S. 145 of that Act confers on them such a right and that no action can lie against them. The question is whether this contention is tenable. Section 145, District Municipalities Act, runs thus :

> The Council, shall, as far as the funds at its disposal may admit, provide and maintain in proper and convenient places a sufficient number of public latrines and shall cause the same to be daily cleansed and kept in proper order.

The principle that is adopted in construing statutes which empower public bodies to do works of public utility is thus laid down by James L. J. in (1881) 16 Ch D 449[1] at page 466 :

> Prima facie nobody is authorized to commit a nuisance, and nobody is to be held so authorized under an Act of Parliament unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance ..... If private rights are to be interfered with, they must be interfered with by express legislation.

The question in that case was whether the erection of a public urinal was a nuisance and whether it was open to the Court to restrain the Vestry of St. James, Westminster which was a body authorized under an Act of Parliament to provide and maintain urinals in places where they might deem such accommodation to be required, from erecting it. An injunction was granted in that case on the ground that the erection of the urinal would constitute a nuisance so grave and so serious that the neighbours who sought the relief were entitled to the injunction prayed for. Cotton L. J. discussed the question as to when a statute might be deemed to authorize a nuisance. He observed as follows :

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1. (1881) 16 Ch D 449: 50 L J Ch 81 : 44 L T 229: 29 W R 222, Vernon v. Vestroy of St. James, Westminster.

We must look to the whole of the section and see whether it justifies their erecting and maintaining a nuisance. It is impossible to say that an urinal or water closet must necessarily be a nuisance. If it could be made out that such an erection, wherever placed and however guarded, must of necessity be a nuisance, then it would be true that the Act of Parliament had authorized a nuisance, and the Court could not have interfered ; but common sense tells us that it cannot be said that no water closet or urinal can possibly be erected without being a nuisance. Therefore, the mere fact that an urinal is authorized to be erected does not necessarily or by necessary implication give Parliamentary power to do it if it is a nuisance. Power to erect these conveniences is no doubt given to them, but subject to this, that they must not exercise it in such a way as to create a nuisance, because the section contains nothing to exempt them from the general law which prevents any one from erecting or maintaining a nuisance.

The language of the section in that case was that :

It shall be lawful for every Vestry and District Board to provide and maintain urinals in situations where they deem such accommodation to be required.

Mr. Rajah Iyer contended that the language of that section was different from the language of S. 145, District Municipalities Act. But I do not think that by the mere use of the word "shall" it was intended that the Municipality was authorized to commit nuisance. It may be noticed that in (1886) 11 A C 45,[2] a case which I shall discuss at length later, the expression used in S. 82 of the Act, 1 Vict. c. cxix, was "it shall be lawful.' Their Lordships of the Privy Council in that case held that S. 82 authorized a nuisance having regard to the scope of the Act. Thus, from the mere use of the words "shall" and "it shall not be lawful", it does not necessarily follow that the statute intended in the one case to authorize a nuisance and in the other, not. What was the intention of the Legislature in any particular Act is a question of the construction of the Act as pointed out by Lord Blackburn in (1881) 6 A C 193[3] at p. 203. It cannot be contended as pointed out by Cotton L. J. that the erection of a urinal wherever placed must of necessity be a nuisance. The fact that an obligation was imposed upon the Municipality to provide and maintain public urinals in convenient places would not empower them to erect urinals in such a way as to create a nuisance. Mr. Rajah Iyer relied on a number of cases which do not lay down anything in conflict with this principle. One of the cases relied on by him was (1881) 6 A C 193[3]; and he laid stress on the observations of Lord Watson as to the distinction between permissive and imperative statutes. But the learned Lord himself explains when a statute can be deemed to authorize a nuisance. At p. 212 he remarks thus :

I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance.

It is not contended before me that the inevitable result of carrying out the provisions of S. 145 will be always the creation of a nuisance. Mr. Rajah Iyer also relied upon (1863) 33 L J Ch 411;[4] but that case is distinguishable, because the finding there was that from the evidence as it stood it did not appear to be certain or probable that the works intended by the defendants in that case would create in point of law a nuisance. Considerable reliance was placed by Mr. Rajah Iyer on 25 Mad 118[5] and particularly on certain observations of the learned Chief Justice in that case. The finding in that case was that no actionable nuisance had been proved. Moore J. rested his decision solely on this ground and remarked thus :

Taking the evidence therefore as a whole, it must, in my opinion, be held that no nuisance whatever has been caused to the plaintiff by the burial ground. There is some evidence that the burning ground is a source of nuisance to a certain extent to anyone occupying the plaintiff's premises .... The plaintiff in order to be entitled to either an injunction or damages must show that the injury suffered by him is not merely nominal but real and substantial. This he has in my opinion failed to prove.

The learned Chief Justice also found that no actionable nuisance had been proved but he went on to observe that even if it were proved, the City Municipal Act afforded the defendant Municipality a statutory immunity from liability. In arriving at this conclusion he relied upon the language of S. 392 of the Act which empowered the Munici-

2. (1886) 11 A C 45 : 55 L J Ch 354 : 54 L T 250 : 34 W R 657 : 50 J P 388, L. B. & S. C. Ry. v. Truman.
3. (1881) 6 A C 198: 50 L J Q B 353 : 44 L T 653: 29 W R 617 : 45 J P 664, Metropolitan Asylum District v. Hill.
4. (1863) 33 L J Ch 411 : 3 D. J. & S. 493 : 9 Jur (NS) 953: 8 L T (N S) 558 : 11 W R 739 : 142 R R 139, Biddulph v. St. George's Vestry.
5. ('02) 25 Mad 118, Muhammed Mohidin Sait v. Municipal Commissioners for the City of Madras.

pality to acquire lands for burial and burning grounds and on S. 458 of the Act which gave a right of action to any person aggrieved by the failure of the Commissioners to perform a duty imposed upon them by the Act. He also relied on two other sections of the Act which gave compensation for the land acquired and also for the injury done in pursuance of the power exercised under the Act. Distinguishing the case in (1881) 6 A C 193,[3] the learned Chief Justice remarked thus :

The present case may also be distinguished on the ground that the Legislature in the present case clearly *contemplated and authorized some interference with private rights of property since S. 392 empowers the Commissioners to acquire land compulsorily for the purpose of burning grounds.* In the hospital case the statute gave no power to acquire land compulsorily.

(The italics are mine.) In some cases the power to acquire land was taken as an indication that the Legislature authorized interference with private rights. No such power of acquisition is given under the District Municipalities Act for the purpose of erecting urinals. The learned Chief Justice was of the opinion that the case before him was governed by (1886) 11 A C 45.[2] But on facts that case was distinguishable from the case in 25 Mad 118[5] and the observations of the learned Chief Justice which seem to indicate that it is not, if I may say so with respect, do not appear to be correct. In (1886) 11 A C 45[2] the railway company was authorized to acquire 50 acres of land for the purpose of erecting cattle sheds. Section 82 of the Act authorized them to purchase lands in such places as shall be deemed eligible and that section was construed by the Earl of Selborne thus :

Although no exact site or local limits may be prescribed by the terms of the authority for the acquisition of that land, yet being directly subsidiary to the general traffic of the line, it follows from the very nature of the purposes authorized that *it must be land contiguous to the railway or some of its stations, the local situation of the whole line of railway being within certain limits of deviation defined by the Act.*

(The italics are mine.) Having given this interpretation viz., that the acquisition contemplated was within a limited area, the learned Lord held that the statute authorized the nuisance and he summed up his conclusion thus :

When acquired it must become part of the railway and its appurtenances in exactly the same way as if similar loading and unloading places had been made upon lands taken when the railway was first made, whether by compulsion or by agreement. It would be (as it seems to me) inconsistent and unreasonable to suppose that the Legislature intended land so acquired, for such purpose to be separated, as to the legal conditions of its tenure and use for those purposes, from the rest of the undertaking with which it would have become incorporated, and as to which the rule, that what is authorized is not actionable, is acknowledged to prevail.

Lord Halsbury also expressed himself to a similar effect :

It seems hardly to admit of argument that the statute intended such additional accommodation, when provided, to form part of and to be used with the railway, and, if so, *to share the immunity which the railway, in its original construction, would have enjoyed from actions levelled at its use.* It would be strange, indeed, if the Legislature could be supposed to have authorized the railway to commit a nuisance upto a certain point to have provided machinery for extending the railway and its use beyond that point, and yet to have allowed the further user to be open to an action to restrain its use.

(The italics are mine.) Thus their Lordships having regard to the scope of the Act thought that the contemplated acquisition must share the same immunity which frees a railway company from liability for any commission of nuisance in the use of the functions with which the statute has entrusted them. The following passage from Lord Halsbury's judgment makes this clear:

It cannot now be doubted that a railway company constituted for the purpose of carrying passengers or goods or cattle are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law.

It is therefore doubtful whether the view taken by the learned Chief Justice in 25 Mad 118[5] that the City Municipal Act authorized the nuisance can be justified on the strength of the decision in (1886) 11 A C 45.[2] However, the observations are obiter. It is unnecessary for me to refer to the other cases cited by Mr. Rajah Iyer as they do not carry the matter further. The view of the learned District Judge is correct and the second appeal accordingly fails and is dismissed with costs. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 652

PANDRANG ROW AND KING JJ.

Chidambaram Pandaram — Appellant

v.

Lakshminarayana Chettiar — Respondent.

Appeal No. 540 of 1939, Decided on 26th March 1941, against order of Sub-Judge, Coimbatore, D/- 14th November 1939.

Civil P. C. (1908), O. 21, R. 90—Application under O. 21, R. 90—Court can demand security only before admitting application and not afterwards — Order to issue notice to other side amounts to admission of application more so where order is made after hearing other side.

Under O. 21, R. 90, the Court can demand security only before admitting the application and not afterwards. The issue of a notice to the other side is a step showing that the petition has been admitted and certainly the actual hearing of the other side before orders are passed only makes the matter more certain. Consequently where notice is ordered in both the petitions, i. e., the petition to set aside the sale and also the petition to dispense with security after hearing the advocate on the other side, both the petitions must be taken to have been admitted and therefore it is not open to the Court to demand security thereafter.

[P 653 C 1]

A. C. Sampath Ayyangar — for Appellant.

C. D. Venkataramanan — for Respondent.

Pandrang Row J. — This is an appeal from the order of Subordinate Judge of Coimbatore dismissing an application to set aside a sale under O. 21, R. 90, Civil P. C., on the ground that the security required to be furnished by his order made a few days earlier had not been furnished. The only ground taken in this appeal is that the order of the Subordinate Judge requiring security to be furnished is itself without jurisdiction and therefore, the order dismissing the petition to set aside the sale on the ground that the security has not been furnished is wrong.

There is no doubt that in this case the learned Subordinate Judge did not bear in mind that under O. 21, R. 90, the Court could demand security only before admitting the application and not afterwards. In this case it is clear from the endorsements made on the petitions that notice was ordered in both the petitions, i. e., the petition to set aside the sale and also the petition to dispense with security and the advocate on the other side was actually heard before orders were passed in both the petitions. It cannot, therefore, be said that either of the petitions had not been admitted. Usually and rightly the issue of a notice to the other side is regarded as a step showing that the petition has been admitted and certainly the actual hearing of the other side before orders are passed is only making the matter more certain. It is quite possible of course that the lower Court did not intend really to admit the petitions, but if in law the procedure adopted by it has necessarily the effect of having brought about the admission of the petitions, it is not possible for us now to regard them as not having passed the admission stage when the order to give security was made. We must, therefore, uphold the appellant's contention that the order requiring security was one passed without jurisdiction and that accordingly the order dismissing the application on the ground that security had not been furnished is wrong and must be set aside. The appeal is accordingly allowed and the petition remanded to the Court below for being heard according to law. The appellant is entitled to his costs of this appeal from the respondents.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 653

ABDUR RAHMAN J.

Veerabhadra Pillai — Petitioner

v.

O. A. Narayanaswami Ayyar, Receiver and others — Respondents.

Civil Revn. Petn. No. 182 of 1939, Decided on 25th October 1940, to revise order of Dist. Court, West Tanjore, D/- 9th December 1938.

(a) Civil P. C. (1908), O. 21, R. 90 and S. 115 — Application under O. 21, R. 90 refused on ground that applicant had no locus standi to apply — Revision lies.

The refusal of an application under O. 21, R. 90 by the Court on the ground that the applicant has no locus standi to make the application amounts to a non-exercise of its jurisdiction and therefore must be held to be revisable since the decision is not a conclusion of law or fact but one in which the question of jurisdiction is involved: ('21) 8 AIR 1921 Mad 157 (FB), *Foll.* [P 653 C 2; P 654 C 1]

(b) Civil P. C. (1908), O. 21, R. 90 — Sale of melavaram interest alone — Kudivaramdar cannot apply under O. 21, R. 90.

In the case of a sale of melavaram interest alone the kudivarmdar has no locus standi to apply under O. 21, R. 90 inasmuch as his interests cannot be said to have been affected by the sale of the melavaram interest: ('28) 15 AIR 1928 Mad 1191, *Rel. on.* [P 654 C 1]

K. R. Ramamurthy Ayyar and T. R. Sundaram — for Petitioner.

K. V. Srinivasa Ayyar and T. K. Subramanian Pillai — for Respondents.

ORDER. — A preliminary objection has been raised that this revision is not competent. The petitioner made an application under O. 21, R. 90, Civil P. C. This has been refused by the lower Court on the ground that he has no locus standi to make the application. The order will show that the Court has not passed any order setting aside or refusing to set aside the sale and it is these orders alone which are appealable under O. 43, R. 1, Civil Pro. Code. If the lower Court's action, as Oldfield J. said in 44 Mad

554[1] consisted in a refusal to deal with the judgment-debtor's petition, a non-exercise of their jurisdiction must be held to be revisable since the decision was not a conclusion of law or fact but one in which the question of jurisdiction was involved. I would therefore overrule the preliminary objection.

The lower Court will report whether the entire property was sold in these proceedings or whether the melwaram interest alone was sold. The papers relating to proclamation and the order passed for sale may be sent along with the report. Time, one month.

Final order.—The only question to decide in this revision is whether the petitioner had a locus standi to present an application under O. 21, R. 90, Civil P. C. There was a little doubt at one time as to what was actually sold in the execution of the decree and I called for a report on that point. The learned District Judge has reported that the melwaram interest alone was sold and the proclamation of sale has also been sent which shows the same. There is no doubt on that point now and this is conceded by the petitioner's learned counsel. The only question then is whether the petitioner who was a kudivaramdar could make an application objecting to the sale under O. 21, R. 90, Civil P. C. If his interests are those of a kudivaramdar, they cannot be, within the language of O. 21, R. 90, Civil P. C., said to have been in any way affected by the sale of the melwaram interest. There is an observation in 51 Mad 770[2] at p. 774 which confirms me in my opinion. The revision petition therefore fails and is dismissed with costs which will be shared by the decree-holder and the auction purchaser.

C.R.K./G.N. *Petition dismissed.*

1. ('21) 8 A I R 1921 Mad 157 : 63 I C 937 : 44 Mad 554 : 40 M L J 497 (F B), Sundaram v. Mamsa Mavuthar.
2. ('28) 15 A I R 1928 Mad 1191 : 109 I C 168 : 51 Mad 770 : 54 M L J 445, Adenna v. Chinna Ramayya.

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* (28) A. I. R. 1941 Madras 654

VENKATARAMANA RAO J.

In the matter of Travancore National and Quilon Bank Ltd., (in Liquidation). I. S. and C. Machado, firm—Applicants

v.

Cyril Gill, Stanley Goodwin and Sydney Albert Bindon, Official Liquidators and another — Respondents.

Application No. 711 of 1940 (in O. P. No. 158 of 1938), Decided on 23rd September 1940.

***Set off—Mutuality of debts, creditors or dealings is essential — Joint debt and several debt cannot be set off against each other—But set off can be allowed where debt is joint and several — *A* and *B* partners in firm — Firm incurring debt from Bank—Suit by Bank against *A* and *B* — *A* can set off against Bank's claim amount due to him from Bank inasmuch as liability of partners is joint and several.**

Before a set off can be claimed there must be a mutuality of debts or creditors or dealings, i. e., the set off is available only between the same parties and in the same right as the claim. On this principle a joint debt and a several debt cannot be set off against each other. But where a debt is joint and several a set off can be allowed. The members of a partnership incurring a debt are jointly and severally liable. But so far as amounts due to members of a firm are concerned, the claim will be a joint claim and all the members must sue jointly. Consequently, if *A* and *B*, members of a firm, sue *C*, *C* cannot set off a debt due by *A* alone, whereas if *C* sues *A* and *B*, *A* can set off a debt due by *C*. Therefore where the amount due to a Bank by *B* is an amount due by a firm consisting of *A* and *B*, *A* can set off the debt due to him by the Bank against a claim by the Bank against the firm of *A* and *B* on the principle that there was a several demand on the one side and on the other: (1787) 2 T R 32; (1858) 5 C B (N S) 526; (1805) 8 R R 75; (1875) 20 Eq 515 and (1872) L R 7 C P 372, *Rel. on*; ('21) 8 A I R 1921 Bom 66, *Dissent.*; ('40) 27 A I R 1940 Mad 266, *Approved.* [P 655 C 2; P 657 C 1, 2]

V. Radhakrishnayya and C. M. J. Earnest — for Applicants.

C. Krishnaswami Iyer — for Respondents.

Order. — This application raises a question of set off of some importance. There is a firm of I. S. and C. Machado carrying on business in Tuticorin. The said firm consists of three partners, who are brothers. They had dealings with the Travancore National and Quilon Bank and on 20th June 1938, when the Bank suspended payment, there was due and owing by the Bank to the firm of I. S. and C. Machado a sum of Rs. 8636-3-6. There was another firm called Machado cloth shop, which was started in or about 8th March 1933 and dissolved on 31st May 1938. That firm was started by I. S. and C. Machado in partnership with one Germain Machado, who was the cousin of the partners of the firm of I. S. and C. Machado. So this firm of Machado cloth shop consisted of two partners (1) the firm of I. S. and C. Machado and (2) Germain Machado. On 20th June 1938, the Machado cloth shop was due and owing to the Travancore National and Quilon Bank in the sum of Rs. 10,179-6-2 in respect of advances made to them, secured by a promissory note executed by the partners of the cloth shop. From the deed of dissolution of the Machado cloth shop, it will be found that Germain Machado ceased to have any interest in that concern from

31st May 1938 and that concern is now solely run by the firm of I. S. and C. Machado. On a demand made by the Bank against the Machado cloth shop, the firm of I. S. and C. Machado claimed to set off the amount due to them by the Bank, i. e., the sum of Rs. 8636-3-6, against the amount due by the Machado cloth shop, namely, Rupees 10,179-6-2. The question is whether the set off is permissible.

The amount due by the Bank to the firm of I. S. and C. Machado, which consisted of three partners, was an amount due in respect of a joint claim and we may treat that firm as entity "A". The amount due to the Bank by the Machado cloth shop is an amount due by a firm consisting of entity "A" and another "B." The question is, to a claim by the Bank against A and B, can A set off the debt to A by the Bank? If this case were governed by the English law, there can be no doubt that the set off cannot be allowed : *vide* (1925) 1 Ch 825.[1] The question is whether the same principle would be applicable in Indian law. I must state at the outset that a set off in similar circumstances was disallowed by the Bombay High Court in a case reported in 45 Bom 1219[2] where Macleod C. J., observed thus :

> It is undisputed that a joint debt cannot be set off against a separate debt either under the English Bankruptcy Act or under the Indian Insolvency Acts.

The question again is, is this view sound? I shall first set out what the English law is before I deal with the Indian law on the point. The provisions governing set off are S. 262, English Companies Act, and S. 38, English Bankruptcy Act. Section 262 runs thus :

> In the winding up of an insolvent company registered in England the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of Bankruptcy in England with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

(Section 229, Indian Companies Act, is word for word the same.) Section 38, English Bankruptcy Act, runs thus :

> Where there have been mutual credits, mutual debts or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him.

(Section 47, Presidency Towns Insolvency Act, and S. 46, Provincial Insolvency Act, are almost identical in terms.) It is thus clear that before a set off can be claimed there must be a mutuality of debts or creditors or dealings, i. e., the set off is available only between the same parties and in the same right as the claim. Applying this principle a joint debt is not allowed to be set off against a separate debt nor a separate debt, against a joint debt and the principle is thus stated in Halsbury's Laws of England :

> A joint debt and a several debt cannot be set off against each other. Thus in an action for a debt due from the defendant to the plaintiff separately the defendant cannot be set off a debt due from the plaintiff jointly with others who are not co-plaintiffs in the action; but he may set off a debt due from the plaintiff severally as well as jointly with others. (Volume 29, page 490).

To put the matter concretely, (1) C has a claim against A and B jointly. A cannot set off a debt due to him by C. (2) A has a claim against C. C cannot set off a debt due by A and B jointly. But where the debt due by A and B is joint and several, then a set off can be allowed, i.e., A sues C. C can set off a debt due to him by A and B jointly and severally. Again, where C sues A and B on a joint and several debt, A can set off a debt to him by C. This is on the principle that where A and B execute a joint and several bond, the debt due thereunder must be treated as the several debt of both. (1787) 2 T R 32[3] and (1858) 5 C B (NS) 526,[4] bring out this principle very clearly. In (1787) 2 T R 32[3] two persons agreed to do a certain work within a specified time and entered into a joint and several bond with the defendant for due performance of the work or payment of a weekly sum in case the work was not finished, it being understood that such weekly payment was not by way

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1. (1925) 1 Ch 825 : 95 L J Ch 93 : (1926) B & C R 39 : 134 L T 66 : 69 S J 758 : 41 T L R 657, In re Pennington Owen.
2. ('21) 8 A I R 1921 Bom 66 : 63 I C 906 : 45 Bom 1219 : 23 Bom L R 537, Trimbak Gangadhar v. Ramachandra Trimbak.
3. (1787) 2 T R 32 : 1 R R 414, Fletcher v. Dyche.
4. (1858) 5 C B (NS) 526 : 28 L J C P 3 : 5 Jur (NS) 112 : 116 R R 753, Owen v. Wilkinson.

of penalty but in the nature of liquidated damages. In an action for work and labour brought by the person who executed the bond, the question was whether it would be open to the defendant to set off the amount of damages under the bond. The contention that was put forward was that there was no mutuality. But this contention was negatived and the set off was allowed. Ashhurst J. in the course of the judgment observes thus:

> This is a case of stipulated damages and it is not to be considered as a penalty. If so, and the parties have entered into a joint and several bond, it becomes the separate debt of both, and therefore may be set off against either. Then it has been objected that there is no mutuality in the debts, because, first, it is a joint debt . . . . . As to the first, it is sufficient to say that this is a separate as well as a joint debt and therefore may be set off.

In (1858) 5 C B (NS) 526,[4] this case was followed and it was held that a joint and several promissory note of A and three others may be set off against a claim of A in an action by him against the payee upon a money demand. In that case Owen sued Wilkinson for money found due upon an account stated. The defendant sought to set off the amount in respect of a promissory note executed by Owen with three others. It was contended that the note could not be made the subject of a set off on the ground that a joint debt could not be set off against a separate debt. It was found that the note was a joint and several note. Following the principle of the decision in (1787) 2 T R 32,[3] the set off was allowed. In the course of the argument, Byles J. referred to the observation of Parke B. in (1844) 13 M & W 494[5] in regard to the distinction between a joint and several contract. As the observation is very instructive, I shall quote it :

> The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally and he does not plead in abatement, he is liable to pay the entire debt. But he is not severally liable in the same sense as he is on a joint and several bond which instrument though on one piece of parchment or paper in effect comprises the joint bond of all and the several bonds of each of the obligors and gives different remedies to the obligee.

These principles were applied to cases of insolvency. In (1805) 8 R R 75,[6] the question arose thus. The firm of Castell and Powell owed Stephens a sum of £ 3320-11-11, Stephens and her brother owed Castell and Powell on a joint and several note a sum of £. 1000. The question was, whether a set off could be allowed. Eldon L. C. held that a set off should be allowed. In (1875) 20 Eq 515,[7] Jessel M. R. dealing with this case observes thus at p. 521 : "The right of set off was indisputable. There was a several demand on the one side and on the other." But in the case which Jessel M. R. was deciding, a set off was disallowed. There, P a solicitor was indebted to K and R, trustees of a marriage settlement. But, one of the trustees was indebted to P in his individual account. It was held that a set off could not be allowed. Jessel M. R. observed thus :

> I do not know of any right to set off as against the joint demand the several debt of one of the joint creditors. There is no such set off either in law or in equity.

The principle of these cases was also applied to cases where the bonds were executed by two persons one of whom was the principal and the other the surety. In (1872) L R 7 C P 372,[8] Lewis and Rowe owed Bechervise a sum of money on a joint and several promissory note. Lewis was surety for Rowe. Bechervise owed to Rowe on individual account a certain sum of money. Lewis sought to set off the amount due by Bechervise to Rowe against the debt due on the note. The set off was allowed. Thus it is clear that even under the English law where a debt is joint and several a set off can be allowed. Now coming to the case of partnership, there can be no doubt that in English law the liability of partners is joint and not joint and several. Lindley in his book on Partnership, dealing with cases of set off, formulates the rule thus :

> As a rule a debt owing by one of the members of a firm cannot be set off at law against a debt owing to him and his co-partners; nor can a debt owing to one of the members of a firm be set off against a debt owing by him and his co-partners. (p. 366, edn. 10.)

Then he says that there are exceptions to this rule and one such exception he states thus :

> If a joint and several promissory note is made by partners and one of them sues the payee for some separate demand, the defendant can set off the note; for, ex hypothesi, it is the several note of the partner suing him. (p. 367.)

Let us take the Indian law. As I have already said, the sections of the Indian Companies Act and Insolvency Acts are almost similar in terms to the corresponding

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5. (1844) 13 M & W 494 : 14 L J Ex 29 : 2 Dowl & L 382 : 8 Jur (NS) 1127 : 67 R R 694, King v. Hoare.
6. (1805) 8 R R 75 : 11 Ves 24, Ex parte Stephens.
7. (1875) 20 Eq 515 : 44 L J Ch 618, Middleton v. Pollock.
8. (1872) L R 7 C P 372 : 41 L J C P 161 : 26 L T 848 : 20 W R 726, Bechervise v. Lewis.

sections in English law. Prima facie the same principles ought to govern in the Indian law. But there is a difference in Indian law in regard to the liability of joint promisors, because every case of a joint promise is treated as a joint and several promise. Section 43, Contract Act, runs thus :

> When two or more persons make a joint promise the promisee may in the absence of express agreement to the contrary compel any (one or more) of such joint promisors to perform the whole of the promise.

Thus the liability is joint and several and if a debt is incurred by the members of a partnership they will be jointly and severally liable : *vide* S. 25, Partnership Act. This is a distinct departure from the English law, though it must be observed that so far as amounts due to members of a firm are concerned, the claim will be a joint claim both in Indian and English law, because S. 45, Indian Contract Act, says :

> When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly.

And as observed by Sankaran Nair J. in 36 Mad 544,[9] the section distinctly states that it is a joint claim and they must sue jointly. So that the position is this: if A and B members of a firm sue C, C cannot set off a debt due by A alone, whereas if C sues A and B, A can set off a debt due by C. If the liability of a partner is joint and several, the principle of the English law must also be applied here and so far as the present claim to a set off is concerned, it must be allowed, because the liability of I. S. and C. Machado and Germain Machado is joint and several, and in a claim to enforce the joint and several liability, it is open to I. S. and C. Machado to set off the debt due to them on the principle stated by Jessel, M. R., "There was a several demand on the one side and on the other." Now coming to the decision in 45 Bom 1219,[2] the learned Chief Justice, though he refers to the provision of the Contract Act, does not advert to the principle underlying the nature of a joint and several liability which has been recognised in English cases and with due respect I am not able to follow it. I may also state that my learned brother, Gentle J. in 1939 M W N 1231,[10] has also dissented from the view taken by Macleod C. J.

Reliance was placed on O. 8, R. 6, illus. (f) and (g), Civil P. C. This rule does not illustrate a different principle. What the rule says is that the parties must fill the same character, which is one of the tests of mutuality. Illustration (f) is: "A and B sue C for Rs. 1000. C cannot set off a debt due to him by A alone." This illustrates the rule laid down in (1875) 20 Eq 515,[7] namely, that a separate debt cannot be set off against a joint demand. Illustration (g) says : "A sues B and C for Rs. 1000. C cannot set off a debt due to him alone by A." If in this case the debt of B and C is a joint one and not a joint and several liability, the rule may be applicable. But if the liability of B and C is joint and several, it may be that illus. (g) will not be applicable to such cases. But I do not propose to go into that question as it is not necessary for deciding this application. Though in a suit it may be that illus. (g) is applicable the same rule will not be applicable when the question arises in insolvency. The reason is, as observed by Parke B. in (1843) 12 M & W 191,[11] that the rule of set off in bankruptcy does not appear to rest on the same principle, as the right of set off between solvent parties, because the principle is wider. In the result, I allow the application and direct the Official Liquidators to give effect to the set off claimed. I allow Rs. 100 costs for the petitioner and Rs. 100 for the Official Liquidators.

C.R.K./G.N. *Application allowed.*

9. ('13) 36 Mad 544 : 19 I C 12 : 24 M L J 333 : 1913 M W N 328 : 13 M L T 268, Annapuranamma v. Akkayya.

10. ('40) 27 A I R 1940 Mad 266 : 1939 M W N 1231, Sundaravaradan v. Narasimhachari.

11. (1843) 12 M & W 191 : 13 L J Ex 209 : 67 R R 298, Forester v. Wilson.

(28) A. I. R. 1941 Madras 657

HORWILL J.

Pudikutty Unneeri — Appellant

v.

Municipal Council, Calicut — Respondent.

Second Appeal No. 163 of 1939, Decided on 13th December 1940, against decree of Dist. Court, South Malabar, in A. S. No. 4 of 1937.

(a) Madras District Municipalities Act (5 of 1920), Ss. 167 and 183—Pial forms part of building — Construction thereof on street alignment amounts to infringement of S. 167—S. 183 does not relate to pials but refers to verandahs of nature of balconies which project over street.

A pial forms part of a building and therefore the construction thereof on the street alignment in-

fringes S. 167. Section 183 does not relate to pials but refers to verandahs of the nature of balconies which project over the street. S. 183, consequently, cannot apply to a pial which does not overhang a street : ('15) 2 A I R 1915 Mad 873, *Disting.* [P 658 C 2]

(b) Madras District Municipalities Act (5 of 1920), S. 168 — Applicability — Person reconstructing house and keeping it outside street alignment in pursuance of municipal order — S. 168 applies.

Section 168 does apply to a person who is reconstructing his house and who, because of an order of the Municipality keeps his house out of the street alignment. Such a person is entitled to compensation under S. 168. [P 658 C 2]

C. K. Viswanatha Ayyar — for Appellant.

K. Kuttikrishna Menon — for Respondent.

Judgment. — The appellant had an old house occupying the site ABDC in the plan filed by him. That house fell into a state of disrepair and the Commissioner of the Calicut Municipality ordered its demolition. The appellant wished to reconstruct the house and he submitted a plan proposing to build the house on E, F, D, G. That plan was approved and a licence (Ex. D) was issued in which a note was added: "the street alignment of six feet — Mooriat Road and the Coast Road on the west should be strictly observed." This note was added to remind the appellant of the provisions of S. 167, District Municipalities Act, to the effect that no person should construct any portion of any building within a street alignment, as defined under S. 166. The findings of the Court below are that after the building was constructed in accordance with this plan, the appellant added a pial on the remaining area of his site, i.e., the land lying between GEFD and ABDC. When the Municipality discovered this construction, they ordered him to demolish it and threatened him that if he did not do so they would demolish it themselves and charge him with the cost. The plaintiff thereupon brought the present suit for a permanent injunction to restrain the defendant Calicut Municipality from demolishing this pial. The suit was dismissed. The appellant preferred an appeal to the District Court which was also dismissed. Hence this second appeal by the plaintiff.

There is no doubt in my mind that a pial does form part of a building and that therefore the appellant committed a breach of the licence and also failed to comply with the provisions of S. 167. The learned advocate for the appellant argues that S. 183 deals with the grant of licenses for verandahs and not S. 167; but the verandahs referred to in S. 183 are of the nature of balconies, which project over a street. That section does not relate to pials, and the appellant's pial does not overhang the street. It is constructed on the plaintiff's own property. 38 Mad 456[1] upon which reliance has been placed by the appellant, merely says that where a person holding land has encroached upon the street and has had possession of it for over the statutory period he acquired a right to the encroached area by prescription; so that the land becomes his, and that he can therefore do what he likes with the land. I do not see how that decision helps the appellant in any way.

The appellant next contends that he is entitled to compensation under S. 168. Section 168 does apply to a person who is reconstructing his house and who, because of an order of the Municipality, has to keep his house out of the street alignment. Such a person becomes entitled under this section to be compensated for his compliance with the Municipality's order. Unfortunately for the appellant however, the plan submitted by him and his application for a licence do not show that he restricted his building on account of some order of the Municipality; but it is probably true, as the appellant states, that it was because the Municipal surveyor told him that he must build within the restricted area so as to allow a six feet margin from the street boundary that he submitted the plan he did. This point was not however raised in either of the Courts below — nor is it to be found in the grounds of appeal. In the absence of pleadings and evidence, it cannot be held that the plaintiff is entitled to compensation. The appellant cannot therefore be given any remedy in this suit; but the Municipality should, in my opinion, have given him compensation, not for demolishing his pial, but for having to build his house on the restricted area. The appeal is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

1. ('15) 2 AIR 1915 Mad 873 : 20 I C 956: 38 Mad 456: 25 M L J 297, Municipal Council, Srirangam v. Subba Pandithar.

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(28) A. I. R. 1941 Madras 658

HORWILL J.

In re Subbaraya Ayyar and others — *Appellants.*

Criminal Appeals Nos. 762 and 763 of 1940, Decided on 23rd January 1941, against order of Court of Session, Trichinopoly Division, D/- 12th September 1940.

(a) Evidence Act (1872), S. 27—Accused confessing to be connected with gang in particular theft—Stolen articles of clothing recovered from accused in consequence of confession—Confession is admissible under S. 27.

A confession by an accused proving that he was connected with a gang in a particular theft and resulting in certain articles of clothing which were the subject of theft being recovered from him is admissible under S. 27. [P 659 C 2]

(b) Criminal trial — Jury — Misdirection — Theft—Stolen property recovered from accused —Theft occuring fortnight before—Judge pointing to jury that recovery of property indicated accused's participation in theft — Failure to point out that accused might be receiver of stolen property held amounted to misdirection.

In a jury trial with regard to a theft which had taken place about a fortnight or so before the recovery of stolen property from the accused the Judge pointed out to the jury that the recovery of the stolen property indicated that the accused had taken part in the theft :

***Held* that Judge's failure to indicate to the jury the alternative that the accused might have been a receiver of stolen property amounted to a misdirection though in view of the accused's own confession the misdirection was not a serious one.** [P 659 C 2]

(c) Criminal P. C. (1898), S. 297—Numerous persons tried by jury for the same offence—Judge should conclude charge to jury by summarising evidence against each accused — Failure to do so renders charge defective.

In the case of a jury trial of a number of persons for the same offence the Judge should conclude his charge with a summary of evidence against each accused so that the jury should be quite clear in their minds what evidence there is against each of them, although there is no fixed rule that the Judge should summarise separately the evidence against each accused. Failure to do so renders the charge defective. [P 660 C 1]

(d) Criminal P. C. (1898), S. 297 — Jury trial —Numerous accused tried for same offence—Omission to marshal evidence against each accused—Fresh trial should ordinarily be ordered —Evidence against accused very slight— Fresh trial is not necessary.

Where numerous persons are tried together for the same offence by a jury and the Judge omits to marshal evidence against each accused a fresh trial should ordinarily be ordered but it is not necessary to do so where the evidence against the accused is very slight. [P 660 C 1]

V. V. Radhakrishnan and G. Gopalaswami — for Appellants.

K. Venkataraghavachari for Public Prosecutor —for the Crown.

Judgment.—Fourteen men were charged by the Sessions Judge of Trichinopoly with being members of a gang associated for the purpose of habitually committing theft or robbery, an offence punishable under S. 401, Penal Code. Of these fourteen accused, four have been acquitted. The remaining accused were sentenced each to two year's rigorous imprisonment. Of these ten accused convicted, five are here appealing. They are accused 3, 7, 8, 12 and 13.

Most of the accused are Ambalagars, a community connected with the Kallars and Maravars. Accused 1 to 3 are Pallas, accused 9, who has been acquitted, is a goldsmith. Accused 8 is a Brahmin. The main argument with regard to accused 8 is that there is very little evidence of association with the gang apart from the evidence of P. W. 1, the approver. The reason for this seems to be this, that this accused contributed more towards the organization of the gang than to the execution of the individual acts of theft or robbery. P. W. 1 says that this accused did not actually take part in any of the thefts or robberies. However, there is a not inconsiderable body of other evidence against this accused. He made a confession proving that he was connected with this gang in a particular theft and certain articles of clothing were recovered from him in consequence of this confession. It has been argued that this confession is not admissible ; but as it led to the discovery of articles which were the subject of theft, it is clearly admissible under S. 27, Evidence Act. Two other witnesses, P. Ws. 3 and 5, have spoken to his association with other members of the gang and P. Ws. 11, 12 and 28 have also spoken against him. As a Brahmin and a Mirasdar, his habitual association with persons of evil repute is itself a matter of suspicion, and he has given no satisfactory explanation of his association with such persons. In fact he denies it. Although the learned Judge did not marshal the evidence against this accused, it is not likely that the jury overlooked the particulars of evidence against this accused. A slight misdirection was given to the jury as far as this accused is concerned with regard to a theft which had taken place about a fortnight or so before the recovery of property from him, in which the learned Judge said that this recovery indicated that this accused had taken part in the theft. The learned Judge did not indicate the alternative that the accused might have been a receiver of stolen property; but, in view of the accused's own confession, I do not think that this misdirection is a serious one. I agree that the learned Judge should have concluded his charge with a summary of the evidence against each accused, so that the jury should be quite clear in their minds what evidence there was against each of them. A considerable body of evidence was let in and there was a danger that the jury should decide by general impressions rather than by a

memory of the actual facts proved in the evidence. However, as far as this particular accused is concerned, there is no reason to think that even if the charge had not been subject to this defect the jury would have acquitted him.

Accused 3, 7, 12 and 13 made no confessions of their guilt as so many others of the accused did, nor was any property recovered from their possession. The evidence of P. W. 1 was corroborated, therefore, only by the evidence of certain witnesses who speak to these persons associating at shandis or toddy shops. In the case of accused 3 four persons have spoken to his association with other members of the gang on various occasions, three persons have spoken to the association of accused 12 and two witnesses each to the presence of accused 7 and 13 in assemblies of members of the gang. There is no fixed rule that a Judge should summarise separately the evidence against each accused and the learned Sessions Judge here has analysed the evidence of each witness fairly; but clearly he should have done so. It is difficult to know what effect such a marshalling of evidence would have had on the minds of the jury; but if it had been pointed out how weak the evidence was against accused 7, 12 and 13 they might well have been found to be not guilty. The evidence of the two witnesses who speak against accused 7 and 13 is rather vague. The evidence agaist accused 12 is the same as that against accused 7 and 13 except for the addition of the evidence of P. W. 4 which the learned Judge told the jury was unworthy of acceptance. Ordinarily, if an omission of this sort takes place, one would remit the case for fresh trial; but as the evidence against these three accused is so slight, I do not think it is in the interests of justice to subject them to a fresh trial. I therefore allow the appeals of accused 7, 12 and 13, set aside their convictions and cancel their bail bonds. The convictions and sentences of the other accused are affirmed and their appeals dismissed.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 660

PANDRANG ROW AND SOMAYYA JJ.

Sri Rajah Vyricherla Narayana Gajapati Raju Bahadur Varu—*Appellant*

v.

Perla Annapurnamma Garu — *Respondent.*

Appeals Nos. 123, 126 and 133 of 1938, Decided on 17th January 1941.

(a) Land Acquisition Act (1894), Ss. 18, 20 and 21—Court has no jurisdiction to decide amount of compensation due to party and give decree for anything more than that awarded by Land Acquisition Officer in absence of reference made to Court at instance of that party.

A party who raises no objection to the apportionment of the compensation made by the Collector must be taken to have accepted the award in that respect and under Ss. 18, 20 and 21 of the Act all that the Court can deal with is the objection which has been referred to it, and it cannot go into a question raised for the first time by a party who had not referred any question or any objection to it under S. 18 of the Act. Hence, Court has no jurisdiction to decide the amount of compensation due to a party and give a decree for anything more than what was awarded by the Land Acquisition Officer in the absence of any reference made to the Court by the Land Acquisition Officer at the instance of that party : 34 Cal 451; 12 C W N 98; 12 C W N 985; 12 C W N 987; 22 M L J 379 and ('30) 17 A I R 1930 P C 64, *Rel. on.* [P 661 C 1, 2]

(b) Land acquisition — Apportionment of compensation—Share of melvaramdar.

Even as much as one-third of the compensation paid for the entire land can be apportioned as the share of the melvaramdar : ('27) 14 A I R 1927 Mad 489, *Rel. on.* [P 662 C 2]

Advocate-General and K. Umamaheswaran — for Appellant.

P. Somasundaram — for Respondent.

Pandrang Row J. — These three connected appeals arise out of certain acquisitions of land made for the Andhra University buildings at Waltair in the Vizagapatam District. Appeals Nos. 123 and 133 may be dealt with together as they raise the same question. That question is whether the lower Court had jurisdiction to decide the amount of compensation due to the melvaramdar and give a decree for anything more than what was awarded by the Land Acquisition Officer, in the absence of any reference made to the lower Court by the Land Acquisition Officer at the instance of the melvaramdar. The Land Acquisition Officer awarded in one case about Rs. 64, and in the other case about Rs. 48, to the melvaramdar, Perla Annapurnamma Garu, while the appellant before us, who is the zamindar of Chemudu, was awarded in one case Rs. 11,000, odd and in the other case Rupees 8800, odd as the permanent ryot of the land. A sub-lessee appears to have been given nothing as compensation. There was a reference made to the District Judge under S. 18, Land Acquisition Act, at the instance of the zamindar of Chemudu, but there was no reference asked for and no reference made at the instance of the respondent Perla Annapurnamma Garu. Nevetheless the Court below has awarded a much

larger amount out of the total amount awarded, namely, one-sixth of the total amount to Perla Annapurnamma as compensation for her rights as melvaramdar. The point appears to us to admit of no doubt. It was decided so long ago as 1907 in 34 Cal 451[1] that (1) a party who raises no objection to the apportionment of the compensation made by the Collector must be taken to have accepted the award in that respect and (2) that under Ss. 18, 20 and 21 of the Act all that the Court can deal with is the objection which has been referred to it and it cannot go into a question raised for the first time by a party who had not referred any question or any objection to it under S. 18 of the Act. This decision was followed in a number of other cases, and it is enough to refer to 12 C W N 98,[2] 12 C W N 985,[3] 12 C W N 987[4] and 22 M L J 379[5] at p. 383. It is perhaps desirable that we should refer also to a clear pronouncement by their Lordships of the Judicial Committee in 57 Cal 1148[6] at p. 1152. It was held in that case that on a reference made to the Court under S. 18 of the Act the jurisdiction of the Court is confined to considering and pronouncing upon the objection which had been raised in the written application for the reference. At page 1152 their Lordships make the following observations :

> Their Lordships have no doubt that the jurisdiction of the Courts under this Act is a special one and is strictly limited by the terms of these sections. It only arises when a specific objection has been taken to the Collector's award, and it is confined to a consideration of that objection. Once therefore it is ascertained that the only objection taken is to the amount of compensation that alone is the 'matter' referred, and the Court has no power to determine or consider anything beyond it.

Their Lordships make particular reference to the words found in S. 21 of the Act which restrict the scope of the inquiry before the Court to a consideration of the interests of the persons affected by the objection. It is therefore clear to our minds that what the lower Court did was something which it had no jurisdiction to do. It purported to decide the question whether the respondent Perla Annapurnamma was entitled to a larger amount as compensation as the melvaramdar than what was awarded by the Land Acquisition Officer, in spite of the fact that she had made no objection to the award and had not asked the Land Acquisition Officer to make any reference claiming a larger amount than what was awarded to her, and in spite of the fact that no reference really was made at her instance. There was no doubt a reference made, but that was one not made at her instance but by the Land Acquisition Officer of his own accord under S. 31 of the Act because she was not competent to alienate the land being a limited owner. That reference, however, gave the Court no jurisdiction to decide what compensation should be paid to her as the melvaramdar or to decree any amount over and above what was awarded to her by the Land Acquisition Officer. On this sole ground, these appeals have to be allowed apart from any question of hardship for, this is a matter which affects the jurisdiction of the Court, and where there is no jurisdiction there can be no plea of either hardship or waiver and so on. As a matter of fact we have no reason to suppose that there was any waiver in this case. No doubt want of jurisdiction was not expressly pleaded in the written claim presented by the appellant in the lower Court, and that was because his claim was put forward long before the respondent appeared on the scene and filed her claim. There are no circumstances from which a waiver can be inferred and on the other hand it is clearly seen from the judgment of the Court below that an objection to jurisdiction was actually taken and was decided by the lower Court. The lower Court relied on a case the judgment in which makes no reference at all to the particular point of jurisdiction. These appeals must therefore succeed and they are allowed and the decree of the Court below so far as it awards any amount over and above what was awarded to the respondent as the melvaramdar by Land Acquisition Officer is set aside. In other words, the award of the Land Acquisition Officer in these two cases is confirmed. The appellant will be entitled to have his costs in this Court in these two appeals from the respondent.

Appeal No. 126 raises a different question. It relates to a similar acquisition in which a larger amount was awarded to the same melvaramdar than what was awarded by the Land Acquisition Officer. But in this

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1. ('07) 34 Cal 451, Abu Baker v. Peary Mohan Mukherjee.
2. ('07) 12 C W N 98, Gobinda Kumar Roy v. Devendra Kumar Roy.
3. ('07) 12 C W N 985, Mahammad Safi v. Haran Chandra.
4. ('07) 12 C W N 987, Prabal Chandra v. Peary Mohun.
5. ('12) 22 M L J 379 : 14 I C 270 : 11 M L T 327 : 1912 M W N 712, Gangadhara Sastri v. Deputy Collector of Madras.
6. ('30) 17 A I R 1930 P C 64 : 121 I C 536 : 57 Cal 1148 : 57 I A 100 (PC), Pramathanath Mullick v. Secretary of State.

case there was a reference by the Land Acquisition Officer under S. 30 of the Act because there was a dispute about the apportionment. It cannot therefore be said that the Court had no jurisdiction to decide the question of apportionment. It is urged, however, on behalf of the appellant that the reference itself was incompetent but there is really no substance in this contention because the award itself shows that there was a dispute regarding the apportionment and it cannot be said that the Land Acquisition Officer acted illegally or without jurisdiction in making the reference which he did under S. 30 of the Act. The other point argued in this appeal is that the amount awarded as compensation for the melvaram right to the respondent is excessive. Reference was made to the fact that in the claim made by the respondent she stated that she would be entitled to not less than fifty times the kattubadi payable for the land and it was argued that nothing more than this amount should be awarded, namely, fifty times the kattubadi. It is however seen that she did claim rights in the land other than the right to collect kattubadi, namely her right of reversion etc. Presumably the words "et cetera" would include mining rights. In any case it is not possible to regard the wording of her claim as disqualifying her from receiving what would otherwise be a reasonable compensation for her rights. Paragraph 4 of her claim makes it clear that she claimed the benefit of the rise in the value of land in this locality over and above what was claimed as fifty times the kattubadi. This is not a case in which a party who has been awarded more compensation has disqualified herself from getting it by limiting her claim to a lesser amount.

On the merits there is really no reason to interfere because it has been decided in more cases than one that even as much as one-third of the compensation paid for the entire land can be apportioned as the share of the melvaramdar. It is enough to refer to one such case, namely 50 Mad 706.[7] That case is somewhat similar because here also there has been a windfall, the land having risen enormously in value owing to the location of the University at Waltair and the harbour at Vizagapatam. There is no reason why part of the benefit of this enormous rise in value should not go to the melvaramdar. On the merits therefore there is no reason to interfere with the decree or the apportionment made by the Court below. This appeal therefore fails and is dismissed with costs of the respondent.

C.R.K./D.S. *Order accordingly.*

7. ('27) 14 A I R 1927 Mad 489 : 100 I C 628 : 50 Mad 706 : 52 M L J 295, Natesa Iyer v. Kaja Maruf Sahib.

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(28) A. I. R. 1941 Madras 662

WADSWORTH AND PATANJALI SASTRI JJ.

Maruthuvamalai Moopanar — *Appellant*

v.

Avadaiachi — *Respondent.*

Appeal No. 205 of 1939, Decided on 7th November 1940, against order of Sub-Judge, Ramnad at Madura, D/- 30th March 1939.

Civil P. C. (1908), O. 21, R. 19 — Decree providing for recovery of sums by two parties against one another — Limitation cannot run against party entitled to lesser decree at time when it is not executable by reason of O. 21, R. 19 — Decree directing defendant to pay to plaintiff maintenance at certain rate and Rs. 166 as his costs — Plaintiff directed to pay Rs. 282 as costs to defendant and to pay Rs. 739 as court-fee due to Government which was charged on plaintiff's maintenance charge — Government executing decree for court-fee — Defendant paying into Court balance due to plaintiff after deducting amount of his decree for costs and subsequently paying balance — Plaintiff executing decree for balance of maintenance — Defendant's decree held not barred and could be set off against plaintiff's claim—Defendant's failure to claim set off in execution of decree by Government held did not preclude him from claiming same in execution by plaintiff.

In the case of a decree which provides for the recovery of sums by two parties one against the other, it is only the party to whom the larger amount is due who is entitled to execute the decree. Limitation cannot run against the person who is entitled to the lesser decree at a time when that decree is not executable having regard to the provisions of O. 21, R. 19. [P 663 C 1]

A decree directed the defendant to pay maintenance at a certain rate to the plaintiff and also Rs. 166 towards his costs. The plaintiff was also directed to pay Rs. 282 as costs to the defendant and to pay Rs. 739 as court fee due to Government which was charged on the plaintiff's charge for maintenance. The Government executed the decree for the amount of the court-fee and in order to save his property the defendant paid into Court the balance due to plaintiff after deducting the amount of his decree for costs and subsequently paid the balance making Rs. 750 claimed by Government. Thereafter the plaintiff filed an application to execute his decree for the balance of the maintenance due after deducting the major portion (but not the whole) of the court-fee paid but not the costs decreed to the defendant. The trial Court disallowed the defendant's claim to set off his decree for costs against the plaintiff's claim on the ground that it was time-barred :

Held that the defendant was entitled to set off his decree for costs against the plaintiff's claim as the same was not barred. [P 663 C 2]

Held further that the defendant's failure to claim a set off when the Government executed the decree for court-fee did not preclude him from claiming the set off in the execution proceedings by the plaintiff. [P 663 C 2]

G. Srinivasa Ayyangar — for Appellant.

T. G. Raghavachariar — for Respondent.

Wadsworth J.—This appeal arises out of an order in execution of a maintenance decree. The decree was dated 30th September 1935. It directed defendant 1 to pay maintenance at a certain rate to the plaintiff and also directed defendant 1 to pay Rs. 166-11-0 towards her costs. It directed the plaintiff to pay Rs. 282-12-0 as costs to defendant 1 and to pay Rs. 739-15-0 as court-fee due to Government and the plaintiff's charge for maintenance was burdened with a charge in favour of the Government for the amount of this court-fee. The Government in 1936 executed the decree for the latter amount. In order to save the properties defendant 1 paid into Court the balance due to the plaintiff after deducting the amount of his decree for costs. Apparently, it was objected on behalf of the Government that the Government's charge should be over the whole amount of the maintenance decree and not over the net amount and defendant 1 on 30th June 1936 paid up the balance making Rupees 750 odd claimed by the Government. On 9th November 1938, the present execution petition was filed by the plaintiff claiming the balance due for maintenance less the major portion (but not the whole) of the amount paid by defendant 1 towards court-fee, no deduction being made in respect of defendant 1's decree for costs. When an objection was raised by defendant 1 that he was entitled to set off for the amount of his decree for costs, the lower Court held that this claim could not be sustained because the execution of that decree for costs was time-barred. It appears that in coming to this conclusion the learned Judge overlooked the provisions of O. 21, R. 19, Civil P. C. Under that rule when the decree provides for the recovery of sums by two parties one against the other, it is only the party to whom the larger amount is due who is entitled to execute the decree. It seems to us to follow that limitation cannot run against the person who is entitled to the lesser decree at a time when that decree is not executable having regard to the provisions of O. 21, R. 19. It is true that after the payment to Government in 1936 there was for a time a balance in favour of defendant 1 as against the plaintiff. But that balance was being steadily reduced as maintenance accrued due, and in any case, the present claim is preferred within three years of the time of this payment. There can therefore be no question of limitation.

It is, however, contended for the plaintiff that in some way defendant 1 is barred from claiming to adjust his decree for costs against the plaintiff's decree, because, when the Government were executing the decree by enforcing the charge over the plaintiff's right to maintenance, defendant 1 failed to establish his right to set off against the Government's claim the amount of his decree for costs. We are unable to understand how the fact that the Government were somehow or other able to recover from defendant 1 a larger amount than was strictly payable by him at that time can be held to have barred a claim by defendant 1 to adjust his decree against the plaintiff when the latter should come to execute. The most that these proceedings between the Government and defendant 1 can be taken to have finally decided is that the extent of the Government's charge is not limited to the net amount of the plaintiff's claim for maintenance but extends over the gross amount of that claim. There was no decision that defendant 1 could not in an execution petition brought by the plaintiff claim to adjust the amount of his decree against that of the plaintiff. In the result therefore the appeal is allowed with costs here and the Court below and the execution petition is remitted to the lower Court for disposal in the light of this judgment.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 663

WADSWORTH AND PATANJALI SASTRI JJ.

Karuppanna Goundan — Petitioner

v.

Marutha Pillai — Respondent.

Civil Revn. Petn. No. 1206 of 1939, Decided on 27th February 1941, to revise decree of Sub-Judge, Dindigul, in S. C. S. No. 139 of 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 8, Explanation—For applicability of S. 8, Explanation debtor must be same though debtors under earlier and later documents need not be identical—*A*, *B* and *C* constituting joint Hindu family — *A* and *B* executing pronote — Family divided — *C* alone executing pronote in lieu of earlier pronote—Debtors under earlier and later documents cannot be said to be same because

under former it is joint family while in later it is divided individual — S. 8, Explanation cannot apply.

In order to apply the explanation to S. 8 the debtor must be the same, though there need not be a complete identity of the debtors under the earlier and the later documents. Where a joint family debt, evidenced by a promissory note executed by two coparceners is after the disruption of the family substituted by a fresh note executed by one of the former coparceners who was not nominally a party to the earlier debt, the second debt cannot be said to be due from the same debtor as the first inasmuch as the first debtor is a joint family and the second debtor is a divided individual, and cannot therefore be regarded as a renewal or inclusion in a fresh document of that debt: ('39) 26 A I R 1939 Mad 186, *Disting.* [P 664 C 1, 2; P 665 C 1]

K. S. Desikan and K. Raman — for Petitioner.

S. Panchapakesa Sastri — for Respondent.

Wadsworth J.—This civil revision petition raises a question under S. 8 of Madras Act, 4 of 1938. The facts have not yet been established by evidence, but assuming them to be as asserted by the petitioner who was the defendant in the Court below, they are as follows : On 2nd March 1925 the defendant's father and brother executed a promissory note in renewal of a series of earlier debts. At some time after the execution of this note, the family divided and in the partition this debt was allotted to the defendant. In pursuance of that arrangement, on 12th July 1932 the defendant alone executed the suit promissory note, discharging the prior promissory note executed by his father and brother. The question is whether in such circumstances the second note can be deemed to be a renewal of the earlier debt.

We have held that in order to apply the explanation to S. 8, the debtor must be the same, though there need not be a complete identity of the debtors under the earlier and the later documents. For instance, we have held that where there is a joint and several debt due by A and B discharged by a later debt by A alone, A can claim that his debt is a renewal of the earlier debt. Similarly, we have held that where there is a joint family debt evidenced by a promissory note executed by one of the coparceners and this debt is discharged by a fresh promissory note executed by another of the coparceners, the debtor in each case being the joint family, there is a substantial identity of the debtors and there can be a renewal. We have also held that where there is a family debt incurred by a joint family consisting of A, B, C and D and after D has left the joint family there is a fresh document executed by the three remaining coparceners, there is a substantial identity of the debtor who is the joint family under each debt and the second document can be deemed to be a renewal or inclusion in a fresh document of the earlier debt. The present case goes further than any of these cases. Here we have what is alleged to be a joint family debt, evidenced by a promissory note executed by two coparceners and after the disruption of the family, the substitution of a fresh note executed by one of the former coparceners who was not nominally a party to the earlier debt.

It is argued that the defendant was under a liability to pay the earlier debt, being a member of the family and that that debt might have been enforced against his interest in the family properties and that in executing the fresh promissory note, he must be deemed to be discharging his own pre-existing property liability. This argument, of course, follows the reasoning in the case in I L R (1939) Mad 218[1] which we have adopted in numerous cases. But we doubt very much whether the principle of that case should govern the decision of the present case. It is true that the defendant was a member of the family which is alleged to have been liable to satisfy the earlier debt, and that that debt might have been enforced against his interest in the family property. But we must remember that Act 4 of 1938 treats the Hindu joint family as a unit for the purpose of the Act. The definition of "person" in S. 3 (1) states that "person" means an individual and includes an undivided Hindu family; and throughout the Act an undivided Hindu family is treated as if it were a person, with the solitary exception that in the case of a family made up of agriculturist and non-agriculturist members special provisions are contained in S. 14 for working out their several liabilities. Apart from this provision, the family is regarded as a person who may be represented by one or other of the coparceners, as under S. 19. It seems to follow that when there is a debt due by this statutory person—a joint family — for which is substituted another debt due by an individual who formerly constituted part of the statutory person, there is a different debtor and it seems to us that to treat this different debtor as merely renewing his own liability which resulted from an interest in the joint family property is to carry the theory of the property liability too far. When once

1. ('39) 26 A I R 1939 Mad 186 : 182 I C 879 : ILR (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.

it is accepted that the debtor must be substantially the same in both transactions, on the fact that the first debtor was a joint family and the second debtor was a divided individual, it must, in our opinion, be held that the second debt is not due from the same debtor as the first debt and cannot therefore be regarded as a renewal or inclusion in a fresh document of that debt. The petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 665

HORWILL J.

Raja Saheb Meharban I Dostan Sri Rajah Rao Venkata Kumara Mahipati Suryarao Bahadur Garu — *Petitioner*

v.

Puramsetti Venkatarao and another — *Respondents.*

Civil Revn. Petn. No. 2204 of 1940, Decided on 11th December 1940, to revise decree of Sub-Judge, Cocanada, in A. S. No. 170 of 1936.

Provincial Small Cause Courts Act (1887), S. 16—Suit filed on original side of Court having no jurisdiction to try it as small cause suit — Suit cannot be considered to be small cause suit —First appeal is competent in such case.

A suit which is filed on the original side of a Court, which has no jurisdiction to try it as a small cause suit cannot be considered to be a small cause suit. All that can be said is that the suit is of a small cause nature. There is nothing in the Provincial Small Cause Courts Act or in the Civil Procedure Code which prohibits a first appeal in such cases: 33 Mad 323, *Disting.*; ('32) 19 AIR 1932 Mad 683, *Ref.* [P 665 C 2]

Ch. Raghava Rao — for Petitioner.

T. Satyanarayana — for Respondents.

Order.—The plaintiff brought this suit for compensation for water taken by the defendants from the source of the plaintiff. It was dismissed with costs. In appeal, it was urged by the defendants that no appeal lay. The plaintiff (appellant) admitted by implication that an appeal would not lie unless the suit were of the nature described in Arts. 13 and 35 (i) and (ii) of Sch. 2 to the Provincial Small Cause Courts Act. It was held by the learned Subordinate Judge that the suit was not covered by either of these articles and he consequently held that an appeal did not lie. The appeal was accordingly dismissed. In the grounds of appeal to this Court, it was again contended that Arts. 13 and 35 (i) and (ii) covered a suit of this kind. In view of my decision in S. A. No. 1067 of 1937 of 25th September 1940 this point was not pressed; but it is now argued that although the suit was of a small cause nature, an appeal did lie. The appellant's contention seems to be well founded. It was assumed in 33 Mad 323[1] that the decision in a suit which should have been tried on the small cause side but which was actually tried on the original side of the same Court was final and that no appeal therefore lay. The point did not really fall for decision there; but that has been taken as the law ever since in cases where a Court has no jurisdiction by virtue of S. 16, Provincial Small Cause Courts Act, to try a suit on the original side. Where, however, a suit is filed on the original side because, as here, the District Munsif has no jurisdiction to try it as a small cause suit, that suit cannot be considered to be a small cause suit. All that can be said is that the suit is of a small cause nature. There is however nothing in the Provincial Small Cause Courts Act or in the Civil Procedure Code which says that no first appeal lies in such cases. The Provincial Small Cause Courts Act applies only to small cause suits, and although S. 102, Civil P. C., is a bar to a second appeal, there is nothing in the Act which prohibits a first appeal. An appeal did therefore lie in the Court below because the District Munsif had no jurisdiction to entertain the suit on the small cause side.

No second appeal lies by virtue of S. 102, Civil P. C.; so that if the appellant is to succeed, this appeal must first be converted into a revision petition and then I must exercise my discretion in his favour. He should undoubtedly have raised the point which has now been discussed both in the Court below and in the grounds of appeal here. This appeal will be converted into a revision petition, the petition allowed, and the first appeal remanded for disposal on the merits, only if the appellant pays the costs of the respondents both in this Court and in the lower appellate Court within three weeks of the receipt of the records in the lower appellate Court. Otherwise, this appeal will stand dismissed with costs. After dictating the above but before signing the transcript, it struck me that the Subordinate Judge might have had jurisdiction over the Peddapuram Munsif and an inquiry in the office confirmed my suspicion. The Subordinate Judge did have jurisdiction to try this suit as a small cause suit. The question is whether this affects the above

1. ('10) 33 Mad 323 : 1 I C 543 : 20 M L J 718, Seetapati v. Subbayya.

decision. At first sight it would appear that as the suit should have been tried on the small cause side, it should be treated as a small cause decision against which there is no appeal; but Mr. Raghava Rao has met this by two arguments. He first of all refers to the wording of S. 15, Civil P. C., which lays down that "every suit shall be instituted in the Court of the lowest grade competent to try it." He argues that the District Munsif was competent to try this suit in spite of the provisions of S. 16, Provincial Small Cause Courts Act. Section 16 says :

> Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable.

He contends that there is another enactment in force which prevents the section from operating and that is S. 15, Civil P. C. He argues that as the Court of the District Munsif was lower in grade to that of the Subordinate Judge, the suit had to be instituted in the District Munsif's Court. Mr. Raghava Rao admits that in practice this would mean that no Subordinate Judge would ever be able to exercise his small cause jurisdiction; because no Subordinate Judge has pecuniary jurisdiction on the small cause side beyond Rs. 3000 upto which amount a District Munsif can try a suit on the original side. Although it would seem reasonable to suppose that the District Munsif was not competent to try the suit because of S. 16, Mr. Raghava Rao has quoted an authority to the contrary. The meaning of "competent to try" came up for decision in 55 Mad 960[2] and the learned Judges there after referring to various cases in which a somewhat similar question had arisen, came to the conclusion that a District Munsif has jurisdiction to try and is competent to try a suit beyond its own pecuniary jurisdiction on the small cause side but within the pecuniary jurisdiction of the Subordinate Judge, "though there is the circumstance or accident that that particular class of suit is removed from its purview." In that case they were considering whether under S. 24 (1-a) a District Court can transfer a suit from a Small Cause Court to another Court on the original side, and they pointed out that S. 24 (4) would have no meaning if it were true that the District Munsif to whom the suit was transferred was not competent to try the suit because of S. 16, Provincial Small Cause Courts Act. It is not necessary however to try to reconcile the above decision with the interpretation of S. 16, Provincial Small Cause Courts Act, and S. 15, Civil P. C., that common sense seems to require; because I think Mr. Raghava Rao's second argument is sound. In 33 Mad 323,[1] the trial on the original side in the District Munsif's Court was referred to his small cause jurisdiction and his decree was upheld apparently on the ground that as he was bound to try the suit on the small cause side, the decree should be looked upon as a decree on the small cause side. In the present case, the trial by the District Munsif on the original side cannot be regarded as a disposal on the small cause side of the Court of the Subordinate Judge; and I do not think therefore that the principle laid down in 33 Mad 323,[1] should be applied to a case where the small cause jurisdiction is exercised by a Court other than that in which the suit is tried on the original side. It follows that the order of remand must stand.

C.R.K./G.N. *Case remanded.*

2. ('32) 19 AIR 1932 Mad 683 : 139 I C 477 : 55 Mad 960 : 63 M L J 689, Chockalinga Chettiar v. Palaniappa Chettiar.

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(28) A. I. R. 1941 Madras 666

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

P. Venkatasubbiah Chetty and others — *Appellants*

v.

Jumma Mosque, by its Muthavalli C. Khadar Mohideen Sahib and H. Abdul Aziz Sahib and another — *Respondents.*

Letters Patent Appeal No. 33 of 1939, Decided on 20th November 1940, against judgment of Patanjali Sastri J. in C. C. C. A. No. 50 of 1937, D/- 4th April 1939.

(a) Evidence Act (1872), S. 32 (3)—Mortgage by trustee of mosque — Redemption suit by successor of trustee — Successor must prove title — Former suit against trustee resulting in compromise decree declaring certain properties including properties in suit as belonging to mosque — Compromise decree held admissible under S. 32 (3) and was sufficient to establish title of mosque.

In a suit to redeem a mortgage the plaintiff must show title. [P 667 C 2]

The successors of the trustee of a mosque brought a suit to redeem the mosque properties mortgaged by the former trustee. A previous suit against the trustee had ended in a compromise decree which declared that certain properties including the properties sought to be redeemed belonged to the mosque :

Held that the compromise decree was admissible under S. 32 (3) and once it was admitted it was

admitted for all purposes and that it was sufficient to establish the title of the mosque to the suit properties : ('21) 8 A I R 1921 Mad 248 (FB), *Disting.* [P 668 P 1]

Held further that the principle that a statement or admission made by a person cannot affect a title previously created by him had no application to the case inasmuch as the declaration in the compromise decree did not affect the position of the mortgagees adversely : (1834) 110 E R 1387, *Disting.* [P 668 C 1]

(b) Mortgage—Mortgage by conditional sale —English rule that once a mortgage always a mortgage applies — Condition that mortgaged property if not redeemed within stipulated time should become property of mortgagee cannot be enforced.

The English rule that once a mortgage always a mortgage applies to a mortgage by conditional sale and consequently the condition that if the mortgaged property were not redeemed within the period stipulated the mortgagee should become the absolute owner thereof cannot be enforced : 4 Mad 179, *Foll.*; 1 Mad 1 (P C), *Ref.* [P 669 C 1]

(c) Limitation Act (1908), Art. 134—Mortgagee under mortgage by conditional sale purporting to convey absolute title—Transaction constitutes transfer within Art. 134.

Where the vendor not in possession of a full title, such as a mortgagee under a mortgage by conditional sale, purports to convey an absolute title the transaction constitutes a transfer within the meaning of Art. 134. [P 669 C 1]

K. Bhashyam Ayyangar, M. S. Venkatarama Iyer and V. Ganapathi Ayyar—for Appellants.

K. V. Krishnaswami Ayyar and T. E. Ramabhadhrachariar — for Respondents.

Leach C. J. — This is an appeal under Cl. 15, Letters Patent. The suit out of which it arises was filed in the City Civil Court by the trustees of the Jumma Masjid in Cutchery Road, Mylapore, Madras for the redemption of four mortgages. The mortgaged properties consisted of two blocks. The first block was mortgaged by a deed executed on 14th February 1873. A part of the second block was mortgaged on 9th February 1850, another part on 28th January 1860 and the remainder of the blocks on 19th December 1864. The City Civil Court Judge held that the trustees had not proved that the properties belonged to the mosque. He also held that the suit was barred by the law of limitation in so far as it concerned the mortgage of the properties in the first block. The result was that the suit was dismissed with costs. The trustees appealed to this Court and their appeal was heard by Patanjali Sastri J., who disagreed with the trial Court on the question of ownership and held that the trustees were entitled to redeem the properties comprised in the second block. With regard to the mortgage of the first block the learned Judge agreed with the trial Court that the law of limitation barred the trustees' claim. Defendants 1, 2, 3 and 4 who are the successors in interest of the mortgagee of the properties comprised in the second block, have appealed against the finding of the learned Judge that the trustees are entitled to redeem. The trustees have filed cross objections, challenging the decision of the learned Judge that the law of limitation has destroyed their right to redeem the mortgage of the first block.

All the mortgages were created by one Ghulam Hyder, who was the superintendent of the mosque at that time. In mortgaging the properties he held himself out to be the owner. In 1874 a suit was filed in this Court by one Hafiz Sadrool Islaam Khan on behalf of himself and other members of the Mahomedan community of Mylapore against Ghulam Hyder for a decree removing him from the office of superintendent. It was alleged that he had wrongfully alienated properties belonging to the trust. This suit was compromised and the decree which was passed in accordance with the terms of the compromise declared that certain properties belonged to the mosque. The area of these properties was defined and it is admitted that within the area fall the properties now in suit. Another suit was filed in this Court in the year 1892, which also ended in a compromise and a further declaration that the properties with which the suit is concerned belonged to the mosque, but Ghulam Hyder was not a party to the second suit. His son was a party but the suit as against him was withdrawn.

The question which the Court is called upon to decide with regard to the properties in the second block is whether there is evidence that the properties belong to the mosque, that is evidence which is admissible in a Court of law and sufficient for proof. Before the respondents can be allowed to redeem the mortgages they must, of course, show title. Owing to the lapse of time the respondents are not in a position to trace the history of the properties and they are driven to relying on the compromise and the decree which followed it in the suit filed in 1874. Patanjali Sastri J., held that the decree passed in that suit was in itself sufficient for the respondents' purpose. He relied on the decision of this Court in 44 Mad 778.[1] The appellants contend that the decree is not sufficient for the purpose of

1. ('21) 8 A I R 1921 Mad 248: 67 I C 971: 44 Mad 778: 41 M L J 223 (F B), Secy. of State v. Ahmed Badsha.

proving the respondents' title. They maintain that no admission made by the mortgagor after the mortgages had been created can bind them. We are unable to agree with the learned Judge that 44 Mad 778[1] has application here. In that case a Full Bench of this Court held that a judgment in a suit which does not operate as res judicata can be used as a piece of evidence on the question of title. The suit was concerned with a claim to an office in a Mahomedan institution, and the question was in no way analogous to the question now under discussion.

It is well settled that a statement or an admission made by a person cannot affect a title previously created by him. To use the words of Lord Denman C. J., in (1834) 1 Ad & E 733=110 E R 1387,[2] a person who has parted with his interest in property cannot divest the right of another claiming under him by any statement which he may choose to make. This principle has been accepted in India and there is nothing in the Evidence Act which throws any doubt on the power of the Court to apply it. Basing his argument on this principle Mr. Bhashyam Ayyangar, on behalf of the appellants, has contended that Ghulam Hyder's admission that the properties in suit belonged to the mosque must be ignored entirely. It would have to be ignored if the compromise decree in the suit of 1874 adversely affected the position of his clients, but that is not the case and the principle, therefore, does not apply. There has been a great deal of discussion on the question whether the decree in the suit of 1874 amounts to an admission within the meaning of S. 18 or S. 19, Evidence Act, but it is unnecessary to decide whether either of these sections has any application. It may be taken for the purposes of this case that neither section applies, but this does not mean that the decree in the suit of 1874 cannot be admitted in evidence. We are of the opinion that the decree can be admitted in evidence under S. 32. Once it is admitted it is admitted for all purposes and we consider that it establishes the title of the mosque to the properties in suit. Sub-clause (3) of S. 32 read with the opening words of the section is to the effect that a statement made by a person who is dead is admissible in evidence when the statement is against his pecuniary or proprietary interest. Ghulam Hyder is dead and the decree is in effect a statement by him that these properties belong to the mosque, a statement which was against his proprietary interest. His statement cannot, however, affect the interests of the mortgagee or of the mortgagee's successors in interest, and, therefore, so far as they were concerned the decree must be taken to be merely an admission by Ghulam Hyder that the mosque was entitled to the equity of redemption in the property. But this is sufficient to entitle the respondents to succeed, as Ghulam Hyder knew the true position and there is no evidence in contradiction. This finding disposes of the appellants' case.

Turning now to the cross-objections the position is this. The mortgage of 14th February 1873 provided that unless it was redeemed within a period of two years the property should become the absolute property of the mortgagees, Meera Sahib and Ali Ibrahim. The mortgagor failed to redeem. Meera Sahib died before 2nd February 1880. On that date the son of Meera Sahib, who represented his deceased father, and Ali Ibrahim sold the property to one Nagayya Chetti. As the property had not been redeemed within the period allowed by the deed for redemption the vendors regarded themselves as the absolute owners. The appellants now stand in the shoes of Nagayya Chetti. The question is whether the deed of 2nd February 1880 amounts to a transfer of the property within the purview of Art. 134, Limitation Act. If it does amount to a sale of the whole interest in the property, not merely a transfer of the mortgagees' interest, admittedly, the article has application, and this is what Patanjali Sastri J., has found. In 1875 in 1 Mad 1,[3] the Privy Council held that a contract of mortgage by conditional sale could be enforced according to the letter under the law of India as it then stood and that the Madras and Bombay Courts in applying English rules had erred. This meant that the English maxim, once a mortgage always a mortgage had no application in India. From the year 1858 the Courts in the Madras Presidency and from the year 1864 the Courts in the Bombay Presidency had applied the English law relating to mortgages, and the Privy Council recognized that what had been done could not be undone. It did not, however, definitely decide what course should be adopted in future and in 4 Mad 179[4] this Court decided that the English rules of law

2. (1834) 1 Ad & E 733 : 110 E R 1387, Doe v. Webber.

3. ('75) 1 Mad 1 : 2 I A 241 : 3 Sar 531 (P C), Thumbuswami Moodelly v. Hossain Rowther.

4. ('82) 4 Mad 179, Ramaswami Sastrigal v. Samiappa Nayakan.

with regard to mortgages should continue to apply to mortgages by conditional sale. Therefore it must be taken that when the mortgage of 14th February 1873 was executed the law in Madras regarded the deed as merely conferring a mortgagee's rights on Meera Sahib and Ali Ibrahim, and the condition that the property should become theirs unless the mortgage was redeemed within two years could not be enforced. That was also the position when the document of 2nd February 1880 was executed.

The question whether the son of Meera Sahib and Ali Ibrahim in fact conveyed a full title to Nagayya Chetti is not material. It has rightly been conceded by Mr. K. V. Krishnaswami Iyer that even if the vendors were not in possession of a full title, but purported to convey an absolute title to Nagayya Chetti, the transaction would constitute a transfer within the meaning of Art. 134. We have examined the document with care and we agree that the learned Judge has rightly construed it as an instrument of sale and not as an assignment of the mortgagees' interest. This being the case the cross-objections also fail and must be dismissed. The appellants will pay the costs of the appeal to the trustees of the mosque, and the trustees of the mosque will pay to the appellants out of the mosque funds the costs of the cross-objections.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 669

LEACH C. J. AND SOMAYYA J.

Bhuloganatham Pillai and others — *Appellants*

v.

Rajagopala Pillai and another — *Respondents.*

Appeal No. 436 of 1939, Decided on 20th March 1941, against order of Dist. Court, South Arcot, D/- 25th August 1939.

Civil P. C. (1908), S. 91 and O. 6, R. 17— Defendant constructing wall six feet high across public way close to plaintiff's house—Due to obstruction plaintiff unable to approach his house from left—Enjoyment of plaintiff's property interfered with — Suit by plaintiff for removal of wall—Plaintiff held suffered special damage — Special damage held ought to have been averred in plaint and made basis of suit— Plaintiff held in circumstances of case should be allowed to amend plaint accordingly.

The plaintiff instituted a suit for the issue of a mandatory injunction against the defendant requiring him to remove a wall six feet high which he had built across the public road close to the plaintiff's house. The plaintiff as a result of the obstruction to the road was unable to approach his house from the left and the enjoyment of his property was seriously interfered with. He did not state all this in the plaint, but left it to be inferred from a plan which he filed with the plaint:

Held that the plaintiff had suffered special damage inasmuch as the wall seriously interfered with the enjoyment of his house : *Case law discussed.* [P 670 C 2]

Held further that the plaintiff was in error in not averring in the plaint that he had suffered special damage and making it the basis of his claim and that in the circumstances the plaintiff should be allowed to amend the plaint accordingly. [P 670 C 2; P 671 C 1]

S. Ramachandra Ayyar — for Appellants.

S. Panchapakesa Sastri and P. S. Ramachandran — for Respondents.

Leach C. J.—The respondents instituted a suit in the Court of the District Munsif of Chidambaram for the issue of a mandatory injunction against the appellants requiring them to remove a wall which they have built close to the respondents' house. The wall is six feet high and according to the respondents it has been built across a public road. The respondents say that as the result of the obstruction to the road they are unable to approach their house from the left and the enjoyment of their property has been seriously interfered with. They have not stated all this in the plaint, but have left it to be inferred from a plan which they filed with the plaint. If the respondents' allegations are true, there can be no doubt that the appellants' action does seriously affect them as the owners of the house, and therefore they have suffered special damage. Before the District Munsif the appellants raised the plea that the suit could not be maintained because the respondents had not expressly averred special damage. The appellants succeeded in persuading the District Munsif to accept this plea and dismiss the suit. The respondents appealed to the District Judge of South Arcot, who reversed the judgment of the District Munsif and remanded the case to the District Munsif for trial on the merits. In adopting this course the District Judge relied on the decision of this Court in I L R (1939) Mad 870.[1] In that case Wadsworth J. held that the judgment of the Privy Council in 47 ALL 151[2] had established that the

1. ('39) 26 A I R 1939 Mad 691: 186 I C 208: ILR (1939) Mad 870: (1939) 1 M L J 392, Munusami v. Kuppuswami.
2. ('25) 12 A I R 1925 P C 36: 86 I C 236: 47 All 151: 52 I A 61 (P C), Manzur Hasan v. Mohamed Zaman.

English rule requiring special damage to be shown in an action by a member of the public for the removal of an obstruction to a public way does not apply in India. The appellants contend that Wadsworth J. had not correctly interpreted the judgment of the Judicial Committee and they ask that the decision of the District Munsif be restored.

In 47 ALL 151,[2] the Privy Council held that a civil suit for a declaration lies at the instance of a private individual against those who interfere with a religious procession or its appropriate observances when the procession is passing along a public street and does not interfere with the use of the street by the public and complies with the lawful directions of the Magistrates. In that case, the Judicial Committee considered the decisions of this Court in 5 Mad 304[3] and 26 Mad 376[4] in which it was held that a civil suit lies against those who prevent a religious procession passing along a public highway, without the necessity of proving special damage. Their Lordships also considered the decision of the Bombay High Court in 2 Bom 457,[5] where it was held that a civil suit does not lie in such a case without proof of special damage. Their Lordships accepted the opinion of this Court as being the correct one. In the Bombay case the plaintiffs who were Mahomedans had sued to establish their right to carry tabuts in procession along a public road and alleged that the defendants had obstructed them. The plaintiffs did not allege any personal loss or damage caused to them by the action of the defendants and it was held that in those circumstances the suit could not be maintained. The remedies provided by the English law in the case of a public nuisance were discussed at length and the decision was based on the English rule that there must be special damage averred and proved before a private individual can be granted an injunction in such a case. The judgment of the Board was delivered by Lord Dunedin who with reference to the Bombay decision said:

> The judgment really proceeds entirely on English authorities, which lay down the difference between proceedings by indictment and by civil action. In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India.

3. ('82) 5 Mad 304, Parthasarathi v. Chinnakrishnan.
4. ('03) 26 Mad 376, Sadagopachariar v. Ramarao.
5. ('77) 2 Bom 457, Satku v. Ibrahim.

The Calcutta High Court in 60 Cal 1003[6] and the Lahore High Court in 16 Lah 517,[7] have interpreted this passage as meaning that the English rule ought never to be applied in India and as already indicated Wadsworth J. has come to the same conclusion. In 19 Pat 208[8] a Bench of the Patna High Court arrived at a different conclusion. It was there held that the English rule had not been rejected except in cases relating to religious processions along public streets. In delivering the judgment of the Bench, Meredith J. stated that if the matter ever came up for decision before the Privy Council again it would be pointed out that the decision of their Lordships in 47 ALL 151[2] was limited to the narrower and not to the wider question whether an action with regard to a public nuisance could be maintained without the proof of special damage.

It is not necessary for the purpose of disposing of the present appeal to decide whether the passage quoted from the judgment of the Privy Council in 47 ALL 151[2] applies to all suits relating to public nuisances but even if it were necessary we should not feel disposed to indulge in prophecy. It is here abundantly clear that if the respondents' allegations are correct, the wall erected by the appellants must constitute a nuisance to the respondents. We have been told that in England it has been held that because a person is compelled to go a longer way round by reason of an obstruction in a public street it does not follow that he has suffered special damage. It is not necessary to consider such a case, nor is it necessary to consider whether the law was correctly interpreted by this Court in 14 Mad 177,[9] because there can be no doubt that if the facts alleged in the present case are true, the wall will interfere with the enjoyment of the respondents' house and therefore there will be special damage. The respondents are, however, in error in not averring in their plaint that they have suffered special damage and making this the basis of their claim. We are told that when the case was before the District Judge on appeal from the decision of the District Munsif the res-

6. ('33) 20 A I R 1933 Cal 884 : 147 I C 811 : 60 Cal 1003, Mandakinee Debee v. Basanta Kumaree Debee.
7. ('35) 22 A I R 1935 Lah 196 : 152 I C 850 : 16 Lah 517 : 37 P L R 753, Municipal Committee, Delhi v. Mohamed Ibrahim.
8. ('40) 27 A I R 1940 Pat 449 : 190 I C 46 : 19 Pat 208 : 22 P L T 46, Bibhuti Narayan Singh v. Mahadeo Asram Prasad Sahi Bahadur.
9. ('91) 14 Mad 177 : 1 M L J 321, Siddeswara v. Krishna.

pondents asked for permission to amend their plaint in this respect, but the District Judge did not consider it necessary to deal with the application because in his opinion the decision of Wadsworth J. in I L R (1939) Mad 870[1] was sufficient for the respondents' case. The application for leave to amend has been renewed in this Court and we consider that it should be granted. The respondents will be allowed to incorporate suitable amendments on the presentation of a formal application to amend. For the reasons we have indicated the appeal fails and will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 671

PANDRANG ROW AND KING JJ.

N. Kunjithapatham Pillai — *Appellant*

v.

Saraswathi Ammal and others — *Respondents.*

Appeal No. 206 of 1939, Decided on 10th March 1941, against order of Dist. Court, West Tanjore at Tanjore, D/- 25th January 1939.

Limitation Act (1908), Art. 182 (2) — Order stating that appeal has abated falls under Art. 182 (2) — Time for executing decree runs from date of order.

An order stating that an appeal has abated comes within the purview of Art. 182 (2) and time runs from the date of such order for the execution of the decree : ('27) 14 A I R 1927 Cal 760 and ('33) 20 A I R 1933 P C 68, *Foll.* [P 671 C 2]

R. Sundaralingam — for Appellant.

K. P. Ramakrishna Ayyar — for Respondents.

Pandrang Row J. — The only question raised in this appeal is whether the petition in the Court below was barred by limitation. The article which is admittedly applicable is Art. 182, Limitation Act. The question is whether the petition was presented within three years after the date of the final order in E. P. No. 139 of 1930. That execution petition was allowed by the District Court on 3rd August 1933 and an appeal preferred from it by the respondent Sivagamu Ammal is said to have abated on 23rd June 1933 because Sivagamu Ammal, the appellant therein, died on 23rd March 1933 and no application to bring her legal representative on record was made within 90 days from that date. An application was made to set aside the abatement (C. M. P. No. 3812 of 1933) and that was dismissed on 17th November 1933. There was however a formal order made on 17th September 1935 by a Bench of this Court to the following effect : "Appellant dead. Appeal abates." If this order of 17th September 1935 can be said to be final order in the appeal, it is admitted that there would be no bar of limitation. If, on the other hand, the date from which the three years' period of limitation is to be counted is taken as 23rd June 1933 when the actual abatement took place or as 17th November 1933 when the application to set aside the abatement was dismissed, the bar of limitation would apply.

The main question argued before us on behalf of the appellant is that the order made on 17th September 1935 is not a final order. The real objection seems to be that because the order was unnecessary and was made at a time when one of the parties was dead and unrepresented, it cannot be regarded as an order at all, and therefore not a final order. Some decisions have been quoted to us in support of the proposition that an order in so many words declaring that a suit or appeal has abated is not necessary under the law as it stands, but no authority has been quoted which goes to the extreme length of declaring that when an order is actually made declaring that an appeal has abated, that order is to be treated as if it had never been made. The exact point appears to us to have been decided in 32 C W N 387[1] and that decision has received the approval of their Lordships of the Judicial Committee as will be seen from 60 Cal 662[2] at p. 668. 32 C W N 387[1] decided that an order stating that an appeal has abated comes within cl. (2) of Art. 182, Limitation Act and time runs from the date of such order for the execution of the decree. This is a decision on the very point which we have to decide and in view of the fact that it has received the approval of the Privy Council, we see no reason for not following that decision. It is perhaps necessary for us to say that we concur entirely in the view which has been taken in that case. It follows from this that the plea of limitation was rightly dismissed by the Court below. This appeal therefore fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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1. ('27) 14 A I R 1927 Cal 760 : 104 I C 566 : 46 C L J 111 : 32 C W N 387, Gohur Bepari v. Ram Krishna Shaha.
2. ('33) 20 A I R 1933 P C 68 : 142 I C 326 : 60 Cal 662 : 60 I A 83 (P C), Husain Asghar Ali v. Ramdittamal.

(28) A. I. R. 1941 Madras 672

KING AND PATANJALI SASTRI JJ.

Venkadari Somappa—Appellant

v.

Narasepally Venkataswamy Chetty—Respondent.

Appeal No. 72 of 1939, Decided on 19th February 1941, against decree of Dist. Court, Bellary, D/- 14th September 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 3, Proviso (C) — Applicability—House must be shown to be assessed as property of person sought to be shown as non-agirculturist.

For the applicability of S. 3, Proviso (C) the house must be shown to be assessed as the property of the person sought to be excluded from the category of agriculturist. [P 672 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 3, Proviso (A) — Firm assessed to income-tax—Application for refund under S. 48, Income-tax Act not made by a partner—Partner holding share in firm comes within S. 3, Proviso (A) whether his total income falls below taxable minimum or not.

Where a firm is assessed to income-tax a partner holding a share in the firm and not having made an application for refund under S. 48, Income-tax Act, of the tax upon his share of the firm, comes within the proviso (A) to S. 3 whether total income falls below the taxable minimum or not. [P 672 C 2]

Ch. Raghava Rao and Rajaram — for Appellant.

V. Ramaswami Ayyar and S. Narasinga Rao— for Respondent.

King J.—The only question involved in this appeal is whether the appellant is an agriculturist entitled to claim the benefit of Act, 4 of 1938. The learned District Judge of Bellary has held that he is not an agriculturist firstly because he has been assessed to income-tax under proviso (A) to S. 3 and secondly because he has paid house-tax under proviso (C). We may say at once that the second reason cannot be substantiated. The language of proviso (C) is that he should be assessed to house-tax. The only evidence is an admission by the appellant that he had gifted certain houses to his wife and that his wife pays taxes on those houses. There is nothing in the case to show, whether this statement could be believed or not, that the houses have been assessed as the property of the appellant.

On the first ground however the order of the learned District Judge must, we think, be upheld. The facts are that the appellant was a partner in a ginning factory and was entitled to one-fourth share of the profits and that the factory was assessed to income-tax for its profits in the year 1937-38. It is argued by Mr. Raghava Rao on behalf of the appellant that because no specific notice was addressed to him by the Income-tax authorities as an individual and because it is only the partnership which has been taxed he himself has not been assessed to income-tax within the meaning of the proviso (A). It seems to us impossible to read the expression "assessed to income-tax" in the present case in so narrow a sense. It cannot be denied that when the income of a partnership is assessed to tax under the Act what is really assessed is nothing else than the income of the individual partners; and we think that to say that a person has been assessed to income-tax may properly be paraphrased by saying that he has paid income-tax, or that his income has been subjected to income-tax or has been reduced by the amount of the income-tax. In this sense it is quite clear that the appellant has been assessed to income-tax. He was entitled to one-fourth share of the profits of the factory and he must have received those profits less the amount of tax paid by the partnership upon them. Of course it is possible that, in spite of his share of the profits being thus subjected to tax, his total income for the year 1937-38 may have been below the taxable minimum. In that case provision exists in the Act under S. 48 for an application to be made by the appellant for the refund of the tax upon his share of the income of the factory. There is no evidence in the case that the appellant made any such application for refund. The result is that whether his income in fact fell below the taxable minimum or not it has undoubtedly been subjected to income-tax and in our opinion there can be no doubt that he comes within proviso (A) of S. 3. He cannot therefore be deemed to be an agriculturist or entitled to the privileges of the Act. The appeal must fail and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

* (28) A. I. R. 1941 Madras 673

SPECIAL BENCH

LEACH C. J., SOMAYYA AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras — *Petitioner*

v.

National Cycle Importing Co., by Proprietor, Amritlal Bhaichand Shaw, Madras — *Respondent.*

O. P. No. 24 of 1941, Decided on 26th March 1941; reference by Commissioner of Income-tax, Madras.

* (a) Income-tax Act (1922, as amended by Act 7 of 1939), S. 26 (2) Proviso — Conditions requisite for operation of S. 26 (2) proviso stated — Firm dissolving — All members of firm alive and can be found — It cannot be said that dissolved firm "cannot be found" within meaning of S. 26 (2) proviso — Partner taking over partnership business after dissolution succeeds to business within meaning of S. 26 (2).

Before the proviso to S. 26 (2) can be brought into operation, it must be established that the person succeeded "cannot be found", that is he must be dead or has disappeared. The proviso cannot be applied where the person succeeded is alive and his whereabouts are known or can be ascertained. It cannot be said that a firm which has been dissolved "cannot be found" within the meaning of the proviso to S. 26 (2) when all the members of the firm are alive and can be found, and therefore, in such a case a partner who takes over the partnership business after the dissolution of the partnership succeeds to the business within the meaning of S. 26 (2) : ('41) 28 A I R 1941 Mad 255 (SB), *Rel. on.* [P 674 C 1]

(b) Income-tax Act (1922, as amended by Act 7 of 1939), S. 26 (2) — Whether S. 26 (2) applies not only to succession during year of account but also to succession during year of assessment *(Quære)*.

Whether S. 26 (2) applies not only to a succession which has taken place during the year of account but also to a succession which has become effective during the year of assessment.

[P 674 C 1]

K. V. Sesha Ayyangar — for Petitioner.

T. S. Venkatesa Ayyar — for Respondent.

Leach C. J. — The real question which arises in this reference is whether it can be said that a firm which has been dissolved "cannot be found" within the meaning of the proviso to sub-s. (2) of S. 26, Income-tax Act, 1922, notwithstanding that all the members of the firm are alive and can be found. The assessee is the proprietor of a business carried on under the style of the National Cycle Importing Company. Upto the end of the Samvat year 1994, that is up to 23rd October 1938, this business was owned by the assessee in partnership with two others, Vanamalai Premchand Shaw and Fulchand Bhaichand Shaw. On 24th October 1938, the first day of the Samvat year 1995, the assessee took over the entire business and the partnership was dissolved as from that date. In the Samvat year 1995, the income-tax officer assessed the total income of the business for the year 1994 at Rs. 16,500. The assessee's share of this amount was Rs. 7425 and Fulchand Bhaichand Shaw's share Rs. 4950 and they were assessed to income-tax on these amounts respectively. The third partner was not assessed on his share (Rs. 4125) as the income-tax officer was informed that he had ceased to be a partner before the month of October 1938.

The Commissioner of Income-tax considered that the income-tax officer had not adopted the right method of assessment. In his opinion the case falls within sub-s. (2) of S. 26 of the Act, and by virtue of the proviso contained in that sub-section the assessee can be assessed to tax on the full amount of the profits earned during the year 1994. Accordingly he revised the assessment and caused notice to be served on the assessee under S. 33 to show cause why he should not be assessed in respect of the sum of Rs. 16,500 which represented the total profits. The assessee objected to the proposal, and, in consequence, the Commissioner has referred to the Court for decision the following question :

Whether in the circumstances of the case the Commissioner of Income-tax was right in setting aside the order of the Income-tax Officer and directing that Amritlal Bhaichand Shaw should be assessed on the entire profits as successor under S. 26 (2), Income-tax Act.

We are concerned in this case only with the provisions of S. 26 (2) as it stands as the result of the amendment made in the year 1939. The sub-section now reads as follows :

Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-s. (4) of S. 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year :

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place upto the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid.

Looking merely at the words used in para. 1 of the sub-section, it would appear that they are only intended to apply to a succession which has taken place during the year of account and not to a succession which has become effective during the year of assessment. Mr. Sesha Ayyangar on behalf of the Commissioner, however, contends that para. 1 of the sub-section must be read in conjunction with para. 2 and says that when this is done the sub-section is wide enough to cover also a succession during the year of assessment. For the purpose of answering the present reference, it is not necessary to decide whether the contention is well-founded. The Commissioner himself has relied on the wording of the proviso, but it is clear that before the proviso can be brought into operation, it must be established that the person succeeded "cannot be found," that is, he must be dead or has disappeared. The proviso cannot be applied where the person succeeded is alive and his whereabouts are known or can be ascertained. Here, all the three persons who formed the firm whose business was taken over by the assessee are alive and their addresses are known. In (1941) 9 I T R 1,[1] this Court held that a partner who takes over the partnership business after the dissolution of the partnership succeeds to the business within the meaning of S. 26 (2).

What the Court has to decide is whether the Commissioner is right in the opinion which he has formed that a firm "cannot be found" when it has been dissolved. The Commissioner dissociates the partners in the firm from the firm itself. This appears to us to be going too far. It is quite true that a firm for purposes of assessment to income-tax in some cases is regarded as a unit, but that does not mean that in all cases a firm must be looked upon as a juridical person. Section 2 (6-B) says that the words "firm," "partner" and "partnership" have the same meanings respectively as in the Partnership Act, 1932, and S. 4 of that enactment states that persons who have entered into partnership with one another are called individually "partners" and collectively "a firm." This being the position, we are unable to say that the firm "cannot be found," when all the partners are here and two of them have paid their proportionate share of the tax.

1. ('41) 28 AIR 1941 Mad 255: 194 I C 118 : I L R (1941) Mad 220: (1941) 9 I T R 1: (1941) 1 M L J 120 (SB), Karuppiah Pillai v. Commissioner of Income-tax, Madras.

The Court is not concerned with any further provisions of the Act which may help the income-tax authorities in this case. It is only concerned with the question under reference and the decision of the question merely involves the construction of the expression "cannot be found." We have indicated that the firm can be found for the purposes of the proviso to S. 26 (2), and the answer to the question formulated by the Commissioner must be in the negative. The assessee has succeeded and he is entitled to his costs, Rs. 250. He is also entitled to the refund of his deposit of Rupees 100.

C.R.K./G.N. *Answer accordingly.*

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(28) A. I. R. 1941 Madras 674

LAKSHMANA RAO J.

Nataraja Mudaliar and others — *Petitioners*

v.

Devanai Ammal — *Respondent.*

Criminal Revn. Case No. 21 and Petn. No. 20 of 1941, Decided on 27th February 1941, to revise judgment and sentence passed by Sub-Divisional Magistrate, Tiruvellore, D/- 28th December 1940.

Penal Code (1860), Ss. 379 and 448—Heir and servants of deceased removing property from deceased's concubine's possession as belonging to deceased are not guilty under S. 379 or S. 448.

The heir and servants of a deceased who remove property from the possession of the deceased's concubine as belonging to the deceased cannot be convicted under S. 379 or S. 448. [P 674 C 2]

M. Natesan — for Petitioners.

K. Venkataraghavachari for Public Prosecutor — for the Crown.

Order. — Petitioner 1 is the heir of one Duraiswami Mudaliar who died on 20th February last and petitioners 2 and 3 are his servants. The complainant was the concubine of Duraiswami Mudaliar and the cattle were removed on 28th February as belonging to Duraiswami Mudaliar. The conviction of the petitioners under Ss. 379 and 448, Penal Code, is, therefore, set aside and the fines, if levied, will be refunded.

C.R.K./G.N. *Conviction set aside.*

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(28) A. I. R. 1941 Madras 675

BURN AND HAPPELL JJ.

In re Kshatri Ram Singh and others — *Prisoners.*

Referred Trial No. 189 and Criminal Appeals Nos. 764 and 925 of 1940, Decided on 6th February 1941, referred by the Court of Session, Guntur Division, D/- 5th October 1940.

(a) Criminal trial — Evidence — Identification parade—Statement by witnesses at identification parade are inadmissible under S. 162, Criminal P. C. — Fact that witnesses identified persons at parades may be proved — Aforesaid fact is important evidence against accused only if parade was held fairly—Evidence as to manner in which parade was held meagre—No evidence that suspected persons were kept out of sight of witnesses before parade or that witnesses were prevented from communicating with each other while parade was being arranged — Evidence of identification cannot strengthen testimony of witnesses.

Any evidence about the statements made by witnesses at the identification parade held by the police in the course of investigation is excluded by S. 162, Criminal P.C. The fact that witnesses have identified persons at parades held by the police may be proved: 1936 M W N 177, *Rel. on.* [P 676 C 1]

But that fact can only be considered important evidence against the accused if the Court is satisfied that the parades have been held fairly. But where the evidence as to the manner in which the identification parade was held is meagre and there is no evidence that the suspected men were kept out of the sight of the witnesses before the parade was held or that the witnesses were prevented from communicating with each other while the parade was being arranged, the evidence of identification cannot strengthen the testimony of the witnesses who identified the accused. [P 676 C 1,2]

(b) Criminal trial — Evidence—Identification parade—Mediator's report is wholly inadmissible in evidence.

The mediator's report containing the record of the proceedings at the identification parade held by the police in the course of investigation is wholly inadmissible in evidence. [P 676 C 2]

G. Gopalaswamy, V. V. Radhakrishnan, V. T. Rangaswami Ayyangar and K. S. Sankara Raman — for Accused.

Public Prosecutor — for the Crown.

Burn J. — On 15th March 1940 a man named Abraham who belonged to Rentachintala was murdered at Gurzala. His dead body was found on the roadside next morning and the Sub-Assistant Surgeon, Gurzala, (P. W. 1) who made the post mortem examination the same day expressed the opinion that the man had been killed partly by strangling him and partly by squeezing his testicles. There is no doubt about the fact or the manner in which Abraham was done to death and the case is certainly one of murder. In S. C. No. 42 of 1940 four men were put on their trial before the learned Sessions Judge of Guntur for the murder of Abraham. The learned Sessions Judge agreeing with all the assessors found accused 1 alone guilty and sentenced him to death and acquitted the other three. C. A. No. 764 is the appeal of accused 1. C. A. No. 925 is an appeal preferred by the learned Public Prosecutor on behalf of the Provincial Government against the acquittal of the other three.

The principal evidence on the side of the prosecution was given by three women Sayamma, Akkamma and Kottamma (P. Ws. 2, 3 and 4). It was in their house that, Abraham was murdered and they said that they were eye-witnesses of the murder. They alleged that Abraham was asleep on a cot in a room inside their house when he was attacked by the four accused. Another man they said came along with these four accused and drove the women into a room opening out of the room in which the murder was done. Accused 1, they said, caught hold of Abraham by the hands, accused 3 put his hands round Abraham's neck, accused 4 sat on Abraham's chest and accused 2 sat upon his legs and squeezed his testicles. The learned Sessions Judge and the assessors believed this evidence as far as accused 1 was concerned. The learned Sessions Judge pointed out that the women were not in themselves reliable witnesses. Their conduct was, he thought, hardly the conduct of innocent females and he would not have accepted their evidence against accused 1 but for additional circumstances appearing against him. On 21st March accused 1 made a statement under S. 164, Criminal P. C., to the Taluk Magistrate, Gurzala. Exhibit C is his statement and in that he admits that he was present when Abraham was murdered but he says that the murder was committed by accused 2, 3 and 4 assisted by the fifth man mentioned by P. Ws. 2, 3 and 4. Accused 1 alleged that he himself was only a frightened spectator of the murder like P. Ws. 2, 3 and 4. Learned counsel for accused 1 has urged this view of the case upon us. It cannot however be accepted because there is another very important item of evidence against accused 1. This is connected with a watch (M. O. 2) and a fountain pen (M. O. 3) belonging to the murdered man. These were recovered by the police from one Guruvayya (P. W. 19) who was keeping Kottamma (P. W. 4). They had been given to him on the evening of 15th March by Kottamma. Now all the eye-witnesses (P. Ws. 2, 3 and 4) say that as soon

as these things were taken from the dead body of Abraham they were offered by accused 1 to Akkamma (P. W. 3) and that when she refused to receive them they were given to Kottamma (P. W. 4). The statement of accused 1 himself agrees with this evidence up to a point. Accused 1 alleges that it was accused 4 who demanded that Akkamma (P. W. 3) should take possession of Abraham's fountain pen, watch and money purse and he says that Akkamma took those things. There is therefore no possibility of doubting the fact that the fountain pen and the watch were taken from Abraham's body immediately after he died and there is no reason for doubting the evidence of P. Ws. 2, 3 and 4, when they say that it was accused 1 who handed these articles to Kottamma (P. W. 4). The learned Sessions Judge was therefore right and the assessors were right in believing the evidence of P. Ws. 2, 3 and 4 as against accused 1. He has been rightly convicted of the murder of Abraham and there is no question of the propriety of the sentence. We confirm the conviction of accused 1 for murder and the sentence of death and dismiss the appeal.

With regard to accused 2, 3 and 4, we find ourselves in agreement with the learned Sessions Judge when he says that the case against them stands on a different footing. It rests entirely upon the evidence of P. Ws. 2, 3 and 4 and they as the learned Sessions Judge has said are not witnesses whose testimony can be readily accepted. The learned Public Prosecutor relies very strongly upon the fact that these three women identified accused 2, 3 and 4 at parades held by the police subsequent to the arrest of these men. On 17th March accused 3 and 4 had been arrested and they are said to have been identified at Rentachintala by P. Ws. 3 and 4. Accused 2 was not arrested till a fortnight later, and on 30th March he is said to have been identified by the same three women at Gurzala. P. W. 2 is said to have identified accused 3 and 4 at a parade held at Gurzala on 17th March. Now, since these identification parades were held by the police in the course of investigation of the murder it is clear that S. 162, Criminal P. C., excludes any evidence about the statements made by the witnesses at the identification parades. The fact that witnesses have identified persons at parades held by the police may be proved : *vide* 1936 M W N 177;[1] but that fact can only be considered important evidence against the accused if the Court is satisfied that the parades have been held fairly. Now, in this case, as the learned Sessions Judge has rightly observed, there is no detailed evidence given regarding the manner in which the identification parades were held. The evidence about them is extremely meagre. The evidence about the parades held on 17th March is contained in statements made by the Circle Inspector (P. W. 27). He says :

> On 17th March 1940 I went to Rentachentala. I held identification parades at Rentachentala. P. Ws. 3 and 4 identified accused 3 and 4 as persons who had come to their house on 15th March 1940. The mediator's report is Ex. M. Thereafter I arrested accused 3 and 4. Then I came to Gurzala. There at a parade P. W. 2 identified accused 3 and 4 as amongst the men who had come to their house on 15th March 1940. The report then drawn up is Ex. K. I examined all the witnesses and then laid the charge sheet.

The Inspector says nothing about the parade held on 30th March but the Sub-Inspector (P. W. 28) says, "P. Ws. 2, 3 and 4 identified accused 2 as one of the assailants of Abraham." The mediator's report drawn up then is Ex. L, containing the record of the proceedings at the parade held at Gurzala on 30th March. The Village Munsif of Gurzala corroborates these police officers with regard to the parades. It will thus be seen that there is no evidence that the suspected men were kept out of the sight of the witnesses before the parade was held. There is no evidence that the witnesses were prevented from communicating with each other while the parade was being arranged, and in these circumstances we must agree with the learned Sessions Judge that the evidence of identification does not sufficiently strengthen the testimony of these women. It need hardly be said that the mediator's reports (Exs. K, L and M) are wholly inadmissible in evidence. There is no other corroboration of the evidence given by P. Ws. 2, 3 and 4 against accused 2, 3 and 4 and since we agree with the learned Sessions Judge that it would be unsafe to rely upon these women uncorroborated, it follows that the acquittal of accused 2, 3 and 4 must be upheld and the appeal of the Provincial Government dismissed. The bail bonds of accused 2, 3 and 4 will be cancelled.

C.R.K./G.N. *Appeals dismissed.*

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1. ('36) 1936 M W N 177, Guruswami Thevan v. Emperor.

(28) A. I. R. 1941 Madras 677

SPECIAL BENCH

LEACH C. J., SOMAYYA AND PATANJALI SASTRI JJ.

A. R. A. N. T. Narayanan Chettiar — *Petitioner*

v.

Commissioner of Income-tax, Madras — *Respondent.*

O. P. No. 46 of 1940, Decided on 18th March 1941; reference by Commissioner of Income-tax, Madras.

Income-tax Act (1922), S. 4 (2) — Assessee partner in firm carrying on business at Kedah in Federated Malay States—*M*, senior partner in Kedah firm also partner in firm doing business at Rangoon—In 1931 assessee's share of Kedah business profits amounted to at least Rs. 30,000 which were sent to *M*'s firm in 1931 and kept in suspense account—In 1932, *M* causing that amount to be credited to assessee's account in Rangoon firm and then utilizing it in discharge of assessee's indebtedness to Rangoon firm—Assessee objecting to this course but eventually agreeing in 1935 Burma being part of British India then—Amount of Rs. 30,000 held must be regarded as remittance of profits made to British India in 1935 and not in 1931 and could be taxed under S. 4 (2).

The assessee was a partner in a firm carrying on a money-lending business at Kedah in the Federated Malay States. The senior partner was one *M* who was also a partner in a firm of money-lenders doing business at Rangoon but the assessee had no interest in the Rangoon firm. In 1931 the assessee's share of the profits of Kedah business amounted to at least Rs. 30,000 which sum was in 1931 remitted from Kedah to *M's* firm in Rangoon and placed in a suspense account. On 12th April 1932, *M* caused that amount to be transferred to the credit of the assessee's account in the books of the Rangoon firm and then utilized it in discharge of the assessee's indebtedness to the Rangoon firm. The assessee strongly objected to this course, but eventually gave his consent to this arrangement some time between 14th February and 5th April 1935. The income-tax authorities sought to assess the Rs. 30,000 as a remittance made to British India in 1935, Burma being then part of British India:

Held that when the money was brought into British India in 1931 it was not brought in as the money of the assessee and only became his when he accepted it in 1935 and allowed his account in Kedah to be debited with the amount and therefore he could not be allowed to say that it constituted his remittance in 1931. Consequently, the sum of Rs. 30,000 must be regarded as a remittance made to British India in 1935 and could be dealt with under S. 4 (2): ('36) 23 A I R 1936 Mad 282 (S B) and ('40) 27 A I R 1940 Mad 416 (S B), *Rel. on.* [P 678 C 1]

L. S. Veeraraghava Ayyar — for Petitioner.

K. V. Sesha Ayyangar — for Respondent.

Leach C. J. — This reference will be answered in accordance with the opinion expressed by the Commissioner of Income-tax in his statement of the case. The assessee was a partner in a firm carrying on a money-lending business at Kedah in Federated Malay States under the vilasam of A. K. R. M. M. K. The senior partner was one Meyappa Chettiar, who was also a partner in a firm of money-lenders doing business at Rangoon under the same vilasam, but the assessee had no interest in the Rangoon firm. The Kedah business resulted in considerable profits being made, and it is accepted that in 1931 the assessee's share of these profits amounted to at least Rs. 30,000. In that year a sum of Rs. 30,000 was remitted from Kedah to Meyappa's firm in Rangoon and placed in a suspense account. On 12th April 1932 Meyappa caused the money to be transferred to the credit of the assessee's account in the books of the Rangoon firm and then utilized it in discharge of the assessee's indebtedness to the Rangoon firm. At least that is what Meyappa purported to do. The assessee strongly objected to this course, but as the result of mediation which took place in Kedah he eventually agreed to accept the Rs. 30,000 as representing a remittance of his profits from Kedah to Rangoon and to the money being utilised in discharge of his indebtedness to Meyappa's firm there. The assessee gave his consent to this arrangement some time between 14th February and 5th April 1935. The income-tax authorities say that in these circumstances the Rs. 30,000 should be taken to be a remittance made to British India in 1935, Burma being then part of British India. On this footing the assessee would be liable for income-tax on the amount in respect of the Tamil year 1935-36. The assessee contends, however, that the remittance of profits must be regarded as having been made on 12th April 1932, when Meyappa caused the Rs. 30,000 standing in the suspense account to be transferred to the assessee's personal account. If this were the position, it would be clear that the assessee would not be liable to be taxed in respect of the Rs. 30,000 because S. 34, as it stood at the time of the assessment, did not allow action to be taken under it where income had escaped taxation for more than a year.

While it is true that the money was actually brought into British India in 1931 it cannot be taken as being then a remittance of profits belonging to the assessee. He opposed most strenuously the remittance being treated in this way. But inasmuch as in 1935 he agreed that the money should be regarded as being a remittance of his

share of the profits made in Kedah and then allowed it to be used in discharge of his own indebtedness in British India the position was changed. It then became in reality his money. The case falls within the principle stated by this Court in 59 Mad 171.[1] There the assessee had a money-lending business in Tinnevelly in British India and a similar business at Penang in the Federated Malay States. He drew hundis on his Penang branch for the repayment, with interest, of a sum deposited with his Tinnevelly branch by a person who also carried on a money-lending business at Penang. The assessee's Penang branch paid the amounts of the hundis and the relevant entries with regard to the discharge of the debt were made in the Penang and the Tinnevelly books. The profits of the Penang branch were sufficient to cover the remittances. It was held that the amounts of the hundis should be treated as remittances of foreign profits into British India within the meaning of S. 4 (2), Income-tax Act, 1922. The same principle was applied by this Court in (1940) 8 I T R 20.[2] The position in this case may be stated thus. When the money was brought into British India in 1931 it was not brought in as the money of the assessee and only became his when he accepted it in 1935 and allowed his account in Kedah to be debited with the amount. In these circumstances he cannot be allowed to say that it constituted his remittance in 1931. It follows that the reference must be answered against the assessee, who must pay the costs, Rs. 250.

C.R.K./G.N. *Reference answered.*

1. ('36) 23 A I R 1936 Mad 282 : 159 I C 787: 59 Mad 171: 69 M L J 844 (S B), Subrahmanyan Chettiar v. Commissioner of Income-tax, Madras.
2. ('40) 27 A I R 1940 Mad 416: 188 I C 395: (1940) 8 I T R 20: (1940) 1 M L J 543 (S B), Commissioner of Income-tax, Madras v. Meyyappa Chettiar, Karaikudi.

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(28) A. I. R. 1941 Madras 678

LEACH C. J. AND HAPPELL J.

Kottiath Vazhayil Devaki and others— Appellants

v.

Aryakandi Kunhi Kannan and others — Respondents.

Letters Patent Appeal No. 7 of 1940, Decided on 18th February 1941, against judgment and decree of Stodart J., *Reported in ('39) 26 A I R 1939 Mad 907.*

Limitation Act (1908), S. 7 — Karnavan *A* of tarwad consisting of himself, niece *B* and another niece's son *C* executing in 1913 gift deed in favour of his children who were members of another tarwad—*A* signing deed in his personal capacity, as karnavan and also as guardian of *C* who was then minor—*A* dying in 1919—*C* within three years of his attaining majority in 1927 instituting suit in 1930 impeaching gift — Limitation for suit held started to run in 1919 when on *A's* death *B* became karnavan of tarwad and was in position to give discharge on behalf of tarwad — Limitation having commenced to run against tarwad ran also against *C*—S. 7 held of no avail: *(1939) 2 M L J 619 : ('39) 26 AIR 1939 Mad 907: 189 I C 167, REVERSED.*

The karnavan *A* of a Malabar tarwad consisting of himself, a niece *B* and the son of another niece *C* executed in 1913 a deed of gift of certain property alleging it to be his own in favour of his children who were members of another tarwad. In addition to signing the document in his personal capacity he signed it as the karnavan of the tarwad and guardian of *C* who was a minor. The deed was also signed by *B*, in her personal capacity, who was found to be the victim of a fraud and not a party to it. *A* died in 1919 and *C* within three years of his attaining majority in 1927 instituted a suit in 1930 impeaching the gift and relied on S. 7 to save the bar of limitation :

Held that limitation for the suit started to run in 1919 when on *A's* death *B* admittedly became the de jure and the de facto karnavan and was in a position to give a discharge on behalf of the tarwad. Limitation having commenced to run against the tarwad it ran against *C* also and therefore S. 7 was of no avail: (1939) 2 M L J 619: ('39) 26 AIR 1939 Mad 907 : 189 I C 167, *REVERSED* ; ('15) 2 AIR 1915 Mad 723 and 18 Mad 38, *Ref.* [P 679 C 1, 2]

D. Ramaswamy Ayyangar and M. C. Sridharan — for Appellants.

K. Kuttikrishna Menon and K. Govindan — for Respondents.

Leach C. J. — The only question which the Court is called upon to decide in this case is one of limitation. In 1913 a Malabar tarwad consisted of one Kannan, respondent 2 (Kannan's niece) and respondent 1 (the son of another niece). On 14th January of that year Kannan executed a deed of gift of certain immovable properties in favour of his own children who, of course, were members of another tarwad. According to the deed, the properties were the private properties of Kannan, but in addition to signing the document in his personal capacity he signed it as the karnavan of the tarwad and the guardian of respondent 1, who was then a minor. It is now beyond dispute that the properties belonged to the tarwad and that the gift constituted a fraud on the tarwad. Kannan died in 1919 and from that date respondent 2 has admittedly been the lawful karnavan of the tarwad. It would appear that respondent 2 managed the properties of the tarwad long before Kannan died, but for the purposes of this appeal it must be taken that at the time the deed of

gift was executed Kannan himself was acting as the karnavan. Respondent 1 attained his majority on 28th October 1927 and within three years of that date, to be exact on 14th October 1930, he filed the suit out of which this appeal arises for a decree setting aside the deed of gift and directing the alienees to give him possession of the properties. The suit was tried by the District Munsif of Cannanore, who rejected the plea advanced by the alienee defendants that the suit was time barred. On appeal to the Subordinate Judge of Tellicherry this decision was reversed and the suit was dismissed on the ground that it was out of time. Respondent 1 then appealed to this Court and Stodart J. who heard it disagreed with the Subordinate Judge on the question of limitation. The learned Judge however gave a certificate which has permitted of the filing of this appeal under Cl. 15, Letters Patent.

The question which has to be decided is whether S. 7, Limitation Act, saves the suit. The appellants say that it does not, because when she became the karnavan respondent 2 was in a position to give a discharge on behalf of the tarwad and that being so time ran also against respondent 1. We consider that this contention is well founded, but before giving our reasons we will refer to two cases which have been quoted to us in the course of the arguments. The first of these cases is 18 Mad 38.[1] There the senior members of a Malabar tarwad in pursuance of a bona fide compromise of certain claims transferred to the claimants some land belonging to the tarwad. Thirteen years later, a suit was filed by junior members of the tarwad, of whom several were minors, for recovery of possession of the land. Other junior members had attained majority more than three years before the suit, but had not impugned the validity of the conveyance. Their right was common with that of the plaintiffs. As there were major members of the tarwad who were in a position to bring a suit, but had taken no action within the prescribed period of limitation, it was held that the plaintiffs' suit was time barred. The second case is 1914 M W N 689.[2] This was a suit brought by the members of a tarwad for a declaration that a document executed by the karnavan acknowledging the right of defendant 2's tarwad to a half share in an office was fraudulent and that the agreement was not binding on the plaintiffs' tarwad. The suit was brought more than ten years after the date of the document. Certain of the plaintiffs were minors and it was on this ground it was claimed that the suit was in time. This claim was rejected because the karnavan and the adult members of the family represented the tarwad. Sadasiva Aiyar J. was inclined to the view that a karnavan whose contract was sought to be impeached was a person who was able to give a discharge within the meaning of S. 7, Limitation Act, but Napier J. did not share in this opinion.

In the case before us respondent 2 was certainly in a position to bring a suit as the karnavan to set aside the transaction. It has been said on behalf of respondent 1 that the fact that she signed the deed of gift debarred her from bringing a suit. Without going into the question whether the opinion expressed by Sadasiva Iyer J. in 1914 M W N 689[2] is well founded we do not accept the respondent 1's contention that respondent 2 was debarred from suing. Respondent 2 signed the deed in her individual capacity, not as the karnavan, and what is more, the Subordinate Judge has found that she was the victim of a fraud and not a party to the fraud. There can be no doubt that respondent 2 joined in the deed because of Kannan's influence with her. It may be that while he was alive she remained under his influence and therefore was not a free agent, but Kannan's influence was removed by his death. In these circumstances it is not necessary to decide whether limitation commenced to run from the time of the execution of the deed, because it must have started to run in 1919 when on the death of Kannan respondent 2 admittedly became the de jure and the de facto karnavan. Limitation having commenced to run against the tarwad it ran against the plaintiff, and the sands had run out before the suit was filed. For these reasons we allow the appeal with costs throughout in favour of the appellants.

C.R.K./G.N. *Appeal allowed.*

1. ('95) 18 Mad 38, Moidin Kutti v. Beevi Kutti Ummah.
2. ('15) 2 A I R 1915 Mad 723 : 25 I C 755 : 1914 M W N 689, Parameswaran Nambudripad v. Sankaran Nambudripad.

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(28) A. I. R. 1941 Madras 679

LAKSHMANA RAO J.

In re S. S. Pattabi Rama Iyer —
Petitioner.

Criminal Revn. Case No. 1048 and Petn. No. 997 of 1940, Decided on 6th February 1941, to revise order of First Class Magistrate, Gobichettipalayam, D/- 28th August 1940.

Criminal trial — Retrial — Accused admitting offence under misapprehension—Prayer for retrial must be granted.

Where an accused admits the offence under a misapprehension his request for a retrial cannot be resisted. [P 680 C 1]

S. S. Ramachandra Iyer — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The petitioner appears to have admitted the offence under a misapprehension and his request for a retrial cannot be resisted. The conviction is, therefore, set aside and there will be a retrial in accordance with law.

C.R.K./G.N. *Retrial ordered.*

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(28) A. I. R. 1941 Madras 680

VENKATARAMANA RAO J.

Koothoor Cherappan and another — *Petitioners*

v.

T. K. S. S. Sankara Ayyar and Subbayya Ayyar and others — *Respondents.*

- Civil Revn. Petn. No. 455 of 1939, Decided on 5th March 1941, to revise order of District Court, South Malabar, D/- 13th September 1938.

Civil P. C. (1908), O. 21, R. 90 — Person claiming title paramount to judgment-debtor cannot apply under O. 21, R. 90.

The fact that under O. 21, R. 90 no relief can be given unless the applicant has sustained substantial injury shows that a person claiming by title paramount is not meant to be the person whose interest is affected by the sale. A cloud may be cast on his title by reason of the sale which might furnish a cause of action for a declaratory suit; but casting a cloud on title is not substantial injury within the meaning of the rule and consequently a person claiming by title paramount to that of the judgment-debtor cannot make an application under O. 21, R. 90 : 15 Cal 488 (FB); 16 Mad 476 and 18 All 141, *Rel. on* ; ('36) 23 A I R 1936 Lah 969, *Not foll.* [P 680 C 2 ; P 681 C 1]

K. P. Ramakrishna Ayyar — for Petitioners.

K. Rajah Ayyar — for Respondents.

Order.—The main question for decision in this civil revision petition is whether the application of the petitioners under O. 21, R. 90, Civil P. C., out of which this petition arises is sustainable. The relevant facts are few and are these. In execution of a decree obtained by respondent 1 against respondent 2, one-fourth share in certain items of immovable property were attached and sold. Respondent 2 and the petitioners were co-owners entitled each to a third share in all the properties that were attached. But, subsequent to the attachment, there was an agreement to refer the matter to arbitration and there was an award in and by which the properties were divided into three equal shares and some of the items which formed the subject-matter of the attachment exclusively fell to the share of the petitioners. The sale in court-auction in execution of the decree of respondent 1 took place subsequent to this division. This application is by the petitioners to set aside the sale in regard to the properties which fell exclusively to their shares. The learned District Munsif allowed the application of the petitioners but the learned District Judge reversed it, but the ground on which he did so is not supported by the learned counsel for respondent 1. But he contended that the application under O. 21, R. 90 is not sustainable. His contention is that the petitioners claim by title adverse to and paramount to that of a judgment-debtor and they are not, therefore, persons whose interests were affected by the sale. It seems to me that this contention is well founded. The corresponding section in the old Civil Procedure Code was S. 311 where the corresponding expression was "any person whose immovable property has been sold." A Full Bench of the Calcutta High Court has interpreted this to mean a person whose interest is affected by the sale. It is this interpretation that was adopted in the Code of 1908 by enacting O. 21, R. 90. In 15 Cal 488[1] the person who made the application is the person who claimed under the sale from the judgment-debtor prior to the attachment. Sir Petheram, the learned Chief Justice, observed in the course of the judgment thus :

> A person claiming by title paramount to the judgment-debtor is not within the meaning of the words "any person" in the section 311 inasmuch as his title to the property is not affected by the sale, whether it were regular or irregular, and therefore, cannot apply to the Court to set aside the sale.

The interpretation was also accepted by our High Court: *vide* 16 Mad 476.[2] On the language of the section it seems to me, if I may say so with respect, that this is the correct interpretation. A sale can be set aside under O. 21, R. 90 only on the ground of material irregularity or fraud in publishing or conducting it. Where an applicant seeks to set aside a sale on the ground that his property has been sold and that the property does not belong to the judgment-debtor, he is not complaining of any material irregularity or fraud in publishing or con-

1. ('88) 15 Cal 488 (F B), Asmathunnissa Begum v. Ashruff Ali.
2. ('93) 16 Mad 476, Subbarayudu v. Pedda Subbarazu.

ducting the sale. The section assumes that the Court has jurisdiction to sell but in the procedure that is adopted, that is, either in publishing or conducting the sale, there was a material irregularity. Where the complaint is that the property not belonging to the judgment-debtor is sold, the sale is a nullity because what would be sold and purchased would be only the right and title of the judgment-debtor and if he has no title, nothing would pass under the sale, and no question of setting aside the sale would arise. This is the view taken by the learned Judges of the Allahabad High Court in 18 ALL 141[3] on the corresponding S. 311, Civil P. C. Burkitt J. in the course of the judgment remarked thus at p. 145:

> . . . . the words 'set aside' are inapplicable to the case of a sale which is null and void. That which is a nullity cannot, from its very nature, be 'set aside' as was held by the Bombay High Court in 11 Bom 429.[4]

With these observations I respectfully agree. Mr. Ramakrishna Aiyer relied on a number of cases on O. 21, R. 89, but it is not necessary for me to deal with them because the expression used there is "any person holding an interest in the property", whereas the language used in O. 21, R. 90 is, "any person whose interests are affected". The fact that under the section no relief can be given unless the applicant has sustained substantial injury shows that the person claiming by title paramount was not meant to be the person whose interest is affected by the sale. It may be that a cloud is cast on his title by reason of the sale which might furnish a cause of action for a declaratory suit; but casting a cloud on title is not substantial injury within the meaning of the rule. Mr. Ramakrishna Aiyer relied on a ruling in A I R 1936 Lah 969[5] for the view that even strangers can come in under O. 21, R. 90. If the decision was meant to lay down that persons claiming by title paramount to that of the judgment-debtor can make the application under that section, I respectfully dissent. The petitioners are not in any way affected by the sale. What was sold was only an undivided share in certain items and if the purchaser wants to realise the fruits of his purchase, he will be obliged to file a suit for partition and separate possession of the share purchased and it will be open to the petitioners to resist his claim and therefore they are not in any way hurt. In the result the civil revision petition fails and is dismissed, but I make no order as to costs.

C.R.K./G.N. *Petition dismissed.*

3. ('96) 18 All 141 : 1896 A W N 9, Shirin Begum v. Agha Ali Khan.
4. ('87) 11 Bom 429, Shivaji Yesaji Chawan v. Collector of Ratnagiri.
5. ('36) 23 A I R 1936 Lah 969 : 163 I C 765 : 38 P L R 839, Mt. Mehr Bano v. Sher Mohamed.

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(28) A. I. R. 1941 Madras 681

LAKSHMANA RAO J.

In re Shaik Silar — Accused.

Criminal Revn. No. 794 and Case Referred No. 40 of 1940, Decided on 31st October 1940, against orders of Sessions Judge, Kistna, D/- 18th September 1940.

Criminal P. C. (1898), S. 213 — Predecessors of Sub-Judge appointed Assistant Sessions Judges by name—No subsequent order appointing Sub-Judge by designation or name as Assistant Sessions Judge — Trial of sessions case by aforesaid Sub-Judge is illegal.

Where the predecessors of a Subordinate Judge had been appointed Assistant Sessions Judges by name but there is no subsequent order appointing the Subordinate Judge by designation or name as Assistant Sessions Judge, the trial by the Subordinate Judge of a sessions case is illegal.

[P 681 C 2]

Public Prosecutor — for the Crown.

FACTS.—The accused was committed to the sessions by the Stationary Sub-Magistrate, Bundar, for an offence under Ss. 457, 380 and 75, Penal Code, and the Subordinate Judge of Masulipatam tried the case and convicted the accused to transportation for life. The previous Subordinate Judges were appointed Assistant Sessions Judges, Kistna, by name; but the Subordinate Judge who tried this case was not appointed as such either by name or by designation. The matter was therefore referred to the High Court by the Sessions Judge, Kistna.

Order.—The immediate predecessors of the Subordinate Judge of Masulipatam were appointed Assistant Sessions Judges by name and there is no subsequent order appointing the Subordinate Judge of Masulipatam by designation or name as Assistant Sessions Judge. The reference is therefore accepted and the conviction of the accused is set aside. He will be retried according to law.

C.R.K./G.N. *Reference accepted.*

(28) A. I. R. 1941 Madras 682

LEACH C. J. AND HAPPELL J.

A. V. Viswanatha Sastri and others — *Appellants*

v.

A. R. Murugappa Chetti and another — *Respondents.*

Letters Patent Appeal No. 77 of 1938, Decided on 28th November 1940, against judgment of Pandrang Row J., D/- 10th August 1938.

Madras City Tenants' Protection Act (3 of 1922), Ss. 1 (3) and 2 (4) — Sub-lessee cannot claim greater rights than his landlord — Lessee creating sub-tenancy before Act — Lease terminating after Act came into force — Sub-tenancy also comes to end—Lease renewed — New sub-tenancy comes into existence—Sub-tenant must be deemed to be in possession under sub-tenancy created after Act came into force — After new lease sub-tenant cannot be said to be person continuing in possession after termination of sub-tenancy — Sub-tenant is not entitled to benefits of Act.

A sub-lessee can have no greater rights than his landlord and when the landlord's lease terminates, any sub-tenancy created by him ceases to exist. Consequently, where the lessee creates a sub-tenancy before the Act and his lease terminates after the Act came into force the sub-tenancy also comes to an end with the termination thereof, and when a new lease is created a new sub-tenancy comes into existence and therefore the sub-tenant must be deemed to be in possession of a tenancy created after the Act came into force. He cannot be said to be a person continuing in possession after the termination of the sub-tenancy after the creation of the new lease. Consequently, the sub-tenant is not entitled to the benefit of the Act : ('40) 27 A I R 1940 P C 17, *Rel. on.* [P 683 C 1]

S. Rangachariar — for Appellants.

W. S. Krishnaswami Naidu — for Respondents.

Leach C. J. — The appellants instituted the suit out of which this appeal arises in the City Civil Court for a decree for the ejectment of the respondents from premises situate in Mottai Gardens, Washermenpet, Madras. The respondents claimed that they were tenants within the meaning of the Madras City Tenants' Protection Act, 1921, and that the suit could not be maintained as the notice required by S. 11 of the Act had not been given. The City Civil Court Judge held that the Act did not apply and decreed the suit. On appeal to this Court, Pandrang Row J. held that the Act did apply and that the plea raised by the respondents was a valid one. Accordingly he allowed the appeal and dismissed the suit with costs. The appellants have preferred the present appeal from the decision of Pandrang Row J. In order to appreciate the contentions of the respective parties it is necessary to refer in some detail to the facts. Appellant 3 is a lessee from appellants 1 and 2 of certain properties, which include the properties in suit. Appellants 1 and 2 are the receivers appointed in a partition suit and by an order of this Court passed in 1925 took possession of all the properties from one Kasim Sahib, to whom they had been leased. The properties comprised a market and houses, shops and vacant land in the vicinity of the market. According to the lease deed, there are four blocks of property. The market comprises one block, a house and shops in Venkatakrishnan Street, another block, a house and shops in the Tiruvottiyur High Road, a third block, and shops and vacant land in Mottai Gardens, a fourth block. The four blocks have been referred to in these proceedings and in the partition suit as "the market." Kasim Sahib went into possession of the properties on 5th January 1916 under a registered deed, which gave him a lease of the premises for five years. Although the contract allowed him to sublet the houses, shops and stalls in the market, it prohibited him from creating any other sub-tenancies. He was also prohibited from converting the existing buildings and from erecting fresh ones. This lease was renewed for a period of three years on 5th January 1921 on similar terms.

A further lease for three years was granted on 27th April 1924, also on the same terms. The partition suit was filed in 1924 and it involved all the properties leased to Kasim Sahib. When the receivers were appointed they ejected Kasim Sahib for breaches of the conditions of his tenancy, and leased all the properties to three persons of whom appellant 3 was one. This lease continued for three and a half years. On 27th August 1929 the properties were leased for three years to defendant 3 in the suit out of which this appeal arises. On 1st November 1931 the properties were leased to appellant 3, who is still the lessee. In 1917 Kasim Sahib sublet a part of the vacant land in Mottai Gardens to the respondents and they erected thereon a shed for the purposes of storing firewood. They were dealers in firewood. Kasim Sahib had no power to allow the respondent to erect this building, but he did not interfere and he accepted rent from them in respect of it. When the receivers took possession of the property in 1925 no objection was taken to the action of the respondents in erecting this building and they granted a new lease knowing that the lessees would be accepting rent from the respondents in respect of the

building. The respondents commenced their occupation in 1927 as the daily tenants of the lessee and throughout have continued in occupation on this basis. On each occasion when a fresh lease was granted the respondents accepted the lessee as their landlord and paid to him the daily rent.

The present suit was filed by the appellants in 1934. The question which the Court is called upon to decide is whether the present tenancy of the respondents must be deemed to have commenced before 21st February 1922 when the Madras City Tenants Protection Act came into force. If they are to be deemed to be holding under a tenancy created after the Act came into force it is conceded that they will not be entitled to the benefit of the Act, as S. 1 (3) provides that the Act shall apply only to tenancies of land created before the commencement of the Act. Section 2 (2) states that land does not include buildings, and much has been said as to whether the respondents' tenancy was a tenancy of the land or of the building. It may be taken that the tenancy which was originally created was a tenancy of the land because the plot of which they got possession and in respect of which they paid rent had no superstructure on it at the outset. We accept the argument advanced on behalf of the appellants that the respondents must be deemed to be in possession under a tenancy created after the Act came into force. A sub-lessee can have no greater rights than his landlord and when the landlord's lease terminates any sub-tenancy created by him ceases to exist. The respondents were originally the sub-tenants of Kasim Sahib, but his lease of the properties terminated in 1925, and with the termination the respondents' sub-tenancy came to an end. On each occasion when a new lease was created there was a new sub-tenancy and the respondents must be deemed to be in possession under a sub-tenancy which commenced on 1st October 1934.

Mr. Krishnaswami Naidu has laid great stress on the definition of the word "tenant" in sub-s. (4) of S. 2 of the Act. The sub-section defines the word "tenant" as meaning a tenant of land liable to pay rent on it, every other person deriving title from him, and as including persons who continue in possession after the termination of the tenancy. The learned advocate says that the respondents derive title from Kasim Sahib, but that is obviously not the case. At one time they did derive title from him, but that title came to an end and they derived title from others after the Act came into operation. Mr. Krishnaswami Naidu has suggested that he receives help from the words "includes persons who continue in possession after the termination of the tenancy". These words would help the respondents if they were now in possession in continuation of the sub-tenancy created by Kasim Sahib, but unfortunately for them that is not the case. In I L R (1940) Mad 172[1] the Privy Council considered the definition of the word "tenant" in S. 2 (4) and held that to obtain the benefit of the remaining sections of the Act including S. 12, a tenant must show that his tenancy was created before the commencement of the Act. The respondents have failed to show that; in fact the evidence clearly demonstrates that the sub-tenancy under which they are now holding was created as late as 1934. For these reasons, the appeal will be allowed and the decree of the trial Court restored with costs throughout. Inasmuch as the receivers took no action after Kasim Sahib's interest in the properties had ceased in 1925 and the respondents were allowed to continue in possession on the basis of paying rent to the then lessees we think that six months will be a reasonable time to give them for the removal of the superstructure.

C.R.K./G.N. *Appeal allowed.*

1. ('40) 27 AIR 1940 P C 17 : 185 I C 571; I L R (1940) Mad 172 : 67 I A 25 : I L R (1940) Kar P C 43 (P C), Ranganathan Chetti v. Ethirajulu Naidu.

(28) A. I. R. 1941 Madras 683

LAKSHMANA RAO J.

In re Vasireddi Sivalinga Prasad — *Petitioner.*

Criminal Revn. Case No. 24 and Petn. No. 21 of 1940, Decided on 31st July 1940, to revise order of Joint Magistrate, Bezwada, in C. C. No. 13 of 1939.

Penal Code (1860), S. 504—Accused while addressing meeting abusing certain persons not present—Conviction under S. 504 is unsustainable.

Where the accused in the course of addressing a meeting abuses certain persons who are not present at the meeting his conviction under S. 504 cannot be sustained. [P 684 C 1]

A. Lakshmayya—for Petitioner.

Public Prosecutor—for the Crown.

Order. — The petitioner was an organising secretary of the Andhra Provincial Ryots Association and he addressed a meeting of the ryots of Peddavaram in the open space in front of the house of P. W. 1, the Kamatam agent of the zamindarini of Muk-

tyala on the night of 21st January last. He abused the zamindarini and her agents in the course of his speech on the inam legislation but neither the zamindarini nor her agents were present at the meeting and, as rightly conceded, the conviction of the petitioner under S. 504, Penal Code, is unsustainable. It is, therefore, set aside and the fine, if levied, will be refunded.

C.R.K./G.N. *Conviction set aside.*

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(28) A. I. R. 1941 Madras 684

KING AND PATANJALI SASTRI JJ.

Land Acquisition Officer, Calicut — *Appellant*

v.

S. V. Subba Rao and another — *Respondents.*

Appeal No. 224 of 1939, Decided on 4th March 1941, against decree of Sub-Judge, South Malabar at Calicut, D/- 7th November 1938.

Land Acquisition Act (1894), S. 23—Acquisition of site with building — Rate of interest obtainable on Government securities only 3 per cent—Mode of calculating compensation to be awarded stated.

It is the practice of the Courts in the Madras Presidency to calculate the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities.

[P 684 C 2]

When the rate of interest on the Government securities is 3 per cent. at the time of acquisition of a site and building thereon the proper course to determine the value of the property for the purpose of awarding compensation is to capitalise the annual rental value of the property at 33⅓ years' purchase according to the practice of the Courts in the Madras Presidency of calculating the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities: ('38) 25 A I R 1938 Mad 33, *Rel. on.*

[P 684 C 2]

Government Pleader — for Appellant.

K. Kuttikrishna Menon — for Respondents.

King J.—The subject-matter of this appeal is a small plot of land in Calicut measuring 2 cents which has been acquired for the purpose of a telephone exchange. Notification was issued in 1935. The evidence shows that at the time of the notification a building was standing upon the site which had originally consisted of four rooms on the ground floor and three rooms in the upper storey. In 1932, however, one of the rooms on the ground floor had been destroyed, and the whole of the upper storey had also been destroyed on account, as the claimant puts it, of a portion of the Anjuman building falling upon it. The owner of this property claimed Rs. 22,000 for it. The Land Acquisition Officer awarded Rs. 2700. He arrived at this figure by calculating the annual rental actually derived from the property (it should be mentioned here that the rooms in the lower storey were let out as shops at Rs. 15 a month). Deducting three months' rent as necessary expenditure for repairs and the payment of tax to the municipality the remaining nine months' rent comes to Rs. 135. This sum capitalised at 20 years' purchase amounts to Rs. 2700. The claimant was dissatisfied with this award and the matter was referred to the learned Subordinate Judge of Calicut. The learned Judge held that by the expenditure of a small sum of money some use could have been made of the original fourth room on the ground floor and an additional rent of Re. 1 per month obtained. He calculated therefore the net rent after deducting necessary expenses at Rs. 144 and capitalised this sum at 33⅓ years' purchase instead of 20 years, following the decision of a Bench of this Court in I L R (1938) Mad 431.[1] The amount of Rs. 2700 was thus increased to Rs. 4800. Against this decision the Government has appealed and the claimant has filed a memorandum of cross-objections. It should also be mentioned at this stage that under S. 27 (2) of the Act, the Subordinate Judge in enhancing the award of the Collector ordered that no costs should be paid by the Collector to the claimant.

The first question which arises in this appeal is whether the learned Subordinate Judge was correct in adopting 33⅓ years' purchase in capitalising the rental value of the property. We are of opinion that he was correct. It is clearly laid down in the case already cited that it has long been the practice of the Courts in this Presidency to calculate the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities. It is no doubt argued on behalf of the Government in this appeal that a purchaser of house property in a municipality like Calicut would expect to get more for his money than if he had invested it in Government securities. But, on this point, there is no evidence available in the proceedings before the learned Subordinate Judge and we have not been shown any authority in which any distinction of this kind has been drawn between sites in a municipality and sites in the country. We are of opinion that

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1. ('38) 25 A I R 1938 Mad 33 : 175 I C 735 : I L R (1938) Mad 431 : (1937) 2 M L J 744, Collector of Kistna v. Zamindar of Challapalli.

the learned Subordinate Judge was right in following the authority in I L R (1938) Mad 431[1] and in view of the fact that there was evidence before him that the rate of interest obtainable on Government securities in 1935 was only 3 per cent., the method of capitalisation by taking 33⅓ years' purchase is mathematically correct.

The other question raised in the appeal is one of costs. It is argued that the learned Subordinate Judge, acting under S. 27 and finding that the claimant had made an extravagant claim would have better exercised his discretion not only by refusing costs to the claimant but by ordering the claimant to pay part of the Collector's costs. We see no good reason for interfering with the discretion exercised by the learned Subordinate Judge, and particularly so in view of the manner in which we proceed to dispose of the memorandum of cross objections. The main question raised in the memorandum of cross-objections is an objection to the procedure of the Land Acquisition Officer and to a lesser extent the procedure of the learned Subordinate Judge, in refusing to recognise that the true rental value of the property acquired might not be something higher than the rent actually received by the claimant. No doubt on this basis an additional rent of Re. 1 has been allowed by the learned Subordinate Judge in making his calculations. But we do not think that this amount is sufficient. As already stated, there is evidence that before 1932 the building was a larger one with more accommodation available. There is evidence that for a short time in 1932 a rent of Rs. 9 was actually received from the upper storey. There is evidence that the reason for the collapse of the upper storey and of one of the rooms below was not any structural defect in the building itself but the fact that a neighbouring building fell upon it and this evidence has not been subjected to any cross-examination. We think therefore that although this aspect of the case has not been dealt with in any detail in the evidence, it is reasonably certain that a purchaser by expending whatever is necessary to put the building once again into proper order, and restoring it to its original size could obtain a rental considerably higher than Rs. 15. Of course to do this he would have to incur considerable expenditure, but we feel certain that the net result would be to his advantage. It is conceded that if in fact the present owner of the property has neglected it in such a way as not to derive the true economic rent from it, he should not be penalised on this account by his not being awarded the true market price. The true market price is what a purchaser would give with all possibilities of the purchase present to his mind. It is of course difficult for us to assess this true market value in view of the paucity of the evidence. But we are of opinion that justice will be done as between both parties by assessing this rental value at Rs. 20 a month.

The result will be that the amount payable to the claimant should be enhanced to Rs. 180 multiplied by 33⅓ and to this of course will be added the usual 15 per cent. compensation. Now that we have enhanced not only the award of the Land Acquisition Officer but the award of the learned Subordinate Judge, we are certainly unable to regard the claimant's original claim as so extravagant as to require that he should be called upon to pay any of the Collector's costs. The result is that the appeal is dismissed with costs, and the memorandum of cross-objections allowed with proportionate costs.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 685

LAKSHMANA RAO J.

T. Kanniah Naidu — Petitioner

v.

Rajammal — Respondent.

Criminal Revn. Case No. 988 and Petn. No. 941 of 1940, Decided on 31st January 1941, to revise order of Sub-Divisional 1st Class Magistrate, Tiruvellore, Chingleput District, D/- 22nd October 1940.

Criminal P. C. (1898), S. 488—S. 488 does not limit right of maintenance to minors.

Section 488 does not limit the right of maintenance to minors and consequently a girl unable to maintain herself is entitled to maintenance irrespective of her age. [P 685 C 2]

A. S. Nataraja Ayyar — for Petitioner.

T. K. Ramaswami Ayyangar — for Respondent.

The Public Prosecutor — for the Crown.

Order.—The girl is unable to maintain herself and S. 488, Criminal P. C., does not limit the right of maintenance to minors. The age of the girl is therefore immaterial and the revision petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 686

BURN J.

Panchayat Board, Razole — Petitioner

v.

Sait Amichand Dungarmal Firm, represented by Sait Anjarimal and others — Respondents.

Civil Revn. Petns. Nos. 572 to 582 of 1938, Decided on 6th November 1940, to revise decrees of Dist. Munsif, Razole, in S. C. S. No. 628 of 1936, etc.

(a) Madras Local Boards Act (14 of 1920), S. 228 (2) and Sch. 4, R. 11A — Plaintiff company alleging assessment to profession tax arbitrary, unjust and incorrect — Burden is on Panchayat Board to show that Act was in substance and effect complied with — President of Board making no reference to accounts or income-tax demand notices submitted and giving no reasons for assessments made—R. 11A cannot be said to be in substance and effect complied with — Suit for refund of tax paid by plaintiff is competent.

Where the assessee company institutes a suit against the Panchayat Board for the refund of the profession-tax paid by it on the ground that the assessment was made arbitrarily, unjustly and incorrectly, the burden is upon the Board to show that the provisions of the Act had in substance and in effect been complied with. [P 686 C 2]

Where the President gives no reasons of any kind for the assessments which he makes and makes no reference to the accounts or income-tax demand notices submitted, the provisions of R. 11A cannot be said to have been in substance and in effect complied with and consequently a suit for the refund of the tax paid is competent in such a case. But the fact that the plaintiff in his appeal had also produced his accounts and that no notice had been taken of his accounts is not by itself sufficient to show that the provisions of the Act had not been substantially complied with. [P 687 C 1, 2]

(b) Madras Local Boards Act (14 of 1920), S. 225—Suit for refund of tax illegally collected —S. 225 does not apply.

Section 225 is confined to suits for compensation or damages and does not apply to suits against a Local Board for the refund of profession-tax alleged to have been illegally collected : ('39) 26 AIR 1939 Mad 421 (FB), *Rel. on.* [P 686 C 2]

V. Viyyanna — for Petitioner.

P. Satyanarayana Rao and V. Parthasarathy — for Respondents.

Order. — These revision petitions are brought from the decisions of the learned District Munsif of Razole in S. C. S. Nos. 625 etc., of 1937. The suits were filed by the respondents, residents within the limits of the Union Panchayat of Razole for the refund of sums of money collected from them in the shape of profession tax. The learned District Munsif decreed the suits and the Panchayat Board has preferred these revision petitions. The Panchayat Board alleged three main reasons why the suits should be dismissed. The first was a plea that the suits were barred by limitation under S. 225, Madras Local Boards Act, since they had been brought more than six months after the date on which the cause of action arose. The second was that the payments had been made voluntarily and therefore the sums paid could not be recovered and the third was that the suits were barred by S. 228 (2), Local Boards Act. Mr. Viyyanna for the petitioning Board has drawn my attention to the decision of the Full Bench in I L R (1939) Mad 566.[1] After that decision it is no longer possible for Mr. Viyyanna to contend that the suits were barred by limitation under S. 225, Local Boards Act. Mr. Viyyanna has also not argued the second point, namely that the payments were made voluntarily. He has devoted his argument to the question arising under S. 228 (2). That provision is as follows :

> No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment or collection of money made under the said authority provided that the provisions of this Act have been in substance and effect complied with.

Here the allegations were that the assessment of the plaintiffs to profession-tax had been made arbitrarily and unjustly and incorrectly. That being so, the burden was upon the Panchayat Board to show that the provisions of the Act had been in substance and effect complied with. The learned District Munsif has written a very long judgment and in some parts it is not quite clear, but his finding is (at the end of his judgment in a para. 26) that

> the defendant Board has not complied with the provisions of the Act in substance and effect in levying profession-tax on the plaintiff firms or in disposing of their appeals.

Mr. Viyyanna has attempted to show that the learned District Munsif has misconceived his proper function and that he has discussed the question whether the assessments were correct rather than the question whether the assessments have been correctly made. It is with regard to this point that the judgment of the learned District Munsif is not at all times quite clear; but there is, I think, sufficient indication in the record that the procedure prescribed for assessing persons to profession tax was not substantially complied with in these cases. For this purpose, the most important rule that

1. ('39) 26 AIR 1939 Mad 421 : 182 I C 474 : ILR (1939) Mad 566 : (1939) 1 M L J 588 (FB), Panchayat Board, Tiruvottiyur v. Western India Matches Co.

needs to be considered is R. 11-A in Sch. 4 appended to the Local Boards Act. Under the first part of this rule, the company or person upon whom a notice has been served is at liberty to submit a return showing the income derived during the half-year for which profession-tax is claimed or for the corresponding half-year of the previous year, and by sub-s. (2) it is provided that if such a return is made and if the President is satisfied that it is correct and complete, the President shall levy the profession-tax from the company or person on the basis of such return. It is further provided in the explanation to sub-s. (2) that if the company or person produces the notice of demand of income-tax served upon it or him, the President shall be bound to take one-half of the income mentioned in the notice as the income derived from the sources on which profession-tax is leviable for the purpose of levying profession-tax. By sub-s. (3) it is laid down that if no return is made as required under sub-r. (1) or if the President is satisfied that any return so made is incorrect or incomplete, the President shall assign to the company or person the class in the scale appropriate to the half-yearly income of such company or person as estimated by him, and sub-s. (4) enacts how the President may arrive at the estimate for the purpose of such classification.

In these cases it is not disputed that returns were submitted by all the plaintiffs as required under sub-r. (1) of R. 11-A. No evidence was produced from the Panchayat Board to indicate that the President was satisfied that any of these returns was incorrect or incomplete. No evidence was produced to show that the President, when he assigned a certain classification to each of these plaintiffs, guided himself by the considerations pointed out in sub-r. (4) of R. 11-A. In some instances moreover income-tax demand notices were submitted which under the explanation already quoted ought to have been accepted as conclusive for the purpose of classification. Mr. Viyyanna can only suggest that since the President did not accept the returns but made his own assignments of classes to these plaintiffs for the purpose of profession-tax, he must be deemed or presumed to have been satisfied that the returns were incorrect or incomplete. I do not think this can fairly be inferred. Since the President gave no reasons of any kind for the assessments which he made and since he made no reference to the accounts or income-tax demand notices submitted, it seems much more probable that the President took no notice of the provisions of R. 11-A of Sch. 4. It cannot in any case I think be said that the Board proved that the provisions of R. 11-A have been in substance and in effect complied with.

The plaintiffs also made objections to the manner in which their appeals had been disposed of. They alleged that with their appeals they had also produced their accounts and that no notice had been taken of their accounts. This contention appears to have been correct in fact, but by itself this would not, I think, suffice to show that the provisions of the Act had not been substantially complied with. The rules with regard to appeals to Panchayat Boards are Rr. 28, 29, 30 and 31 in Sch. 4 to the Local Boards Act. In these rules no procedure is laid down for the disposal of appeals. Learned counsel for the respondents agrees with the learned District Munsif in referring to a Government Order No. 691 which appears to have been published in the Gazette of 4th July 1924. There was not, however, any proof on the side of the plaintiffs that this Government order was authoritative in the sense that it was passed by the Government in the exercise of any rule-making power conferred upon them by the provisions of the Local Boards Act. Its terms read rather more like advice to Local Boards as to the disposal of appeals. I am not satisfied therefore that this Government order has been shown to have the force of law. For the reasons already indicated, I think the decision of the learned District Munsif in these cases is in accordance with law. These petitions must therefore be dismissed with costs — one vakil's fee for the batch, Rs. 150.

C.R.K./G.N. *Petitions dismissed.*

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(28) A. I. R. 1941 Madras 687

LAKSHMANA RAO J.

In re B. Sriniwasa Rao — Appellant.

Criminal Appeal No. 639 of 1939, Decided on 10th April 1940, against order of Chief Presidency Magistrate, Egmore, Madras, D/- 3rd November 1939.

Defence of India Act (1939), S. 2 — Rules under, R. 34 (6) (d) and (k) — Speech to desist public from enlisting in army or assisting prosecution of war in any manner is prejudicial act within meaning of R. 34 (6) (d) and (k).

A speech exhorting the audience to desist from enlisting in the army or assisting the prosecution of the war in any manner prejudices the recruiting of persons for services in the army and influences

the conduct or attitude of the public in a manner likely to be prejudicial to the efficient prosecution of the war and thus amounts to prejudicial act as defined in R. 34 (6) (d) and (k). [P 688 C 1]

S. Suryaprakasam — for Appellant.

C. V. Nagaraja Sastri for the Crown Prosecutor — for the Crown.

Judgment. — The appellant was the Secretary of the Madras Socialist Party and he delivered two speeches at two public meetings held on 29th September and 15th October last. He was charged under R. 38, cl. (5), Defence of India Rules, and besides alleging some distortions in the transcriptions, he contended that the speeches were not "prejudicial acts" as defined in R. 34, cl. (6). The Magistrate held otherwise and convicted and sentenced him to rigorous imprisonment for two years in respect of each speech, directing the sentences to run concurrently. The accuracy of the transcriptions of the speeches which were taken down in shorthand by trained Sub-Inspectors was not seriously disputed, and apart from other objectionable matters the appellant exhorted the audience in both the speeches to desist from enlisting in the army or assisting the prosecution of the war in any manner. He had been warned by the Commissioner of Police against carrying on such propaganda and the speeches were intended to prejudice the recruiting of persons for services in the army and influence the conduct or attitude of the public in a manner likely to be prejudicial to the efficient prosecution of the war. They were thus prejudicial acts as defined in sub-cls. (d) and (k) of R. 34, cl. (6) and the conviction under R. 38, cl. (5) is correct. It is therefore confirmed, and in the absence of any undertaking not to repeat the offence, the sentence cannot be said to be excessive. The sentence too is confirmed and the appeal is dismissed.

C.R.K./G.N. *Appeal dismissed.*

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* (28) A. I. R. 1941 Madras 688

LEACH C. J. AND SOMAYYA J.

Mathrukovil Kizhakkappat Matathil Ramalinga Iyer — Appellant

v.

Thavanur Matathil Krishna Pattar's son Swaminatha Ayyar—Respondent.

Appeal No. 71 of 1939, Decided on 26th March 1941, against order of Sub-Judge, Tellicherry, North Malabar, D/- 21st September 1938.

*** Civil P. C. (1908), S. 13—Plaintiff obtaining decree against defendant in Cochin State Court before 1932 — Defendant's parents subjects of Cochin State — Defendant born in British India —At date of suit defendant resident in British India and not submitting to jurisdiction of Cochin State Court — Defendant held Cochin subject as well as being British subject at date of suit — Decree held binding on defendant and could be executed in British India against him— Fact that defendant who was of Cochin nationality changed his domicile of origin held could not affect Cochin Court's right to adjudicate upon claim against him — Renunciation of Cochin nationality by defendant after passing of decree against him held could not help him.**

The plaintiff obtained a decree against the defendant in a Court in the Cochin State. The parents of the defendant were subjects of the Cochin State but the defendant was a British subject as he was born in British India. At the time of the institution of the suit, the defendant was resident in British India and there was no submission to the jurisdiction of the Court in Cochin. The decree was obtained before 1932 when the Cochin State Nationals Definition Act was passed. The Act was not retrospective :

Held **that (1) the defendant at the time of the institution of the suit had a dual nationality. Under the law of Cochin, he was a Cochin subject as well as being a British subject and therefore the decree was binding on the defendant and could be executed in British India against him : 22 Coch L R 393 (FB), *Rel. on.*** [P 690 C 1]

(2) Domicile was not a factor in determining nationality. Consequently, since the defendant was a Cochin national the fact that he had changed his domicile of origin could not affect the right of the Cochin Court to adjudicate on a claim against him. [P 689 C 1]

(3) Renunciation of the Cochin nationality by the defendant after the passing of the decree against him could not help him : (1917) 116 L T 446, *Rel. on.* [P 689 C 1]

B. Sitarama Rao and S. Venkatachala Sastri— for Appellant.

T. M. Krishnaswami Ayyar and C. K. Viswanatha Ayyar — for Respondent.

Leach C. J. —This appeal raises a question of international law. It arises out of execution proceedings instituted in the Court of the District Munsif of Cannanore. The appellant had obtained a decree against the respondent in the District Court of Trichur, which is in the State of Cochin. For the purpose of execution the appellant caused the decree to be transferred to the District Court of Tellicherry. The District Judge, however, sent the decree to the Court of the District Munsif of Cannanore in order that he might hear and decide the application for execution. When the application came on for hearing, the respondent challenged the right of the Court to execute the decree. He claimed that he was a British subject with a residence outside the Cochin State and therefore the decree could not be enforced against him in a British Indian Court.

The respondent is a British subject because he was born in British India, but his parents were subjects of the State of Cochin. The fact that he could claim British nationality under S. 2 (1) (a), British Nationality and Status of Aliens Act, 1914, does not, however, preclude him from having a dual status. Dual nationality is now well recognized. Section 13, Civil P. C., states that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title, except under certain circumstances which are set out. There is only one exception with which the Court is now concerned and that is, the decree must have been pronounced by a Court of competent jurisdiction. The Trichur Court could only be a Court of competent jurisdiction within the meaning of S. 13 if the respondent were a Cochin subject, or were resident within its jurisdiction when the suit was instituted, or had submitted to its jurisdiction. It is common ground that he was resident in British India at the time of the institution of the suit and that there was no submission to the jurisdiction of the Trichur Court. The District Munsif held that the respondent was a Cochin subject and that the appellant was entitled to proceed to execute the decree which he had obtained in Trichur, but, on appeal, the Subordinate Judge of Tellicherry reversed the decision of the District Munsif on the ground that the respondent, although born of Cochin parents, had lost his Cochin nationality by reason of his change of domicile. There can be no doubt that here the Subordinate Judge erred. Domicile is not a factor: *see* Dicey's "Conflict of Laws" (Edn. 5, p. 405). Therefore, if the respondent is a Cochin national the fact that he had changed his domicile of origin, if it be a fact, could not affect the right of the Cochin Court to adjudicate on a claim against him.

In his evidence in the District Munsif's Court the respondent stated that he was not a Cochin subject and this statement has been said to amount to a renunciation of his Cochin nationality, but renunciation after the decree had been passed against him cannot help him : *see* (1917) 116 L T 446.[1] In that case the appellant was born in London in 1882. His father and mother were both Dutch subjects, but were ordinarily resident in Great Britain. On 8th November 1916, he was arrested on a charge of failing, when called up for military service, to appear at the time and place appointed. The case was adjourned to 15th November 1916. On 9th November 1916 the appellant made a declaration of alienage under S. 14 (1), British Nationality and Status of Aliens Act of 1914, and as the result claimed that he was not a British subject and therefore not liable to be called up for military service. The Divisional Court (Lord Reading C. J., Ridley and Rowlatt JJ.) said that the first and fatal answer to the appellant's case was that nothing which happened after 8th November could be an answer to the charge of failing to submit himself to the military authorities before that date. In accordance with the same principle, if the respondent was a Cochin subject at the date of the passing of the decree any declaration renouncing his Cochin nationality after the passing of the decree would leave the position unchanged. As domicile is not a factor and as it is common ground that the respondent was not resident in Cochin at any time material and had not submitted to the jurisdiction of the Trichur Court, the question resolves itself into whether under the law of Cochin, he was a Cochin subject as well as being a British subject at the date of the institution of the suit. From the time of the passing of 25 Edward III, a son of British parents born abroad has always been regarded as a British subject. There were statutes passed in the reigns of Anne, George II and George III dealing with the question of nationality, but the right of the son of a British subject to claim the nationality of his father has throughout been recognised. The position of the grandson does not call for mention in this case. There was no statute in Cochin until 1932 when the Cochin State Nationals Definition Act was passed. Section 2 of the Act states that descendants of emigrants from the Cochin State, born abroad, shall be considered to be State nationals for two generations. The respondent was born in 1896 and it has been accepted on behalf of the appellant that the statute cannot be given retrospective effect. In these circumstances the Court has to decide what was the law in the Cochin State at the time the respondent was born. This question was not considered in the Courts below, but it has to be considered in this Court.

It is manifest from a decision of a Full Bench of the Chief Court of Cochin given

1. (1917) 116 L T 446: 81 J P 199: 15 L G R 491: 25 Cox C C 684 : 33 TLR 317, Vecht v. Taylor.

in the year 1931 that before 1932 the law of Cochin was the same as the English law on the subject. The case was that in 22 Coch L R 393,[2] there it was expressly recognised that a member of a Cochin tarwad could acquire a foreign nationality by birth or otherwise and that a person could at one and the same time be the subject of more than one State. The Court had to consider whether a person born of Cochin parents had acquired British nationality and after recognising that dual nationality could exist the Court found that the appellant had acquired British nationality and was liable under a decree passed by the Subordinate Judge of Calicut which had been transferred to Trichur for execution. That case differs from the present case in that the decree was passed by a British Indian Court and sent to a Cochin Court for execution, whereas here we have a decree passed by a Cochin Court sent to a British Indian Court for execution, but the principle is the same. The Chief Court of Cochin was the highest Court of the Cochin State at the time and the pronouncement by a Full Bench of the Court must be accepted as an authoritative statement of the law which existed in the State before the passing of the Act of 1932. It cannot be denied that the respondent at birth was a subject of the Cochin State, because he was born of Cochin parents. The fact that he was born in British India did not affect his status in Cochin, and at the time of the institution of the suit he had not lost that status, which means that the Trichur Court was a Court competent to try the appellant's suit against the respondent. For these reasons we allow the appeal and restore the decision of the District Munsif. The appellant is entitled to his costs here and in the Subordinate Court.

C.R.K./G.N. *Appeal allowed.*

2. ('31) 22 Coch L R 393 (F B), Meenakshi Amma v. Subramania Iyer.

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(28) A. I. R. 1941 Madras 690

WADSWORTH J.

Javvadi Narasimhamurti — Appellant

v.

Maharajah of Pittapur and another — Respondents.

Second Appeal No. 169 of 1938, Decided on 11th February 1941, against decree of the Sub-Judge, Amalapuram, D/- 31st August 1937.

(a) Transfer of Property Act (1882), S. 53— Cases falling under S. 53—Consideration found to be partly good — Class of cases to be distinguished when considering aforesaid cases stated — S. 53 does not apply to transactions which though supported by good consideration might in case of insolvency be impeached as fraudulent preferences.

In dealing with cases falling under S. 53 in which the consideration is held to be partly good, it is necessary to distinguish between certain classes of cases and to remember that S. 53 does not apply to transactions which, though supported by good consideration, might in case of an insolvency be impeached as fraudulent preferences. There are three main classes of cases which should be distinguished: (1) those in which that portion of the consideration which is true goes to discharge a prior simple debt of the transferee himself. (2) Cases in which that portion of the consideration which is true goes to the discharge of a prior mortgage debt on the property transferred. These cases raise questions of subrogation and, under S. 92, T. P. Act, questions of registration. (3) Cases in which that portion of the consideration which is true goes to discharge prior simple debts due to third parties and not to the transferee. [P 691 C 1, 2]

(b) Transfer of Property Act (1882), S. 53 — Debtor to defeat or delay his creditors colluding with one of them and executing mortgage in his favour — Consideration partly fictitious and partly true — Transaction as whole found to be collusive and intended to defeat and delay creditors—Transaction must be set aside as a whole.

When a debtor with a view to defeat or delay his creditors colludes with one of those creditors and creates a mortgage in his favour for a consideration which is partly fictitious and partly made up of a true money debt due to that creditor, on the finding that the transaction as a whole was a collusive transaction intended to defeat and delay creditors, the transaction should be set aside as a whole and the creditor who is a party to the fraud cannot be allowed the protection of the transaction to the extent of his prior debt discharged thereby: 36 Mad 29, *Not foll.*; ('24) 11 A I R 1924 Mad 450, *Doubted*; 24 M L J 266 and ('28) 15 A I R 1928 Mad 20, *Rel. on; Case law discussed.* [P 693 C 1]

(c) Transfer of Property Act (1882), S. 53— Transaction attacked under S. 53—Burden lies in first instance on attacking party to show transaction to be fraudulent — Prima facie case established — Burden shifts to alienee to show that he is transferee in good faith for valuable consideration.

When a transaction is attacked under S. 53 the burden lies upon the attacking party to show in the first instance that the transaction was a fraudulent transaction intended to defeat and delay creditors. But when a prima facie case has been established on that basis, then the burden shifts to the alienee to show that he is a transferee in good faith for valuable consideration: 23 Mad 184, *Rel. on.* [P 693 C 1]

When once it is established that the mortgagee has set up as true an item of consideration which to his knowledge was false and that the transaction as a whole was intended to defeat and delay creditors, the inference is irresistible that the mortgagee himself was a party to the scheme of fraud. [P 693 C 2]

M. Appa Rao — for Appellant.

Ch. Raghava Rao and S. Kothandarama Nayanar — for Respondents.

Judgment. — This appeal raises a question under S. 53, T. P. Act. The appellant, who was the plaintiff in the Court below, got a small cause decree against defendant 2 and in discharge of that decree he got a mortgage from defendant 2 for a sum of Rs. 1000 on 23rd March 1934. Besides the amount of Rs. 450 which went to discharge the small cause decree, there were two other debts of defendant 2 which were purported to have been discharged out of the consideration for the mortgage. These two debts have been found to be fictitious. In a suit of 1931, defendant 1 had got a decree for rent against defendant 2 and on 8th May 1934 in execution of that rent decree he attached the property covered by the mortgage in favour of the appellant. Presumably, this property was not the property on which the rent decreed fell due, so that there was no question of a first charge for rent. The appellant filed a claim in the execution proceedings on the strength of his mortgage. The claim petition was rejected and hence he had to file the present suit. The first Court found that the mortgage was good to the extent of Rs. 450 which went to discharge the small cause decree, that the other items of consideration were not true and gave a decree that the mortgage was valid and binding to the extent of Rs. 450 only. The lower appellate Court agreed with the findings of fact, namely that the consideration was true to the extent of Rs. 450 which went to the discharge of the small cause decree but that the balance of Rs. 550 represented fictitious payments one of which was alleged to have been made by the appellant, the mortgagee, himself. The lower appellate Court also came to the conclusion that the transaction as a whole being in fraud of creditors, it must be declared void as a whole and could not be held valid to the extent to which the money went in discharge of a prior debt due to the mortgagee.

Now in dealing with cases falling under S. 53, T. P. Act, in which the consideration is held to be partly good, it is necessary to distinguish between certain classes of cases and to remember that S. 53, T. P. Act, does not apply to transactions which, though supported by good consideration, might in case of an insolvency be impeached as fraudulent preferences. There are three main classes of cases : (1) those in which that portion of the consideration which is true goes to discharge a prior simple debt of the transferee himself (as in the present case); (2) cases in which that portion of the consideration which is true goes to the discharge of a prior mortgage debt on the property transferred. These cases raise questions of subrogation and, under S. 92, T. P. Act, as amended in 1929, questions of registration, with which we are not now concerned ; (3) cases in which that portion of the consideration which is true goes to discharge prior simple debts due to third parties and not to the transferee. In such cases the transfer cannot be supported by the argument that the transferee is to some extent getting a payment of his own debt and at the most conniving at what might be considered a fraudulent preference. Although in 46 M L J 125,[1] such a transaction, being in the form of a mortgage, was held to be good to the extent to which the consideration went in discharge of other debts of the transferor, this decision has been criticised in 34 M L W 949[2] and (1939) 2 M L J 362,[3] and it is doubtful whether it can now be considered good law. A further distinction has been made in some of the cases between fraudulent transfers by way of sale and fraudulent transfers by way of mortgage and there has been a tendency to regard a mortgage which is supported by good consideration only to the extent to which it discharges a prior simple debt due to the mortgagee as standing in a better position than a sale carried out in similar circumstances. This distinction has been by no means universally accepted and it is difficult to see how the general body of creditors are in any better position when the debtor's property is put out of their reach by a mortgage for a consideration which is largely fictitious, than when the same object is achieved by a fraudulent sale.

The appellant relies strongly on the decision of Sundara Ayyar J. sitting singly in 36 Mad 29.[4] The facts of that case are not very fully stated, but it appears that the mortgage which was attacked was to a certain extent supported by the discharge of a prior debt to the mortgagee and that the rest of the consideration was fictitious, the debtor being not at the time in a position to pay all his debts. The learned Judge

1. ('24) 11 AIR 1924 Mad 450 : 80 I C 147 : 46 M L J 125, Loorthia Odayar v. Gopalaswami Iyer.
2. ('32) 19 AIR 1932 Mad 182 : 135 I C 582 : 34 M L W 949, Appalaraju v. Krishnamurthi.
3. ('39) 26 AIR 1939 Mad 745 : 188 I C 283 : (1939) 2 M L J 362, Muthuvasu Chettiar v. Velu Muruga Nadar.
4. ('13) 36 Mad 29 : 11 I C 868 : (1911) 2 M W N 152, Chinna Pitchia v. Peda Kotiah.

points out that in so far as the mortgage was a fraudulent preference, it does not come within the mischief of S. 53, T. P. Act, and he seems to draw a distinction between a simple mortgage the effect of which is to give the real creditor only a security for his true debt, though fictitious debts are joined along with the true debt and a similar case where the transaction is in the nature of a sale or a mortgage with possession. The learned Judge states that the plaintiff's claim is only that of a simple mortgagee and his claim is simply to recover his money, and the fact that the mortgage is for an amount larger than he really paid, could be no reason for not upholding it to the extent that it is supported by a debt existing at the date of the mortgage, and the learned Judge distinguishes 30 Mad 6[5] as being a case of sale. Sundara Ayyar J.'s decision has been referred to frequently in subsequent cases of this Court. In some of those cases it has been merely differentiated on the ground that it relates to a mortgage held to be in part a fraudulent preference and has no bearing on cases of a sale: *cf.* (1939) 2 M L J 362.[3]

In 24 M L J 266,[6] the case is distinguished on the ground that there was no finding of any collusion between the mortgagor and the mortgagee whereby the fictitious sum was to be held by the mortgagee to defeat the creditors of the mortgagor; and though the facts in 24 M L J 266[6] are almost identical with those in 36 Mad 29,[4] the learned Judges, on a clear finding that there was collusion, held that the mortgage though supported by prior debts to the mortgagee to the extent of more than half of the consideration was a fraudulent transfer taken as a whole and could not be split into two transactions one of which was good and the other was bad. A similar view was taken by the Bench which decided A I R 1928 Mad 20,[7] which was also a mortgage case, and the learned Judges observed that if it is proved satisfactorily that only a portion of the consideration recited in the document did really pass, it is open to the Court to come to the conclusion that the transaction was intended to defeat or delay creditors and that in such a case, the proper order of the Court should be to set aside the transaction as a whole, because a transaction which is intended to defeat or delay creditors cannot be good in part and bad in part. This decision does not actually refer to the ruling in 36 Mad 29,[4] though the reasoning of the decision must be deemed incompatible with that case. In AIR 1927 Mad 278[8] the learned Judges had to deal with a case of a sale for Rs. 2000 which was supported by good consideration only to the extent of Rs. 500 and in dealing with the case in 36 Mad 29[4] they observe :

> If the learned Judge meant to lay down that in all cases where a mortgagee paid only a portion of the consideration that he should be given a decree for that portion on the footing of that mortgage, with due respect, we are unable to agree. If a person who is in embarrassed circumstances in order to shield his property from his creditors transfers it to another and if only a portion of the consideration recited in the document of transfer is paid and the balance is left with the transferee for his benefit and if this is done to the knowledge of the transferee, then the transaction is one coming under S. 53 . . . Where the transfer is bad under S. 53, the transferee is not entitled as a matter of right to get a mortgage decree for the amount actually paid by him. The decision in 36 Mad 29,[4] is opposed to the decisions of this Court as well as of the Privy Council.

The case in 1930 M W N 1145[9] was one of a usufructuary mortgage with a provision for the transaction to be treated as a sale if the money was not repaid within five years. Of the consideration for this deed, part was due to the mortgagee himself and it was held that this sum and one other item of consideration was true, but that the rest was fictitious and that the whole transaction was intended to defraud creditors. The learned Judges consider the leading cases including the decision in 36 Mad 29[4] and hold that the decision in 30 Mad 6,[5] which was confirmed by the Privy Council in 37 Mad 227[10] establishes that where a transaction is intended to defeat and delay creditors, the mere fact that a portion of the consideration was paid is no ground for not setting aside the transaction entirely and that in such a case the whole transaction has to be set aside. They also observe that the trend of authority clearly is in support of the view that unless there is a previous charge or mortgage which has been paid off, the mere fact that a portion of the consideration has been proved to have been paid is no ground for supporting a transac-

5. ('07) 30 Mad 6 : 16 M L J 427 : 1 M L T 351, Chidambaram Chettiar v. Sami Iyer.
6. ('13) 24 M L J 266 : 18 I C 768 : 13 M L T 206, Sama Rao v. Doraiswami Chettiar.
7. ('28) 15 AIR 1928 Mad 20 : 106 I C 651, Rajabhadar Mudaliar v. Thiruvengada Mudaliar.
8. ('27) 14 AIR 1927 Mad 278 : 99 I C 709, Viswanatha Reddi v. Venkata Reddi.
9. ('30) 1930 M W N 1145, Ponnuswami Pillai v. Quadir Mohideen Rowther.
10. ('14) 1 A I R 1914 P C 137 : 23 I C 714 : 37 Mad 227 (PC), Chidambaram Chettiar v. Srinivasa Sastrigal.

tion entered into to defeat or delay creditors as valid to the extent of the consideration actually paid. It is true that this was not a case of a simple mortgage. But the general pronouncement of the law on the subject is quite inconsistent with the view taken by Sundara Ayyar J. in 36 Mad 29.[4] It must, I think, be taken as established so far as Madras is concerned that when a debtor with a view to defeat or delay his creditors colludes with one of those creditors and creates a mortgage in his favour for a consideration which is partly fictitious and partly made up of a true money debt due to that creditor, on the finding that the transaction as a whole was a collusive transaction intended to defeat and delay creditors, the transaction should be set aside as a whole and the creditor who is a party to the fraud should not be allowed the protection of the transaction to the extent of his prior debt discharged thereby. It is contended that even assuming so much, there should be a finding that the mortgagee was a party to the fraud. Now, ordinarily speaking, when a transaction is attacked under S. 53, T. P. Act, the burden lies upon the attacking party to show in the first instance that the transaction was a fraudulent transaction intended to defeat and delay creditors. When a prima facie case has been established on that basis, then the burden shifts to the alienee to show that he is a transferee in good faith for valuable consideration. In 23 Mad 184,[11] which is a mortgage case similar to the present case, the learned Judges observed:

> We think that the inclusion of such debts (i. e., fictitious debts) in a document which would otherwise not be within the section, is prima facie evidence of an intention to defeat or delay the creditors, and it would lie upon the parties who wish to take advantage of the document to show that there was no such intention.

Now in the present case it has been found that out of a consideration of Rs.1000, Rs. 550 represented a good debt due to the transferee and the balance was made up of two fictitious debts, one of which is alleged to have been discharged by the transferee himself and it is found that the evidence of this alleged payment by the mortgagee is not true evidence and that the transaction as a whole was intended to defeat and delay creditors. In the face of such findings, it seems to me impossible to contend that the mortgagee was an innocent party who played no part in the fraud, except in so far as he secured the payment of his own debt. When once it is established that the mortgagee has set up as true an item of consideration which to his knowledge was false and that the transaction as a whole was intended to defeat and delay creditors, the inference is irresistible that the mortgagee himself was a party to this scheme of fraud. It follows therefore that even assuming that it is necessary to prove that the mortgagee was an active party to the scheme of fraud, the findings in the present case make such an inference irresistible. In the result therefore I agree with the conclusion of the lower appellate Court and dismiss the appeal with costs. (One set of costs for the two appeals before the lower appellate Court.) (Leave refused).

C.R.K./G.N. *Appeal dismissed.*

11. (1900) 23 Mad 184, Narayana Pattar v. Viraraghavan Pattar.

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(28) A. I. R. 1941 Madras 693

LEACH C. J. AND SOMAYYA J.

Vanga Krishna Reddi — Petitioner

v.

Kosana Peda Satyam and others — Respondents.

Civil Misc. Petn. No. 235 of 1941, Decided on 12th March 1941, to issue a writ of certiorari.

(a) Madras Hereditary Village Offices Act (3 of 1895), Ss. 12 and 10 (5)—Succession to office governed by S. 12—Fact that procedure under S. 10 (5) has been followed by mistake does not affect legal position.

Where succession to an office is governed by s. 12 under which no registration is necessary but persons who are entitled to succeed to the office are registered, under the mistaken idea that S. 10 (5) applied to the case, the fact that their names were registered does not in any way affect their legal position. [P 694 C 1]

(b) Madras Hereditary Village Offices Act (3 of 1895), Ss. 14 (1), 13—Person entitled to succeed to office even though minor by custom—Suit for office and emoluments — Court cannot give decree for mesne profits for more than three years before suit—S. 6, Limitation Act, does not apply.

Where a person who is entitled to succeed to office, even though he is a minor, by custom, sues for recovery of office and emoluments, the Court has no power to grant the plaintiff a decree for mesne profits for a period greater than three years. Section 6, Limitation Act, does not apply to such a suit by virtue of S. 29 (2) (b) of the same Act. [P 694 C 2]

Kasturi Seshagiri Rao and D. Suryaprakasa Rao — for Petitioner.

G. Chandrasekhara Sastry — for Respondents.

Leach C. J. — The petitioner was defendant 1 in a suit brought by respondents 1 and 2 in the Court of the Sub-Collector of Rajahmundry for the recovery of lands forming the emoluments of the office of village

blacksmith in the village of Arikirevula which is in the East Godavari District. The plaintiffs-respondents obtained a decree for the possession of the lands and for the payment to them of an amount representing the mesne profits for the years 1931 to 1939 inclusive. The petitioner says that the Revenue Court had no power to grant to the plaintiffs-respondents a decree for mesne profits for more than the three years immediately preceding the suit, and he asks the Court in certiorari proceedings to quash that part of the decree which is in excess of the trial Court's jurisdiction. It has been found, and is now accepted to be the case, that the office of the village blacksmith devolved in accordance with custom on the plaintiffs-respondents, notwithstanding that they were minors. The office of village blacksmith appears in the list of village offices set out in sub-section (4) of S. 3, Madras Hereditary Village Offices Act, 1895. Section 10 (1) states that a person shall not be eligible for appointment to one of the offices in the list given in sub-s. (1) of S. 3, unless he has attained the age of majority, but this provision is not applied in respect of offices falling within S. 3 (4). Succession to the offices mentioned in S. 3 (4) is governed by the provisions of S. 12, which says that succession to such offices shall devolve "in accordance with the law or custom applicable thereto at the date on which this Act comes into force." As already indicated custom, allows the office of the village blacksmith to devolve upon a minor, and at all material times the plaintiffs-respondents have been the holders of this office and entitled to the lands forming its emoluments. There has been a specific finding to this effect. It appears that the plaintiffs-respondents were registered as persons entitled to succeed to the office, apparently under the mistaken idea that the procedure contemplated by S. 10 (5) applied. Registration was not necessary in this case, but the fact that the names of the plaintiffs-respondents were registered does not in any way affect their legal position. The petitioner relies on S. 14 (1) which reads as follows :

> No suit preferred before the Collector under the last preceding section shall be entertained which is not preferred within three years from the date of the cause of action arising, whether such date be before or after the commencement of this Act :
>
> Provided that, in the case of a person who, by reason of minority, was disqualified for holding office, the right to sue for such office or for the recovery of the emoluments thereof shall accrue from the date of his attaining majority.

Section 18 contains provisions relating to suits for the recovery of offices and of their emoluments and this is a suit of that nature. By reason of sub-s. (1) of S. 14 the Collector is prohibited from entertaining any such suit unless it has been preferred within three years from the date of the cause of action. If the cause of action accrued more than three years before the presentation of the plaint the Revenue Court has no jurisdiction to try it. The proviso to S. 14 (1) does not help the plaintiffs-respondents, as it only applies to the case of a person who by reason of minority was disqualified for holding the office. The plaintiffs-respondents were never disqualified. Section 6, Limitation Act, does not apply. (See S. 29 (2) (b) of that Act.) For these reasons we are of the opinion that the Collector had no power to grant the plaintiffs-respondents a decree for mesne profits for a period greater than three years. The position is not a very satisfactory one, but the Court can only interpret the section. It is for the legislative authority to make an amendment if it considers that the Act operates unfairly.

The result is that we quash the decree so far as it awards the plaintiffs-respondents mesne profits for more than three years immediately preceding the suit. The petitioner does not contend that the decree is invalid in other respects and therefore this Court's order will merely be confined to the matter of mesne profits. The petitioner is entitled to his costs.

C.R.K./K.S. *Order accordingly.*

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(28) A. I. R. 1941 Madras 694

LAKSHMANA RAO J.

In re Marimuthu Kavandan

—Petitioner.

Criminal Revn. Case No. 1057 and Petn. No. 1006 of 1940, Decided on 4th February 1941, to revise judgment of Sub-Divisional First Class Magistrate, Coimbatore, D/- 16th November 1940.

Penal Code (1860), S. 411—Husband and wife living in house — Wife producing stolen property from house—Conviction of husband under S. 411 is not warranted.

The production of stolen property by the wife from the house in which both husband and wife were living cannot warrant the conviction of the husband under S. 411. [P 694 C 2 ; P 695 C 1]

K. S. Jayarama Ayyar and G. Gopalswami —for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor —for the Crown.

Order. — The only circumstance proved against the petitioner is that his wife produced the stolen properties from the house where both were living and this would not warrant

the conviction of the petitioner under S. 411, Penal Code. The conviction and sentence of the petitioner are therefore set aside and his bail bonds will be cancelled.

C.R.K./G.N. *Conviction set aside.*

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(28) A. I. R. 1941 Madras 695

LEACH C. J. AND SOMAYYA J.

M. Ramalinga Iyer — Petitioner

v.

T. K. Jayalakshmi and another — Respondents.

Civil Revn. Petn. No. 162 of 1940, Decided on 13th March 1941, to revise finding of Sub-Judge, South Malabar at Palghat, D/- 6th December 1939.

Contract Act (1872), S. 49—English common law rule that debtor must seek out his creditor and pay where creditor resides—Applicability—Wife, due to husband's maltreatment going to her father's place at Palghat and instituting suit there against husband for maintenance and against father-in-law for return of stridhan alleged to have been entrusted to him at time of marriage at Negapatam outside Palghat Court's jurisdiction — Both husband and father-in-law residing outside Palghat Court's jurisdiction — Palghat Court held had no jurisdiction since English common law rule that debtor must seek his creditor did not apply to particular facts of case.

Section 49 does not preclude the application of the English common law rule that the debtor must seek out his creditor and pay his debt where the creditor happens to reside and does not get rid of inferences which should justly be drawn from the terms of the contract itself or from the necessities of the case. In the first place, the terms of the contract should be looked at and, if they do not help, the Court must have regard to the necessities of the case in deciding whether the rule should be applied : ('27) 14 A I R 1927 P C 156, *Expl., and Rel. on* ; 31 Mad 223, *Ref.* [P 696 C 2]

The wife on account of the maltreatment of her husband left his house, returned to her father's house at Palghat and instituted a suit in the Court of South Malabar sitting at Palghat against her husband and father-in-law both of whom were residing outside the jurisdiction of that Court claiming maintenance against the husband, and against the father-in-law for return of certain stridhan, cash and jewels and utensils alleged to have been entrusted to him at the time of the marriage at Negapatam outside the South Malabar Court's jurisdiction. The plaintiff relied for the purpose of the jurisdiction of the Court on the English common law rule that the debtor must seek his creditor and pay his debts where the creditor happens to reside :

Held that (1) the English common law rule did not apply to the case as the husband or father-in-law was not shown to be a debtor. [P 696 C 2]

(2) Even if they were debtors the common law rule had no application inasmuch as in the case of husband the liability did not arise out of a contract but because he maltreated his wife to such a degree that she could not live with him any longer and in the case of the father-in-law it was reasonable to infer that the parties contemplated repayment and redelivery of the cash and articles at the family house or at the place where the wife was residing with her husband. [P 696 C 2]

M. Ranganatha Sastri — for Petitioner.

Ch. Raghava Rao — for Respondents.

Leach C. J. — The question which is involved in this petition is whether the Subordinate Judge of South Malabar sitting at Palghat was right in holding that he had jurisdiction to try a suit instituted by respondent 1 against the petitioner and respondent 2. The petitioner is the husband of respondent 1 and the son of respondent 2. The petitioner and his father are members of a joint Hindu family. The petitioner married respondent 1 at Negapatam in the month of June 1929. It is respondent 1's case that at the time of her marriage she entrusted her stridhanam property to respondent 2, who was to re-deliver it to her on demand. She alleges that the property entrusted to him consisted of Rs. 1750 in cash and jewels, furniture and household utensils of the value of Rs. 3352. Respondent 1 alleges that, while she was living with her husband at Vellore, where they went to reside after leaving Negapatam, his treatment of her was so cruel that she was compelled to leave him and return to her father's house at Palghat. At the time the suit was filed the petitioner was residing at Vellore in the North Arcot District and his father at Mayavaram in the Tanjore District. In filing the plaint in the Court of the Subordinate Judge of Palghat, respondent 1 relied on the rule of English common law that the debtor must seek out his creditor and pay his debt where the creditor happens to reside, unless there is an arrangement to the contrary. She contended that both her husband, and her father-in-law were her debtors, the husband being indebted to her for moneys in respect of her maintenance and her father-in-law in respect of the properties entrusted to him. So far as the husband is concerned her claim is for Rs. 3400 for past maintenance and for future maintenance at the rate of Rs. 60 per mensem. The Subordinate Judge accepted the contention that the common law rule applies in this case and held that the Court had jurisdiction to try the suit.

Section 20, Civil P. C., states that, subject to the limitations contained in Ss. 16 to 19, every suit shall be instituted in a Court within the local limits of whose jurisdiction (a) the defendant, or each of the defendants, where there are more than one, at the time

of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; (b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that the leave of the Court is given or the other defendants acquiesce in the suit being instituted there; or (c) the cause of action, wholly or in part, arises. It is quite clear that in this case the cause of action does not arise, even in part, at Palghat and neither of the defendants resides or works there. Therefore, the order of the Subordinate Judge can only be supported if the defendants are to be regarded as debtors and the common law rule that the debtor is bound to seek out his creditor applies here. Section 49, Contract Act, states that, when a promise is to be performed without application by the promisee and no place is fixed for its performance, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at the place appointed. There is nothing in the Contract Act or in any other statute which states what is to be the position when the promisor fails to fulfil the duty imposed upon him by this section. In 31 Mad 223,[1] which is a case under the Code of 1882, a Bench of this Court held that the common law rule does not apply in India, but it has been argued that this decision has in effect been overruled by the judgment of the Privy Council in 5 Rang 451.[2] I do not read the judgment of the Judicial Committee as deciding that that rule can always be applied in India where there is no express stipulation with regard to the place of payment or no appointment of a place under S. 49, Contract Act. In delivering the judgment of the Board, Viscount Sumner, after referring to the decisions in 30 Bom 167,[3] 11 Bom 649,[4] 7 Bom L R 993[5] and 53 Cal 88[6] at p. 89 said :

> Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that S. 49, Contract Act, gets rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him.

It was not necessary in that case to decide whether the common law rule had full force in this country, because on examination of the terms of the contract the Privy Council considered that the suit had been instituted in the proper Court. But giving full weight to the words used in the passage which I have just quoted from the judgment, the judgment goes no further than saying that S. 49 does not preclude the application of the rule and does not get rid of inferences which should justly be drawn from the terms of the contract itself or from the necessities of the case. In the first place the terms of the contract are to be looked at and, if they do not help, the Court must have regard to the necessities of the case in deciding whether the rule should be applied. Without considering in what cases the rule might be conveniently applied in India, it is, in my opinion, clear that it should not be applied in the present case. It has not been established that either the husband or the father-in-law is a debtor, but it may be assumed for purposes of this judgment that the husband is liable to pay the maintenance of the wife and that the father-in-law has possession of the properties described in the plaint. Taking the case of the husband, his liability, if any, does not arise out of contract. It arises, if at all, because he has maltreated his wife to such a degree that she cannot live with him any longer. The rule can have no application in such a case. Then, what is the position with regard to the father-in-law? The first respondent's claim here does arise out of an alleged contract, but it must have been within the contemplation of the parties that the repayment of the money and the redelivery of the goods entrusted assuming there was entrustment should take place at the family house or at the house where respondent 1 was residing with her husband. It could never have been in the contemplation of the parties at the time of the marriage (and that is when the entrustment is said to have taken place) that the husband would so illtreat his wife that she would be compelled to return to her father's house. I consider that in this case the Court can justly draw the inference that the parties contemplated repayment and re-delivery at the family house or at the husband's

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1. ('08) 31 Mad 223 : 4 M L T 97, Raman Chettiar v. Gopalachari.
2. ('27) 14 AIR 1927 P C 156 : 102 I C 16 : 64 I A 265 : 5 Rang 451 (P C), Soniram Jeetmul v. R. D. Tata & Co. Ltd.
3. ('06) 30 Bom 167 : 6 Bom L R 1038, Motilal v. Surajmal.
4. ('87) 11 Bom 649, Dhunjisha Nussarwanji v. A. B. Fforde.
5. ('05) 7 Bom L R 993, Puttappa v. Virabhadrappa.
6. ('25) 12 AIR 1925 P C 290 : 92 I C 760 : 53 Cal 88 : 53 I A 58 (P C), Bansilal Abirchand v. Ghulam Mahbub Khan.

residence, and therefore the common law rule cannot be applied. I would allow this petition with costs against respondent 1 and direct that the plaint be returned to her so that she may file it in the proper Court.

Somayya J. — While this case was argued before me when I was sitting as a single Judge it was urged that, in every case of a creditor and debtor, the common law rule of England that the debtor should seek out the creditor and pay the debt where the creditor resides applies. It is in order to consider the validity of this argument that I posted this case before a Bench. If the common law rule of England is to be invoked as a mere aid in finding out the place of performance of a contract I have no objection to its being so used and that is the way in which the Judicial Committee used it in 5 Rang. 451,[2] but if it is argued that in every case of debtor and creditor, the rule is to be applied without considering either the terms of the contract or the circumstances attending on it or the necessities of the case I have no hesitation in rejecting the contention. The question whether the common law rule of England is to be applied to a country of vast distances as India has to be considered with care, and it is not necessary to go into that question now. I concur in the order passed by my Lord the Chief Justice.

C.R.K./G.N. *Petition allowed.*

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(28) A. I. R. 1941 Madras 697

WADSWORTH AND PATANJALI SASTRI JJ.

V. Sreenivasachariar — Appellant

v.

Bysani Krishnayya Chetti, insolvent, represented by Official Assignee, Madras — Respondent.

Appeal No. 57 of 1940, Decided on 20th February 1941 against an order of Venkataramana Rao J., *Reported in ('40) 27 A I R 1940 Mad 485.*

Madras Agriculturists' Relief Act (4 of 1938), S. 19 — Mortgage decree for principal of Rs. 7500 with Rs. 3648 as interest and Rs. 1515 as taxed costs passed in 1935 — Rs. 8500 in October 1935 and further sum of Rs. 500 in August 1936 paid towards decree — As to Rs. 8500 creditor appropriating Rs. 5000 towards principal and Rs. 3500 towards interest in April 1937—No evidence as to appropriation of later payment of Rs. 500 by judgment-debtor in his favour—Appropriation of later sum of Rs. 500 held must be presumed to be towards interest and hence to that extent interest was not available for cancellation on 1st October 1937 — Creditor's appropriation as to Rs. 8500 held must stand and under S. 19 Proviso amount appropriated towards principal and amount appropriated towards interest should contribute rateably in making up amount required for reappropriation towards costs.

A mortgage decree for the principal amount of Rs. 7500 with Rs. 3648 as interest and Rs. 1515 taxed costs was passed in February 1935. In October 1935, the judgment-debtor by mortgaging an item of the hypotheca raised a sum of Rs. 8500 which was paid towards the credit of the decree. On 13th August 1936 a further sum of Rs. 500 was paid into Court towards credit of the decree. On 16th April 1937 part satisfaction was recorded to the extent of Rs. 9000 and execution proceeded for the balance. There was evidence to show that out of the first payment of Rs. 8500, Rs. 5000 were appropriated by the creditor towards principal and Rs. 3500 towards interest but as to later payment of Rs. 500 there was no evidence as to actual appropriation towards either principal or interest:

Held that after the recording of part satisfaction on 16th April 1937, no portion of the sum of Rs. 9000 paid towards the decree could be said to have remained unappropriated. To the extent of the later payment of Rs. 500 of which the debtor could not show an appropriation in his favour, it must be presumed that the appropriation was towards interest and that to that extent interest was not available for cancellation on 1st October 1937. The creditor's appropriation as to Rs. 8500 must stand, except in so far as the proviso to S. 19 required reappropriation, and in so far as that appropriation was to be undone with reference to the proviso to S. 19 it was equitable that the amount appropriated towards principal and the amount appropriated towards interest should contribute rateably in making up the amount required for reappropriation towards costs.

[P 698 C 2; P 699 C 1]

S. Panchapagesa Sastri and U. C. Gopalan — for Appellant.

D. Narasaraju and T. A. Rangachari — for Respondent.

Wadsworth J. — This is an appeal against an order of our learned brother Venkataramana Rao J. on an application under S. 19 of Madras Act, 4 of 1938, to scale down the debt due under a decree on a mortgage. The mortgage was for an amount of Rs. 7500 and it was dated 30th August 1925. It was assigned to one Jagannatham Chetty who sued on the mortgage in O. S. No. 42 of 1933. There was a preliminary decree for the principal amount with Rs. 3311-14-0 interest and Rs. 336-8-0 subsequent interest up to the date fixed for redemption and Rs. 1515-8-0 taxed costs. Final decree was passed in February 1935. In October 1935, the judgment-debtors obtained the leave of the Court to raise a sum of Rs. 8500 on a first mortgage of one item of the hypotheca, the amount so raised being paid to the credit of the decree. And in pursuance of this arrangement, on 14th November 1935, the Insurance Company which had taken the mortgage deposited Rs. 8500 towards the decree. In

June of the following year, the decree was assigned to one Krishnayya Chetti and on 13th August 1936 a further sum of Rs. 500 was paid into Court to the credit of the decree. On 16th April 1937 part satisfaction was recorded to the extent of Rs. 9000 and execution proceeded for the balance.

In the view which we have taken on similar cases, it cannot be contended that after the recording of part satisfaction on 16th April 1937, any portion of this sum of Rs. 9000 paid towards the decree remained unappropriated. The only question is how it was appropriated. If a definite appropriation can be proved it will stand except so far as an adjustment towards suit costs may be necessary. To the extent to which the debtor cannot show an appropriation in his favour, it will have to be presumed that the appropriation was towards interest and that to this extent interest is not available for cancellation on 1st October 1937. The learned trial Judge did not go into the rather meagre evidence of actual appropriation but proceeded solely on the legal inferences in the absence of evidence of definite appropriation and arrived at a conclusion which cannot be supported in view of subsequent Bench decisions arising out of Act 4 of 1938. There was however some evidence of actual appropriation of this payment of Rs. 8500 adduced before the Official Referee, both on behalf of the judgment-debtors and on behalf of the decree-holder. The judgment-debtor stated in his evidence before the Official Referee that this sum of Rs. 8500 was "paid towards principal" and that the sum of Rs. 500 subsequently paid was "paid towards the decree". He gave no reason for an appropriation of this payment of Rs. 8500 towards principal and it is difficult to see how, before the passing of Act 4 of 1938, the judgment debtor would have been benefited by such an appropriation, since both the principal and the interest included in the decree would bear interest at the same rate. In cross-examination he was apparently asked some further questions about these payments and he said that these payments were "towards the decree debt". There the matter stands so far as the oral evidence goes, no one having been examined on behalf of the decree-holder. But at the close of the enquiry, the decree-holder exhibited an order assessing him to income-tax on the basis of the accounts covering this payment under mortgage to the Insurance Company. The assessment order is Ex. 7. The Income-tax Officer apparently by a mistake speaks of a payment of Rs. 8000 not of Rs. 8500 and he says that the assessee has appropriated Rs. 3500 out of this amount towards interest in his accounts and he proceeds for income-tax purposes to treat the payment as if it had been appropriated towards the full amount of interest due under the decree and assesses the decree-holder accordingly. Now, there is no reason to doubt that this order of the Income-tax Officer shows the actual state of the decree-holder's accounts at a time before any question arising under Act 4 of 1938 was under consideration, the assessment being made in 1936. It is possible that in order to escape income-tax, the decree-holder might have appropriated towards interest a less amount than he ought to have appropriated according to the revenue point of view. If so, it was apparently to his own disadvantage so far as proceedings under Act 4 of 1938 are concerned. But the appropriation made by him towards interest in his books is to our minds a clear indication that the judgment-debtor is not speaking correctly when he says that the whole of this sum of Rs. 8500 was at the time of the payment definitely appropriated towards principal. Had this been the case, the decree-holder would for income-tax purposes certainly have taken advantage of such an appropriation, which as things stood then would be very much in his favour.

We have come to the conclusion, therefore, that there was no appropriation at the time of the payment by the judgment-debtor, but that there was a subsequent appropriation by the entry in the decree-holder's books of Rs. 3500, towards interest and the balance towards principal. This sum of Rs. 8500 cannot therefore be treated as not definitely appropriated by the act of the creditor and the creditor's appropriation must stand, except in so far as the proviso to S. 19 requires reappropriation. So far as the later payment of Rs. 500 is concerned, there is no evidence of any actual appropriation towards either principal or interest. The amount was definitely adjusted to the decree when part satisfaction was recorded and it can no longer be treated as an unappropriated payment; and to the extent of this sum of Rs. 500, the debtor is not in a position to show that interest was outstanding on 1st October 1937 for cancellation under S. 8 (1) of the Act. There remains a question regarding the re-appropriation of the first payment towards costs with reference to the proviso to S. 19. Under this proviso all payments made in respect of the decree must

first be applied in payment of all costs as originally decreed to the creditor. The first payment was the payment of Rs. 8500 and it has to be treated as having been made in the first instance towards costs of the suit. We have come to the conclusion that this sum of Rupees 8500 was appropriated, as to Rs. 5000, towards principal and, as to Rupees 3500 towards interest by the subsequent act of the creditor. When this appropriation has to be undone with reference to the proviso, it seems equitable that the amount appropriated towards principal and the amount appropriated towards interest should contribute rateably in making up the amount required for re-appropriation towards costs. The decree will be amended accordingly. Parties will pay and receive costs in this appeal according to their failure and success.

C.R.K./G.N. *Decree modified.*

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* (28) A. I. R. 1941 Madras 699

LEACH C. J. AND MOCKETT J.

Pattu Achi — Appellant

v.

V. Rajagopala Pillai, Plaintiff and others—Respondents.

Letters Patent Appeal No. 17 of 1940, Decided on 6th March 1941, against judgment of King J., *Reported in ('40) 27 A I R 1940 Mad 923.*

(a) Hindu law — Adoption — Whether husband gave wife oral authority to adopt second son in event of first adopted son dying is question of fact.

The question whether the husband gave his wife oral authority to make a second adoption in the event of the first adopted son dying is a question of fact and the judgment of the first appellate Court is conclusive on the point. [P 700 C 1]

*** (b) Hindu law — Adoption — On death of first adopted son widow making second adoption—Estate vested in her as heir to first adopted son is divested.**

A second adoption by a widow after the death of the first adopted son has the effect of divesting the adoptive mother of the estate inherited by her from her first adopted son which thereupon devolves upon the second adopted son unaffected by alienations made by her without necessity : 24 W R 183, *Dissent.*; ('40) 27 A I R 1940 Cal 241, *Rel. on*; *Case law discussed.* [P 703 C 1,2]

(c) Hindu law — Adoption — Existence of deceased father's estate is not condition precedent to adoption.

The existence of the deceased father's estate is not a condition precedent to an adoption and the validity of the adoption in no way depends on the existence of an estate : ('33) 20 A I R 1933 P C 155, *Rel. on.* [P 702 C 2]

K. Rajah Ayyar, V. Ramaswami Ayyar and K. Venkataramani — for Appellant.

T. M. Krishnaswami Ayyar and C. A. Seshagiri Sastri — for Respondents.

Leach C. J.—This appeal raises a question of importance and also of difficulty relating to the Hindu law of adoption. Venkatachalam Pillai, the husband of respondent 2, died in 1890. No child had then been born to him, but two months after his death his widow was delivered of a still born female child. Before his death Venkatachalam Pillai authorised his wife to make an adoption in case the child she was expecting should prove to be a female. Although Venkatachalam Pillai indicated a preference for a boy named Pichai Pillai should it become necessary to adopt a son to him it has been found as a fact that the power was of a general nature and conferred authority on respondent 2 to make another adoption should the adopted boy die. On 9th February 1891 respondent 2 adopted Pichai Pillai, who was murdered in the month of February 1907. Pichai Pillai had attained majority, but was unmarried. On the death of Pichai Pillai the nearest male reversioner to the property which had formed Venkatachalam Pillai's estate was one Muthukumara Pillai. In 1922 respondent 2 entered into an agreement of partition with Muthukumara Pillai under which the estate was divided between them, the intention being that each should have an absolute interest in the allotted portion. It is common ground that this transaction did not operate as a surrender of the estate to Muthukumara Pillai and did not bind the reversion.

In 1926 respondent 2 adopted respondent 1 in exercise of the power conferred upon her by her husband. She had also received the consent of the nearest sapinda. On attaining majority respondent 1 filed a suit in the Court of the District Munsif of Mayavaram to recover the property which was delivered to Muthukumara Pillai as the result of the partition in 1922. This is the suit out of which the present appeal arises. The defendants were respondent 2, the appellant (the widow of Muthukumara Pillai) and respondents 3, 4 and 5 who were joined as alienees of the property in suit. The District Munsif held that the adoption of respondent 1 was valid, that the partition deed entered into by respondent 2 with Muthukumara Pillai was invalid and that respondent 1 was entitled to sue for the recovery of the property which had passed to Muthukumara Pillai without waiting for the death of respondent 2. There were other findings, but it is not necessary to refer to them. The appellant appealed to the Subordinate Judge of Mayavaram, who concurred

in the findings of the District Munsif. The appellant then appealed to this Court, again without success, but the learned Judge who heard the second appeal (King J.) gave a certificate under Cl. 15 of the Letters Patent which has permitted of the present appeal.

Mr. Rajah Ayyar, on behalf of the appellant, desired to raise the question of the validity of respondent 1's adoption, but this was not open to him. Whether Venkatachalam Pillai gave his wife oral authority to make a second adoption in the event of the first adopted son dying is a question of fact and the judgment of the Subordinate Judge is conclusive on the point. But even if it were not, the right of respondent 2 to make a second adoption cannot be challenged as respondent 2 received the consent of the nearest sapinda before she adopted respondent 1. The only question which arises in this appeal is whether the adoption of respondent 1 gave him an immediate right to sue to recover the property taken by Muthukumara Pillai under the partition deed, or whether his right of action is postponed until the death or re-marriage of respondent 2. There is no decision of this Court directly bearing on the question and the decisions of other High Courts in India which have bearing cannot be deemed to have settled the law. In these circumstances, it is necessary to consider what are the principles which apply. When a Hindu dies leaving a widow and no issue, the widow takes the estate as his heir and she has, to use the words of Bhashyam Ayyangar J. in 26 Mad 143[1] at p. 148,

> an absolute right to the fullest beneficial interest in her husband's property for her life and she has a personal interest therein, which she can exercise at her will and pleasure, by giving, selling or transferring the estate to another for her own life, or speaking more accurately, for the term of her widowhood.

By adopting a son to her husband a widow divests herself of this estate and the property devolves upon the adopted son unaffected by any alienation made by her, unless made as the result of necessity. In 26 Mad 143[1] Bhashyam Ayyangar J. sitting with Davies J. held that by adopting a son to her deceased husband the widow could not defeat alienees of her interest in the property and that the son could not sue to recover possession from alienees until her death or the termination of her widowhood. This decision was, however, overruled by a Full Bench of this Court (Wallis C. J., and Oldfield and Kumaraswami Sastri JJ.) in 41 Mad 75.[2] In view of the observations of the Privy Council in 12 M I A 397[3] at p. 443 and 32 Cal 669[4] it was clear that the decision in 26 Mad 143[1] could not be allowed to stand. In 12 M I A 397[3] at p. 443, Sir James Colvile in delivering the judgment of the Board said :

> The rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption which she makes,

and this rule was applied by the Judicial Committee in 32 Cal 669,[4] when deciding a question of limitation. In overruling 26 Mad 143,[1] the members of the Full Bench were not detracting anything from what Bhashyam Ayyangar J. had said with regard to a widow's rights in the estate upto the time of the adoption by her of a son to her husband, but in view of the judgments of the Privy Council in the cases referred to they were bound to decide that by the adoption she divests herself of the estate, which thereupon devolves upon the adopted son unaffected by alienations made by her without necessity. A Hindu widow has a right of surrendering her interest in her husband's estate in favour of the nearest male reversioner or reversioners, but in 39 Mad 1035,[5] this Court held that a surrender by a Hindu widow does not affect alienations made by her before the surrender. Such alienations are binding on the reversioners so long as she is alive. In 48 Mad 933[6] this Court held that the judgment in 41 Mad 75[2] did not affect the validity of the decision in 39 Mad 1035.[5] When an adopted son dies and the widow makes a second adoption in pursuance of authority given to her in that behalf the position is not exactly the same as it was when she made the first adoption, because she no longer holds the estate as the heir of her late husband, but as the heir of the deceased adopted son. In 2 Mad 91[7]

1. ('03) 26 Mad 143 : 12 M L J 197, Sreeramalu v. Kristamma.

2. ('18) 5 A I R 1918 Mad 469 : 42 I C 245 : 41 Mad 75 : 33 M L J 387 (F B), Vaidhyanatha Sastri v. Savitri Ammal.

3. ('67-69) 12 M I A 397 : 1 Beng L R 1 : 10 W R 17 : 2 Suther 135 : 2 Sar 361 (P C), Collector of Madura v. Mootoo Ramalinga Sethupathi.

4. ('05) 32 Cal 669 : 32 I A 80 : 1 C L J 319 : 9 C W N 673 : 8 Sar 784 (P C), Rai Banomali Roy v. Jagat Chandra.

5. ('17) 4 A I R 1917 Mad 473 : 32 I C 813 : 39 Mad 1035 : 30 M L J 260, Subbamma v. Subrahmanyam.

6. ('25) 12 A I R 1925 Mad 1267 : 91 I C 401 : 48 Mad 933 : 49 M L J 266, Sundarasiva Rao v. Viyyamma.

7. ('78) 2 Mad 91 : 6 I A 196 : 4 Sar 42 (P C), Ramaswami Iyen v. Venkataramayyan.

at p. 101, a case in which there was a second adoption, the Privy Council observed :

> The first adopted son became his father's heir; on the death of that son after that of his father, the widow became the heir, not of her late husband but of the adopted son. Whether by the act of adopting another son she in point of law divested herself of that estate in favour of the second son may be a question of some nicety, on which their Lordships give no opinion.

That on the death of the first adopted son the widow holds the estate as his heir is emphasized in 41 Mad 855[8] at p. 859. In delivering the judgment of the Board Viscount Haldane, after pointing out that when Brozo Kishore, the first adopted son, succeeded he became the full owner of the estate from whom heirship must be traced instead of as from the widow's husband, Adikonda, went on to say,

> the widow of the latter was therefore in a different position when she endeavoured to effect the second adoption from that which she occupied on the former occasion. She could on that occasion, by exercising the power conferred on her, establish a direct succession to the estate of her husband Adikonda, which related back to his death. On the second occasion the ownership which had become vested in Brojo Kishore had intervened, and it was only to his estate that she could possibly establish a succession.

As the result of the judicial decisions given since the judgment of the Privy Council in 2 Mad 91,[7] it is conceded on behalf of the appellant that when the widow lawfully makes a second adoption she again divests herself of her interest in the property, but it is not conceded that the divesting affects alienations made by her after she had gained possession of the property as the heir of her son. It is contended that in the case of a second adoption the principle stated in 39 Mad 1035[5] should be applied. The reasons given for asking the Court to differentiate between a first and a second adoption are these. A son is superior to a widow as an heir and when a widow makes a fresh adoption she is creating an heir who comes in front of her. In adopting a second time the widow is not creating an heir to her deceased husband's estate. That estate no longer exists; it has become the estate of the first adopted son. By the second adoption she creates an heir to her son's estate and here she is in a superior category, because a mother comes before a brother under the Hindu law of succession. In these circumstances it is said that the principle stated in 2 Mad 91[7] and applied in 32 Cal 669,[4] cannot be applied here.

8. ('18) 5 A I R 1918 P C 74 : 46 I C 481 : 41 Mad 855 : 45 I A 156 (P C), Madana Mohana Ananga Bhima Deo v. Purushothama Ranga Bhima Deo.

At this stage it will be convenient to refer to the cases which have been quoted in argument and have direct bearing on the question under discussion. These comprise three decisions of the Calcutta High Court, namely the decisions in 24 W R 183,[9] 5 C W N 20[10] and 44 C W N 443;[11] the decision of the Bombay High Court in 49 Bom 604[12] and the decision of the Allahabad High Court in 8 ALL 319.[13] In 24 W R 183[9] the Calcutta High Court held that where a Hindu widow succeeds to the estate of her adopted son on his death, and before making a second adoption she alienates the property, the adopted son cannot divest the alienee of his rights, and this was said to be the decision of the Privy Council in 10 M I A 279.[14] I am unable to read the judgment in 10 M I A 279[14] in the same way. The facts in that case were shortly these. In 1811 a Hindu gave his wife power to adopt a son, but before he died his wife bore him a son. In 1819 by a written instrument the husband gave the wife power to adopt should the son die. The son survived his father, but died without issue. He had married and his wife survived him. After the death of the son his mother exercised the power given to her by the instrument of 1819 and adopted a son to her husband. The question which fell for decision by the Privy Council was whether the mother could lawfully make a second adoption inasmuch as on the death of the natural son the estate vested in his widow. It was held that in these circumstances she was precluded from exercising the authority to adopt given in 1819. The decision did not go beyond that, and therefore the judgment does not help in deciding the question now before the Court. In 5 C W N 20,[10] the Calcutta High Court held that when a Hindu widow adopts a second son upon the death of a first son the second son takes the estate because by adopting a son to her husband in those circumstances the widow must be taken to intend the vesting of the estate which originally belonged to her deceased

9. ('75) 24 W R 183, Gobindo Nath Ray v. Ram Kandy Chowdhury.
10. ('01) 5 C W N 20, Rai Jatindranath Chowdhuri v. Amritalal Bagchi.
11. ('40) 27 A I R 1940 Cal 241 : 188 I C 479 : 71 C L J 243 : 44 C W N 443, Hamed Gazi v. Sadat Ali Sikdar.
12. ('25) 12 A I R 1925 Bom 402 : 89 I C 62 : 49 Bom 604 : 27 Bom L R 642, Hanmat Subbayya v. Krishna Manjunath.
13. ('86) 8 All 319 : 1886 A W N 118, Lakhmichand v. Ghatto Bai.
14. (1863-66) 10 M I A 279 : 3 W R 15 (P C), Bhoobun Moyee Debia v. Ram Kishore Acharjee.

husband in the second son. It was also held that where a widow makes a second adoption the second adopted son takes the estate immediately on his adoption. Full approval of the judgment in that case was expressed in 44 C W N 443.[11]

The Bombay High Court in 49 Bom 604,[12] expressly held that a second adopted son acquires by virtue of his adoption an inherent right to question alienations made by his adoptive mother before his adoption and that the fact that there was a previous adoption in no way affects his rights. The Court was of the opinion that the second adopted son did not succeed to the first adopted son, but this conflicts with what is said in the passages which I have quoted from the judgments of the Privy Council in 2 Mad 91[7] and 41 Mad 855.[8] The Allahabad High Court held in 8 ALL 319,[13] that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived in the husband's lifetime, and that his title relates back to the death of his elder brother, the first adopted son. Except for the judgment in 24 W R 183,[9] which goes far beyond the decision of the Privy Council on which it is based, this was in effect also pointed out in 49 Bom 604,[12] the trend of the decisions, it will be observed, is against the appellant's case. Mr. T. M. Krishnaswami Iyer, on behalf of the respondents has also relied on the following passage in the latest edition of Mayne (Edn. 10, p. 267):

> It will be observed that if the effect of the adoption is to introduce only a brother to the last male holder, the estate of the mother, who is a preferable heir, would not be divested. The title of the adopted son however relates back to the death of the adoptive father and the adoption substitutes another son in place of the deceased son. He can be regarded as a coparcener with his brother only under the Mitakshara law, but not under the Dayabagha law, where also the mother's estate is divested by the adoption. The ground of the divesting must therefore be either that the mother elects to hold the property as her husband's property when she exercises her power of adoption, or that the title of the adopted son relating back to his father's death is the necessary legal result of the power to substitute another son for one deceased. The Madras High Court has in one case held that a widow who had succeeded as heir to an adopted son and made a subsequent adoption after his death, was divested of the self-acquired property of the son first adopted by her (41 Mad 604.[15]). This decision does not appear to be sound in principle; the adopted son can only succeed to what is or could have been the property of the adoptive father, and the mother's interest in her husband's estate only could be divested.

Without entering on a discussion of the decision in 41 Mad 604,[15]—the Madras case referred to—Pichai Pillai left no separate property—there is here room for criticism. On a second adoption it is not the mother's interest in her husband's estate which is divested; it is her interest in the estate of her first son. It is also to be remembered that the existence of the deceased father's estate is not a condition precedent to an adoption. In 12 Pat 642,[16] the Privy Council said that it can hardly be doubted that the doctrine of the devolution of property, though recognized as the inherent right of the son, is altogether a secondary consideration when considering the question whether the widow should adopt. In the judgment in that case the Judicial Committee laid great stress on the spiritual side of the act of adoption. Bearing in mind that the validity of an adoption in no way depends on the existence of an estate, that the father's estate, if there is one, becomes the son's estate, when a son is adopted to him; and that on the death of the adopted son the mother succeeds to the property as the son's heir, if he leaves neither issue nor widow, it is difficult to see how the ground of the divesting of the property on a second adoption can be either the assumption that the mother elects to hold the property as her husband's property or that the necessary legal result of the exercise of the power to adopt a second son is that the second son's title relates back to his father's death. However much the widow may intend or even proclaim that she is holding the property as the property of her husband it will not alter its character. Neither intention nor act can change back her first son's property into the estate of her deceased husband. With respect I agree with the observation of Varadachariar J. in 59 Mad 1064[17] where he said that "even a fiction cannot be carried to illogical limits". Why could not the reason for the divesting be placed on the broad ground that the act of adoption implies it. But the finding of the proper reason is not important when one is faced with a reality.

The right in the second adopted son to sue immediately to set aside an unlawful

15. ('19) 6 A I R 1919 Mad 1077 : 48 I C 526 : 41 Mad 604 : 34 M L J 87, Suryanarayana v. Ramadoss.

16. ('33) 20 A I R 1933 P C 155 : 143 I C 441 : 12 Pat 642 : 60 I A 242 (P C), Amarendra Mansingh v. Sanatan Singh.

17. ('36) 23 A I R 1936 Mad 642 : 164 I C 977 : 59 Mad 1064 : (1937) 1 M L J 60, Subramanian Chettiar v. Somasundaram Chettiar.

alienation made by his mother between the death of his brother and his own adoption cannot properly be based on legal fiction. If the right is to be recognized at all it must be because there exists no overriding reason why the rule which has been applied in the case of a first adoption should not be applied in the case of a second adoption. The conclusion at which I have arrived—and I must say, not without hesitation—is that there is no overriding reason and that therefore they should both be placed on the same footing with regard to the setting aside of unlawful alienations made by the widowed mother. The reasons for my conclusion are these: (1) There is no authority to be found in the ancient texts for the rule that when the widow adopts a son to her deceased husband he takes the property which formed his father's estate unaffected by unlawful alienations made by his adoptive mother. The rule is of modern growth and seems to have been first stated in this form in 12 M I A 397.[3] (2) The rights of the widow in the property which she holds as the heir of her son are co-extensive with the rights which she possessed when she held it as the heir of her husband. In both the cases she possesses the right of alienating for the period of her life, but not beyond, except in case of necessity. In other words, the quality of the estate is the same. (3) If it is right that an alienee should be defeated by a first adoption, except in the case of necessity—and this must be regarded as being well settled—it is difficult to see why he should not be defeated in the case of a second adoption, the widow's powers of alienation being the same when she holds the property as a mother as when she holds it as a widow. (4) A person contracting with a childless widow does so subject to the knowledge that she may possess, or may be given, a right to adopt. (5) There is a difference between a widow surrendering the estate to the nearest reversioner and being divested of the property by reason of her own act of adoption. In adopting a son to her deceased husband she is fulfilling what is regarded as a religious duty. In surrendering the estate to the nearest reversioner duty plays no part. (6) Excluding the case in 24 W R 183[9] which was based on a misconception, the High Courts of Calcutta, Bombay and Allahabad have recognized the immediate right of the second adopted son to set aside unlawful alienations and the earliest of the decisions in which the right was recognized was given as long ago as 1886. (7) The second adopted son is just as much the son of his father as was the first adopted son and to give him the same rights in the property which had formed his father's estate as were given to his deceased brother involves no undue straining of what is now an accepted doctrine in the case of a first adoption. (8) To put the second adopted son on the same footing as his deceased brother is in accordance with Hindu conceptions of what is right and proper.

It follows that in my opinion the decision under appeal should not be disturbed and I would dismiss the appeal with costs.

Mockett J.—The judgment of my Lord has analysed the result of a line of authority which, whilst at times approaching, has never, with the possible exception in 49 Bom 604,[12] directly decided the "question of some nicety" with which the able arguments of Mr. Rajah Iyer and Mr. T. M. Krishnaswami Iyer have confronted us in this appeal. Even in 49 Bom 604[12] it does not appear from the report that the Courts were invited to consider the numerous cases to which we have been referred. 10 M I A 279[14] was cited but not 12 M I A 397[3] at p. 443 nor 2 Mad 91[7] before the Bombay High Court. It is important to note that in 2 Mad 91,[7] although the decision in 12 M I A 397[3] was cited before the Board, Sir Robert Collier still treats as open for discussion the question which it is pressed upon us must be taken to be concluded by the dictum of Sir James Colvile in 12 M I A 397.[3] I accordingly agree that this matter must be regarded as "res integra" so far as this Court is concerned. The ancient texts give us no assistance, a fact which is not surprising in this more material age. The blending of modern principles of inheritance with the purely spiritual idea underlying the Hindu conception of adoption must, as Varadachariar J. in 59 Mad 1064[17] has indicated, produce a position where fiction and logic are irreconcilable. It seems to me that only by allowing the modern law of inheritance to predominate in this welter of ideas can we decide this case in favour of the appellant. Perhaps a modernist would prefer another result, but for the reasons which my Lord has given and with which I am in respectful agreement, I consider that the result of this appeal is more in consonance with and does no more than apply, the true principles of Hindu law which as emphasised, are concerned with spiritual rather than material matters.

I, therefore, agree that this appeal must be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 704

WADSWORTH AND PATANJALI SASTRI JJ.

Mrs. Swarnam Iswariah — *Appellant*

v.

K. M. S. R. M. Kanappa Chetty

— *Respondent.*

Appeal No. 1 of 1941, Decided on 27th February 1941, from order of Gentle J., D/- 25th November 1940.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii) Proviso C and S. 28—Rules framed under S. 28, R. 7—R. 7 is intra vires.

Under proviso (C) to S. 3 (ii) the Legislature intended to disqualify from a claim to be an agriculturist only a person from whom tax had been demanded by virtue of ownership. Rule 7 makes it clear that the term "assessed to property tax" appearing in S. 3 (ii), proviso (C), will not cover the case of a person in whose name an assessment has been made, when he was not in fact the owner of the property during the relevant period. Hence there is nothing repugnant to the apparent intention of proviso (C) in this rule, nor can it be said that this rule gives to the proviso a meaning which is not its probable meaning. The rule is therefore not beyond the powers of the Provincial Government : ('39) 26 A I R 1939 Mad 942, *Expl.*; ('41) 28 A I R 1941 Mad 152, *Ref.* [P 705 C 2]

(b) Evidence Act (1872), S. 114—Onus on one party — No request to opposite side to offer for cross-examination — No evidence tendered by former — Theory cannot be held established merely by failure to offer for cross-examination by opposite side.

When no evidence at all has been tendered on behalf of the party on whom burden of proof lay and apparently no request has been made for the cross-examination of the opposite side, it cannot be held that the theory, in respect of which the onus clearly lay, was established merely by the failure of the opposite side to offer himself for cross-examination. [P 704 C 2]

V. Radha Krishnayya and R. Venkataraman — for Appellant.

M. Subbaroya Ayyar and T. S. Krishnamurthy Ayyar — for Respondent.

Wadsworth J.—This appeal arises from a decision of our learned brother Gentle J., on a matter relating to proviso C to S. 3 (ii) of Madras Act, 4 of 1938 and the connected R. 7 of the rules framed under that Act by the Government of Madras. The appellant here is the decree-holder. He obtained a decree in 1934 on a promissory note. The respondent filed an application under S. 19 of Act 4 of 1938 and it was resisted on the allegation that the respondent was not an agriculturist by reason of his being assessed to property tax in respect of a house situate within the Municipality of Devakottah. The respondent proved that the house in question had been sold by him on 10th February 1935. This was met by an allegation that the sale was a benami transaction, which allegation the appellant failed to substantiate by the necessary evidence. The learned Judge consequently held, applying R. 7, that the person in whose name the assessment to property tax stood was not the owner of the property during the relevant period and that therefore he was not disqualified by reason of the mere inclusion of his name in the municipal registers from being an agriculturist under the Act. We should add that there was evidence before the learned Judge that the tax for the relevant period was actually recovered from the purchaser. In appeal before us, an attempt has been made to dispute the finding on the question of benami by the argument that the facts could only be established in the cross-examination of the respondent and that the respondent had not gone into the box. It seems to us that when no evidence at all was tendered on behalf of the appellant and apparently no request was made for the cross-examination of the respondent on his affidavit, it cannot be held that the benami theory, in respect of which the onus clearly lay upon the appellant, was established merely by the failure of the respondent to offer himself for cross-examination. A more substantial contention is that Rule 7 of the rules framed by the Provincial Government is inconsistent with proviso C to S. 3 (ii) and therefore beyond the powers of the Government under S. 28. Section 28 of the Act gives to the Provincial Government power to frame rules for removing any difficulty in giving effect to the provisions of the Act, provided that the rules shall be consistent with the provisions of the Act. Proviso C excludes from the category of agriculturists any person

> who has within the two years immediately preceding 1st October 1937 been assessed to property or house tax in respect of buildings or lands other than agricultural lands under the Madras District Municipalities Act. . . . . provided that the aggregate annual rental value of such buildings and lands, whether let out or in the occupation of the owner, is not less than Rs. 600.

It is to be noted that this proviso, though it does not expressly make ownership an integral part of assessment, contemplates that the person assessed shall be the owner. A Bench consisting of Burn and Stodart JJ. had to deal with a case, (1939) 2 M L J 495[1]

1. ('39) 26 A I R 1939 Mad 942 : 186 I C 424 : (1939) 2 M L J 495, Swaminatha Udayar v. Srinivasa Iyer.

in which it was contended that mere ownership of property liable to tax disqualified the owner thereof from being an agriculturist, regardless of whether there was or was not an assessment and the learned Judges held that the proviso to S. 3 excludes from the benefit of the Act only persons who have been assessed to property tax and it does not exclude those who, though liable to property tax, have for some reason or other escaped assessment. In the particular case before the learned Judges, the nominal assessee was dead and it might well be argued in such a case that if it is established that there has actually been a demand made for the tax on the building from the owner, this demand might amount to an assessment even though a dead man's name is shown in the municipal registers. More especially if the person upon whom the demand is made actually pays the tax. That is a matter which is not before us and on which we do not wish to express any considered opinion. For the present, it is sufficient to say that mere ownership apart from assessment will not disqualify a person under proviso (C). It does not, however, follow that a mere registry in the assessment registers and a repetition in the demand notice of the name so shown in the register would constitute an assessment apart from ownership, so as to import the disqualification under proviso (C). We had to make a reference to this possibility in (1940) 2 M L J 841[2] at p. 844 where we observed :

> It may well be argued that proviso C contemplates not only the assessment of an individual, but also the ownership by that individual of the property in respect of which he has been assessed.

It is necessary now to go further into this contention. Strictly speaking, under the Madras District Municipalities Act, the assessment is imposed, not on the individual, but on the property. The property tax under S. 86 has to be paid by the owner and the only contingency in which liability might be imposed on a person who is not the owner seems to be under S. 88 (4) whereby in case of a transfer, if the transferor omits to give notice of the transfer to the municipality, both the transferor and the transferee may be held liable for the tax. But in such circumstances, if in fact, though there has been no formal notice, the municipal officials are well aware of the transfer and, without making any change in their registers, if the tax is in fact demanded from the transferee and paid by him, can it be said that the transferor who ceased to be the owner and who has neither been asked for the tax nor has paid it, has been assessed to property tax so as to disqualify him under proviso (C) ? The word "assess" is one which is susceptible of several different meanings. According to the dictionary, it may mean "to fix the amount of the tax" or "to determine the amount and impose the tax upon an individual" or merely "to impose a tax upon an individual" or "to estimate officially the value for purpose of taxation." In view of these different meanings of which the word "assess" is susceptible and of the fact that the liability to property tax under the District Municipalities Act depends primarily upon ownership, can it be contended that the use of the word "assessed" in proviso (C) necessarily implies the mere registry of an individual as the person liable and does not imply the full process of demanding the tax from the person as the owner of the property ?

It seems to us that the matter is by no means free from ambiguity and that the use of the word "owner" in the last sentence of this proviso gives considerable support to the view that the Legislature intended to disqualify from a claim to be an agriculturist only a person from whom tax had been demanded by virtue of ownership. This is a view which is consistent with the terms of the District Municipalities Act which was expressly in the contemplation of the Legislature when this proviso was enacted and it is a view, for which there is much to be said from the practical point of view. The Provincial Government have enacted R. 7 making it clear that the term "assessed to property tax" will not cover the case of a person in whose name an assessment has been made, when he was not in fact the owner of the property during the relevant period. We do not find anything repugnant to the apparent intention of proviso (C) in this rule, nor do we think that it can be said that this rule gives to the proviso a meaning which is not its probable meaning. It is within the powers of the Local Government to make a rule which merely removes an ambiguity in a clause of the statute. That is, in our opinion, the effect of this rule and we see no reason to hold that the rule is beyond the powers of the Provincial Government. In the result therefore the appeal is dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

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2. ('41) 28 AIR 1941 Mad 152: (1940) 2 M L J 841, Sarveswara Rao v. Umamaheswara Rao.

(28) A. I. R. 1941 Madras 706

WADSWORTH J.

Sreepathi Balaiah and another — *Petitioners*

v.

Darsi Ramayya and another — *Respondents.*

Civil Revn. Petn. No. 1223 of 1940, Decided on 11th December 1940, to revise order of Dist. Court, Kurnool, D/- 4th July 1940.

(a) Civil P. C. (1908), Ss. 148 and 151—Scope — Order that in default of payment of certain sum within specified time appeal would stand dismissed — Default in payment due to error of Court's officer — Application for extension of time—Court has no power to extend time under S. 148 but it can do so under S. 151 for ends of justice.

When a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is no power under S. 148 after the date on which those proceedings would stand dismissed, to extend the time in which the payment was to be made. But the Court has inherent power to prevent a party from being damnified by the error of the Court's own officer and though there is no power under S. 148 to reopen a closed matter and give an extension of time, the Court has power under S. 151 to do that which is necessary for the ends of justice in order to set right the consequences of an unfortunate error committed by an officer of Court : ('28) 15 A I R 1928 Mad 154, *Expl., and Disting.*

[P 706 C 2; P 707 C 1]

(b) Civil P. C. (1908), Ss. 148 and 115—Order under S. 148 without jurisdiction—Court should not refuse to interfere in revision merely on ground of hardship to person adversely affected *(Obiter)*.

The High Court should not be inclined to refuse to interfere in revision with an order passed under S. 148 without jurisdiction, merely on the ground of hardship to the person adversely affected.

[P 706 C 2]

Kasturi Seshagiri Rao — for Petitioners.

W. Kothandaramayya — for Respondents.

Order.—This civil revision petition arises out of an order passed in the following circumstances. The respondents were the appellants before the District Judge and their appeal was preferred against an order decreeing the suit exparte. The District Judge passed an order that on condition the appellants paid Rs. 15 within one month the appeal would stand allowed and that in default of payment of the sum of Rs. 15 as specified above the appeal would stand dismissed with costs. It would appear that when this judgment was pronounced neither side was present. In incorporating the result of the judgment into the rough diary maintained by the Court, an unfortunate error was committed: instead of the sum of Rs. 15 the sum of Rs. 12 was inscribed. The respondents' advocate referring to the rough diary found that Rs. 12 had to be paid and without undue delay paid that sum to the petitioners' advocate. This payment was made two weeks after the judgment was pronounced. When the Court re-opened after the vacation it was discovered that a mistake had been made and that an amount of Rs. 3 had not been paid which should have been paid in order to comply with the formal order. The respondents therefore filed an application under S. 151, Civil P. C., to extend the time to pay the balance of the amount of costs. The learned District Judge accepted the contention that there was a bona fide mistake and extended the time till the date of that order and the balance was paid at once. In revision it is contended by the petitioners that by the terms of the original order of 15th April the appeal would stand dismissed as from 15th May owing to the failure of the appellants (respondents here) to pay Rs. 15 within the time allowed and that as the appeal had been dismissed the Court had no jurisdiction to grant an extension of time at a later date.

The petitioners rely upon the observations of the Bench which decided 53 M L J 494.[1] It is true that the finding in that case made it unnecessary for the Court to decide whether there was power to extend the time in circumstances similar to those now under consideration. But the learned Judges discuss the law on the subject at some length and give a considered opinion which, though perhaps not an actual decision, must be treated with great respect. With respect I may say that I see no reason to differ from that opinion. When a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is in my opinion no power under S. 148, Civil P. C., after the date on which those proceedings would stand dismissed, to extend the time in which the payment was to be made; moreover I should not be inclined to refuse to interfere in revision with an order passed under S. 148 in such circumstances without jurisdiction, merely on the ground of hardship to the person adversely affected.

But the present case stands on a somewhat different footing. The application granted by the lower Court was not made under S. 148, Civil P. C., but under S. 151,

1. ('28) 15 A I R 1928 Mad 154 : 105 I C 124 : 53 M L J 494, Balakrishna Iyer v. Parvathammal.

invoking the inherent powers of the Court and it was not a case of a mere mistake by the party which led to his failure to comply with the conditions. The basic mistake which led to the trouble was the mistake of the Court's officer. The rough diary is maintained by the Court for the benefit of parties so that they may readily find out what has been the nature of the order passed. In the present case, the rough diary contained an entry to the effect that the respondents must pay Rs. 12 within one month and they complied with that order. Unfortunately, that order wrongly set forth the nature of the actual order of the Court. But it seems to me that the Court must have inherent power to prevent a party from being damnified by the error of the Court's own officer. The respondents did that which they should have done according to the order as embodied in the rough diary. The money was received without objection by the petitioners' advocate who seems to have been under the same misapprehension owing to the terms recorded in the rough diary; and though, in my opinion, the District Judge had no power under S. 148, Civil P. C., to reopen a closed matter and give an extension of time, he had power under S. 151, Civil P. C., to do that which was necessary for the ends of justice in order to set right the consequences of an unfortunate error committed by an officer of Court. In this view, I decline to interfere in revision with the District Judge's order, but in the circumstances I direct each party to bear his own costs in this Court.

C.R.K./K.S. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 707

LEACH C. J. AND HAPPELL J.

Kausalai Ammal — Appellant

v.

Sankaramuthiah Pillai — Respondent.

Letters Patent Appeal No. 26 of 1939, Decided on 11th December 1940, from judgment of Krishnaswami Ayyangar J., in S. A. No. 643 of 1935, D/- 24th January 1939.

Transfer of Property Act (1882) (before amendment of 1929), Ss. 3 and 39—Word "wilful" in S. 3—Meaning — Omission to make inquiries is not sufficient to constitute constructive notice within S. 3.

The word "wilful" in S. 3 makes it clear that the abstention from inquiry should be designed and due to a desire to avoid an inquiry which would lead to ultimate knowledge. An omission to make inquiries is not sufficient to constitute constructive notice within the meaning of S. 3: 22 Cal 185, *Rel. on.* [P 708 C 1]

A. S. Nataraja Iyer — for Appellant.

K. R. Rangaswamy Ayyangar—for Respondent.

Leach C. J.—The appellant is the widow of a person who was a member of a joint Hindu family. Her husband died some time before 1926, but the actual date does not appear in the record. On 18th October 1926 the appellant filed a suit to recover from Murugesam Pillai, the surviving member of the joint Hindu family, money by way of maintenance. She succeeded and the Court made the sums awarded to her under the decree a charge on certain immovable properties. On 25th July 1926 Murugesam Pillai mortgaged these properties to the respondent, who in 1931 filed in the Court of the District Munsif of Cuddalore the suit out of which this appeal arises to enforce the mortgage. The appellant was made a party and she pleaded that her charge for maintenance took priority of the respondent's mortgage. The District Munsif and the Subordinate Judge of Cuddalore on appeal upheld the appellant's contention, but the respondent appealed to this Court and Krishnaswami Ayyangar J. allowed his appeal. This appeal has been filed under Cl. 15 of the Letters Patent, Krishnaswami Ayyangar J. having given the necessary certificate. Stated shortly, the appellant's case is that the respondent was placed on inquiry whether a Hindu widow had a claim on the properties, and as he failed to make any inquiries he is postponed to the appellant. Section 39, T. P. Act, as it stood at the time of the mortgage, read as follows:

> Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property, and such property is transferred with the intention of defeating such right the right may be enforced against the transferee if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Therefore, under this section in order that a transferee should be postponed to a person entitled to maintenance or a provision for advancement or marriage the transfer had to be made with the intention of defeating the right and the transferee had to have notice unless he accepted the transfer without giving consideration. In 1929 the section was amended to read as follows:

> Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property, and such property is transferred the right may be enforced

against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

It is said by the learned advocate for the appellant that the section as amended has retrospective effect. It is not necessary to embark upon a discussion of this question, because it is obvious that the respondent could not by reason of the amendment be required to do more than he was required to do by the law as it stood when the property was mortgaged to him. In 1926 the definition of notice given in S. 3, T. P. Act, read as follows :

A person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, S. 229.

Krishnaswami Ayyangar J. considered that the use of the word "wilful" in the definition made it clear that the abstention from inquiry should be designed and due to a desire to avoid an inquiry which would lead him to ultimate knowledge, and that an omission to make inquiries was not to be regarded as sufficient to constitute constructive notice within the meaning of the section. The learned Judge pointed out that no authority dealing with S. 39 had been quoted to him, and no authority has been quoted to us, but there is support for his interpretation of the word "wilful", and I agree with him that in this case the omission to make inquiries is not to be regarded as sufficient to constitute constructive notice within the meaning of the section. In 22 Cal 185,[1] the Calcutta High Court held that the words "wilful abstention from an inquiry or search" must be taken to mean such abstention from inquiry or search as would show want of bona fides, and no reason has been suggested why the word "wilful" should be construed in a different sense here. It has been accepted that the mortgage was a genuine transaction and that the consideration passed. There has been no suggestion that the mortgage was created in order to defeat the appellant. It has in fact been assumed by learned advocate for the appellant that the mortgage was created for a necessary purpose, namely a purpose which would be necessary from the point of view of the members of a joint Hindu family. Howsoever the case is looked at, it is obvious that there has been no wilful abstention or gross negligence on the part of the respondent, and in these circumstances the mortgage which was created in his favour stands. Consequently it must take priority of the appellant's charge. For these reasons the appeal fails and will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

1. ('95) 22 Cal 185, Joshua v. Alliance Bank of Simla.

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(28) A. I. R. 1941 Madras 708

LAKSHMANA RAO J.

In re Thotabalija Puchala Somanna and another — Appellants.

Criminal Appeal No. 756 of 1940, Decided on 17th December 1940, against order of the Court of Session, Kurnool Division, in C. C. No. 33 of 1940.

(a) Criminal P. C. (1898), S. 297 — Jury trial — No misdirection — On evidence jury could reasonably have convicted — Conviction cannot be interfered with in appeal.

A conviction by a jury cannot be interfered with in appeal when there was no misdirection and on the evidence the jury could reasonably have convicted the accused. [P 708 C 2]

(b) Penal Code (1860), S. 411—Offence under S. 411—Accused being member of criminal tribe is no ground for enhanced sentence.

The fact that the accused is a member of a criminal tribe is no ground for passing enhanced sentence for an offence under S. 411. [P 708 C 2]

K. Venkataraghavachari for Public Prosecutor — for the Crown.

Judgment. — The appellants have been convicted under S. 411, Penal Code, and sentenced, appellant 1 to rigorous imprisonment for two years and appellant 2 to rigorous imprisonment for three years. There was housebreaking by night and theft in P. W. 1's building on the night of 27th February and stolen properties were recovered on the information of each of the appellants from the place shown by him on 1st March. So the appellants were charged in the alternative under Ss. 457 and 380, Penal Code, or S. 411, Penal Code, and they denied the alleged recovery. The trial was by jury and the verdict was unanimous. There was no misdirection and on the evidence the jury could reasonably have convicted the appellants under S. 411 Penal Code. There is therefore no ground for interference with the conviction and the sentence of appellant 1 cannot be said to be excessive. That appellant 2 is a member of a criminal tribe is no ground for differentiation of sentence for an offence under S. 411, Penal Code and his sentence is

reduced to rigorous imprisonment for two years. Otherwise the appeal is dismissed.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 709

MOCKETT J.

C. Velayudham Pillai — *Defendant 1 — Petitioner*

v.

S. C. Subramania Pillai — *Plaintiff — Respondent.*

Civil Revn. Petn. No. 1696 of 1940, Decided on 30th January 1941, to revise order of Dist. Munsif, Ariyalur, D/- 3rd October 1940.

Civil P. C. (1908), O. 11, R. 14—Party cannot be asked to apply for and produce certified copies of income-tax returns.

Order 11, R. 14 deals with existing documents and documents which at the time of the application are in the possession or power of the person against whom the order is sought to be made. Hence the Court cannot direct a party to apply for a certified copy of his income-tax returns and profit and loss statements and produce them at the cost of the opposite party. An order under O. 11, R. 14 is a discretionary order and power under it should be exercised with great caution : ('40) 27 A I R 1940 Mad 768 (FB), *Expl.* ; (1905-11) 5 Tax Cas 74 ; 1938 A C 101 and (1930) 1 K B 527, *Ref.*; (1887) 36 Ch D 731, *Rel. on.* [P 709 C 2; P 710 C 1]

K. S. Desikan and K. Raman — for Petitioner.

S. Panchapagesa Sastri and P. S. Ramachandran—for Respondent.

Order.—This is a civil revision petition to revise the order of the learned District Munsif of Ariyalur. The lower Court on an application by the respondent has ordered the petitioner, who is the defendant in the suit, to apply for a certified copy of his income-tax returns and profit and loss statements with particulars submitted by him to the Income-tax Officer, First Circle, Trichinopoly over a period of several years. He is to produce them at the plaintiff's cost. It will be observed that the application was not in the precise terms of O. 11, R. 14, Civil P. C., to produce documents in the defendant's possession or power relating to the matter in suit but to obtain and produce copies of these documents. The learned District Munsif has made the order because he considers that a new situation has been created by the decision of a Full Bench of this Court reported in I L R (1940) Mad 969.[1] What that case decided was that certified copies of profit and loss statements and statements showing details of net income filed by the assessee in support of his income-tax return were admissible in evidence. It appears from the judgment that under the rules in the income-tax department as a matter of practice an assessee is permitted to have a copy of his income-tax returns. I do not understand that the learned Judges decided anything more than that when a copy had been given to the assessee, it was admissible in evidence.

It has been argued before me that the effect of that decision is to make it compulsory for an assessee to obtain and produce to the opposite party in a suit copies of the returns if the opposite party desires to inspect them. Now, in the first place, it must be observed that O. 11, R. 14, corresponding to O. 31, R. 14 of the English Rules of the Supreme Court, deals with existing documents and documents which at the time of the application are in the possession or power of the person against whom the order is sought to be made. There is no record of any case where a party has been called upon not only to produce but to have brought into existence a copy of a document, and in this particular case it must be remembered that the document is a highly confidential document protected by S. 54, Income-tax Act. That Act prohibits a public servant from making any disclosures with regard to such income-tax returns and it says that no Court shall, with certain exceptions, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record or to give evidence before it in respect thereof. None of the exceptions which are in public interests have any relation to litigation between ordinary citizens and there is no provision for the production of documents for the benefit of individual litigants. I think that it is an answer to this application to say that first of all there is no document in existence and therefore it cannot be in the power of the defendant and secondly that the Court is prohibited from ordering a defendant to produce his original income-tax returns equally as it cannot order the Income-tax Officers themselves to produce them. To direct that a litigant should produce a certified copy of his return would render S. 54, Income-tax Act, in some respects a dead letter.

It must be remembered that it is nothing more than a rule of practice by which the income-tax authorities allow assessees to have copies of these documents and there

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1. ('40) 27 A I R 1940 Mad 768 : 192 I C 548 : I L R (1940) Mad 969 : (1940) 2 M L J 257 (FB), Venkata Gopala Narasimha Rama Rao v. Venkataramayya.

is nothing before me to show that that privilege might not be withdrawn. But, generally speaking, this application is entirely contrary to authority. Such an application was refused in a Scotch case reported in (1905-11) 5 Tax Cas 74.[2] There are other cases based on other statutes dealing with documents of which (1938) A C 101[3] and (1930) 1 K B 527[4] are examples, showing that when a statute prohibits the production of a document, that prohibition is absolute and inconvenience of litigants is irrelevant. Further, an order under O. 11, R. 14 is a discretionary order and in the words of Bowen L. J. in (1887) 36 Ch D 731[5] at p. 738 this power should be exercised with great caution. I do not think that this aspect of it was present in the mind of the lower Court. Generally I think this order is contrary to law for the reasons which I have given. I would repeat that it seems to go to the root of the whole principle that these income-tax returns are confidential documents which not even the authorities themselves may disclose. The civil revision petition is allowed with costs and the order of the lower Court is set aside.

C.R.K./K.S. *Petition allowed.*

2. (1905-11) 5 Tax Cas 74, Shaw v. Kay.
3. (1938) 1938 A C 101 : 106 L J K B 790 : 157 L T 369 : 81 S J 765 : 53 T L R 982 : (1937) 3 All E R 660, Rowell v. Pratt.
4. (1930) 1 K B 527 : 99 L J K B 293 : 142 L T 368 : 74 S J 26 : 46 T L R 172, Ankin v. L. & N. E. Ry. Co.
5. (1887) 36 Ch D 731 : 56 L J Ch 844 : 57 L T 299 : 36 W R 246, Arnott v. Hayes.

(28) A. I. R. 1941 Madras 710

WADSWORTH J.

Muthuswami Chettiar — Petitioner

v.

Narayanaswami Chettiar—Respondent.

Civil Revn. Petn. No. 1001 of 1937, Decided on 18th November 1940, to revise order of Dist. Munsif, Tindivanam, D/- 12th February 1937.

Civil P. C. (1908), O. 1, R. 10 and O. 34, R. 1 — Suit on mortgage — Person claiming part of mortgage applying for being added as party to suit — Person though claiming adversely is necessary party and must be added as party to suit.

A person claiming that he is, as to a portion of the mortgage, the mortgagee himself is a necessary party to the mortgage suit. The claim, though adverse to the plaintiff mortgagee, is one which ought to be decided before a decree is given in the mortgage suit; for, otherwise, the result would be that the mortgagor would be liable to another suit on the same mortgage and the decree in the plaintiff's suit would not enable him to satisfy the claim under the mortgage by payment of the amount due to the plaintiff. Such person ought, hence, to be added under O. 1, R. 10, as a party to the mortgage suit. [P 710 C 2; P 711 C 1]

N. Muthuswami Iyer and S. Srinivasan — for Petitioner.

M. L. Nayak and T. K. Rajagopalan — for Respondent.

Order. — This petition arises out of an order dismissing an application under O. 1, R. 10, Civil P. C., to add the petitioner as party to a mortgage suit. The mortgagee was a deceased person whose property was claimed by an alleged adopted son. The present petitioner challenged the validity of the adoption and claimed himself to be entitled to the properties of the deceased mortgagee. There was a suit to declare that the adoption was invalid. This suit was compromised in 1934, the result being that the right of the present petitioner was recognized as to one-half of the properties and the right of the adopted son to the other half. There was also a subsequent partition suit to divide the properties as a result of which the present mortgage was to be shared equally between the two. However, in 1936 the adopted son purported to assign the suit mortgage to the plaintiff as if he was solely entitled thereto. The plaintiff brought a suit on the mortgage ignoring the claim of the present petitioner to a half share therein. The suit was filed in 1936, and while the suit was pending the present petitioner applied to be brought on record as a party to the suit entitled to a half share in the mortgage. The learned District Munsif refused to complicate the suit by adding a person who claimed adversely to the plaintiff and dismissed the application. It seems to me that the learned District Munsif has incorrectly appreciated the legal position. Granted that it is ordinarily undesirable to implicate in a mortgage suit persons claiming adversely to either the mortgagor or the mortgagee, that is not really the position here. Present petitioner's claim is not in any way in derogation of the rights of the mortgagee or the mortgagor. He claims that he is, as to a half share, the mortgagee himself and that the plaintiff is entitled only to the other half of the mortgage right by virtue of his assignment. Although this is a claim adverse to the plaintiff it is one which in my opinion ought to have been decided before a decree was given in the mortgage suit; for, otherwise, the result would be that the mortgagor would be liable to another suit on the same mortgage and the decree in the plaintiff's suit would not enable him to satisfy the claim under the

mortgage by payment of the amount due to the plaintiff. Order 34, R. 1 requires that all persons having an interest in the mortgage security shall be joined as parties to any suit relating to the security. If the allegations in the petition are correct, the petitioner is entitled to half of the mortgage security and he is a necessary party to the suit.

It is objected that the suit has now reached the stage of a final decree. That is unfortunate. But it is not due to the fault of the petitioner, who filed his application in good time and challenged the rejection of that application in the only way open to him by filing the present revision petition. It is a pity that the revision petition has been pending so long in this Court. It seems to me, however, that the decree which the plaintiff has obtained is one which should not either in the interests of the present petitioner or in the interests of the mortgagor, be allowed to enure solely for the benefit of the plaintiff. In the result, therefore, I allow the petition with costs and direct that the petitioner be impleaded as a party before the trial Court which will go into the truth of the allegations in the petition, and if they are established, will amend the decree so as to make the petitioner entitled to half the amount payable under the decree.

C.R.K./N.K. *Petition allowed.*

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(28) A. I. R. 1941 Madras 711

LEACH C. J. AND
KRISHNASWAMI AYYANGAR J.

V. Ramaswami Iyer and another — *Appellants*

v.

Veerarayan Raja alias Kuttunni and another — *Respondents.*

Letters Patent Appeal No. 71 of 1938, Decided on 12th November 1940, against decree and judgment of King J., D/- 23rd March 1938, in S. A. No. 264 of 1936.

Civil P. C. (1908), S. 15—'Instituted'—Plaint presented to Court having jurisdiction — Its acceptance by Court as being in order — Subsequent finding of fact as to value of subject-matter of suit requiring presentation to another Court having jurisdiction — Plaint returned for presentation to that Court — Plaint held instituted when presented to first Court.

The presentation of the plaint to a Court which has no jurisdiction to try the suit cannot be said to be the institution of the suit, even though the plaint has been accepted as being in order and registered. Before a suit can be deemed to be "instituted" the plaint must be presented to a Court having jurisdiction. But when a plaint is presented to a Court having jurisdiction and that Court accepts the plaint as being in order it must be held that the suit has been instituted. Because at some later stage, as the result of a finding of fact on the question of the value of the subject-matter of the suit, it is found that the plaint should have been presented to another Court having jurisdiction and that the plaint is returned for presentation in that Court, it does not mean that the suit has not been instituted. When a plaint has been presented to a Court having jurisdiction, a transfer of the case to another forum cannot mean the cancellation of the institution : ('28) 15 AIR 1928 Bom 421, *Disting.* [P 712 C 1, 2]

P. Govinda Menon — for Appellants.

Leach C. J.—Appellant 2 is the karnavan of a Malabar tarwad. On 8th January 1906, the jenmi, who is now represented by respondent 1, executed in favour of the tarwad of the appellant a kanom mortgage in respect of 58 parcels of agricultural land. On 6th January 1925 the jenmi executed a melcharth in favour of respondent 2, who on 4th February 1929 filed a suit in the Court of the Subordinate Judge of Calicut to enforce the redemption of the kanom. There were 136 defendants, the karnavan, 22 other members of the tarwad and 113 tenants. The contesting defendants pleaded that the Subordinate Court had no jurisdiction because the plaintiff had overvalued the property and that on a true valuation it should be filed in the Court of the District Munsif of Chowghat. After inquiry the Subordinate Judge held that the allegation of overvaluation was well founded and by an order dated 4th March 1930 directed that the plaint be returned to respondent 2 for presentation to the District Munsif's Court. The plaintiff appealed to the District Judge of South Malabar, who came to the conclusion that the suit had not been overvalued and accordingly directed the Subordinate Judge to hear and decide it. The contesting defendants then appealed to this Court, and Jackson J. who heard this appeal came to the conclusion that the District Judge had erred and that the order of the Subordinate Judge should be restored. In pursuance of the order of the learned Judge, respondent 2 applied for the return of the plaint and it was handed to him by the Subordinate Judge on 31st March 1932. On 11th August 1932 respondent 2 presented the plaint to the District Munsif. In the meantime the Malabar Tenancy Act, 1929 had been passed and came into force on 1st December 1930, but in S. 1 (3) there is a proviso in these terms :

Provided that in all suits for eviction instituted after 30th July 1929, and pending in the Court of

first instance on the date when the Act comes into force, which would have been governed by the provisions of this Act had it been in force at the time of their institution, the rights and obligations of the parties concerned shall be regulated by the provisions of this Act.

By virtue of Ss. 22 and 23 of the Act a kanomdar is now in a position to apply for a renewal of his kanom. On 29th March 1933 the appellant as the karnavan of the tarwad in whose favour the kanom of 8th January 1906 had been executed applied to the District Munsif of Chowghat for the renewal of the kanom. Respondent 2 objected. He relied on the proviso in S. 1 (3) of the Act, as the suit instituted by him for the redemption of the kanom was in effect a suit for eviction. The validity of this objection depends on the date on which the suit was "instituted". If it was instituted on 4th February 1929, the date on which the plaint was presented to the Subordinate Judge, the appellant was not entitled to apply for a renewal of the kanom, but if the date of institution is 11th August 1932, when the plaint was presented to the District Munsif of Chowghat, the proviso will apply and the appellant's application for a renewal of the kanom will lie. The District Munsif held that the suit must be deemed to have been filed on the date the plaint was presented to the Subordinate Judge of Calicut, namely 4th February 1929, and accordingly he dismissed the application of the appellant. The appellant appealed to the Subordinate Judge of Ottapalam, who agreed with the District Munsif. The appellant then appealed to this Court, but again without success. The appeal was heard by King J. who agreed with the Subordinate Judge's conclusion but on grounds somewhat different from those stated by the Subordinate Judge. The learned Judge having given a certificate under Clause 15, Letters Patent, the present appeal has been filed against his decision.

If it had been the case that the Subordinate Judge of Calicut had no jurisdiction to entertain respondent 2's suit we should have no hesitation in accepting the contention of the appellant that the date of the institution of the suit was 11th August 1932, when the District Munsif of Chowghat became seized with the matter. The presentation of the plaint to a Court which has no jurisdiction to try the suit cannot be said to be the institution of the suit, even though the plaint has been accepted as being in order and registered. Before a suit can be deemed to be "instituted" the plaint must be presented to a Court having jurisdiction. But notwithstanding that here the plaint should have been filed in the Court of the District Munsif by reason of S. 15, Civil P. C., which says that every suit shall be instituted in the lowest Court competent to try it, the Subordinate Judge had in fact jurisdiction to try it and he received his jurisdiction under the provisions of S. 12, Madras Civil Courts Act. That section says that the jurisdiction of a District Judge or a Subordinate Judge extends subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of a civil nature. There is nothing in the rules of the Code of Civil Procedure which takes away the jurisdiction conferred by S. 12, Madras Civil Courts Act. If no objection to the valuation had been taken, the Subordinate Judge would have heard and decided the suit and the decree passed by him would have had full validity, subject, of course, to an appeal.

Mr. Govinda Menon has very properly conceded that the Subordinate Judge had jurisdiction, but he has said that inasmuch as the plaint should have been presented to the lowest Court having jurisdiction the suit must be deemed to have been instituted when it was presented to the District Munsif. We cannot accept this argument, as we have already indicated. When a plaint is presented to a Court having jurisdiction and that Court accepts the plaint as being in order it must be held that the suit has been instituted. Because at some later stage, as the result of a finding of fact on the question of the value of the subject-matter of the suit, it is found that the plaint should have been presented to another Court having jurisdiction and that the plaint is returned for presentation in that Court, it does not mean that the suit has not been instituted. When a plaint has been presented to a Court having jurisdiction a transfer of the case to another forum cannot mean the cancellation of the institution. Mr. Govinda Menon has relied on the decision of the Bombay High Court in 52 Bom 548,[1] but we fail to see what application the judgment in that case has here. On 10th March 1925 and on 29th June 1925, two suits were instituted in the Court of the First Class Subordinate Judge at Sholapur against the G. I. P. Railway. At that time the railway was controlled by a limited liability Company, but on 1st July 1925 it

1. ('28) 15 AIR 1928 Bom 421 : 113 I C 511 : 52 Bom 548 : 30 Bom L R 970, Hirachand Succaram v. G. I. P. Ry Co., Bombay.

came under State control and it was necessary to add as a defendant to the suits the Secretary of State for India in Council. Up to the happening of this event, the Subordinate Judge had jurisdiction to try the suits, but inasmuch as they had to be converted into suits against the Secretary of State for India in Council his jurisdiction ceased and it was necessary for the plaintiff to take back the plaints and present them to the District Court. Before the District Judge the question was raised on behalf of the Secretary of State whether the suits were bad for want of notice under S. 80, Civil P. C., and the date of the institution of the suits became a material factor. The Bombay High Court held that the date of the suits must be taken to be the date on which the plaints were presented to the District Court. The difference between Bombay suits and the suit now before us is that in the Bombay suits the Subordinate Judge had no jurisdiction to try them, but in the case before us the Subordinate Judge had jurisdiction, although after the suit had been instituted it was found that another Court also had jurisdiction and that the Code of Civil Procedure required the suit to be tried by the other Court as the Court of first instance. We hold that the suit with which this appeal is concerned was instituted on 4th February 1929 and therefore the appellant had no right of a renewal of the kanom. Consequently the appeal will be dismissed but there will be no order as to costs as it has proceeded ex parte.

C.R.K./K.S. *Appeal dismissed.*

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* (28) A. I. R. 1941 Madras 713

VENKATARAMANA RAO AND HORWILL JJ.

Nadiminti Satyanarayanamurthi — *Appellant*

v.

Malluri Papayya and another — *Respondents.*

Appeal No. 365 of 1938, Decided on 31st January 1941, against order of Sub-Judge, Amalapuram, D/- 2nd August 1937.

***(a) Provincial Insolvency Act (1920), S. 28 (4) —All property acquired by insolvent after adjudication and before discharge vests in official receiver—Latter's intervention is not necessary —Transfer of decree for costs obtained by insolvent after adjudication is invalid.**

All property acquired by an insolvent subsequent to the date of adjudication and before his discharge vests in the official receiver the moment the acquisition is made. The word 'forthwith' in the section leaves no room for any other interpretation. Actual intervention by the official receiver is not necessary: ('27) 14 AIR 1927 P C 108, *Foll.*; *Case law reviewed.* [P 714 C 2; P 715 C 1]

Hence where the insolvent obtains subsequent to the adjudication and before his discharge a decree for costs in his favour, the decree for costs vests in the official receiver the moment it is passed and he is the only person entitled to transfer it and a transfer by the insolvent is therefore invalid. [P 718 C 2]

(b) Interpretation of statutes—English law—Invoking of.

The Court is only bound to consider the enactment as it stands uninfluenced by any consideration of what the English law is. [P 718 C 1]

(c) Interpretation of statutes — Argument of ab inconvenienti—Application of.

The argument *ab inconvenienti* is of no use when the language of a statute is plain. [P 718 C 1]

M. S. Ramachandra Rao — for Appellant.

K. Ramamurthy — for Respondents.

Judgment. — This is an appeal from the order of the learned Subordinate Judge of Amalapuram dismissing an application by a transferee decree-holder under O. 21 R. 16 to recognize the transfer of the decree in his favour and to execute it against the judgment-debtor's property. The decree that was transferred was a decree for costs in favour of an undischarged insolvent. He obtained the decree after the order of adjudication under the following circumstances. The order adjudging the transferor insolvent was passed in 1923. On a mortgage executed by him before the adjudication, a suit was instituted in 1927 being O. S. No. 1 of 1927 on the file of the Subordinate Judge's Court, Amalapuram. An ex parte decree was passed against him and he sought to set aside that decree. The learned Subordinate Judge who heard the application dismissed it on the ground that he had no right to present the application because he was an undischarged insolvent and the right to redeem vested in the Official Receiver. Against the said order an appeal was presented to the High Court. Their Lordships Reilly and Ananthakrishna Ayyar JJ. took the view that though the insolvent was not a necessary party to the suit, yet as the plaintiff therein chose to make him a party, he was entitled to be heard on his petition to get costs at least for having been unnecessarily impleaded. But since nothing would be gained by getting the suit heard, they did not go into the merits whether he had sufficient reason for not appearing on the date of the trial and dismissed the appeal. They however directed the plaintiff to pay the costs of the insolvent in the appeal and in the application out of which the said appeal arose. It was this decree for costs that was transfer-

red in favour of the appellant transferee decree-holder.

The ground on which the Subordinate Judge declined to recognize the transfer was that under S. 28 (4), Provincial Insolvency Act, the decree vested in the official receiver and the insolvent was not competent to transfer it. He followed a decision of this Court reported in A I R 1935 Mad 694.[1] It was a decision of our learned brother Pandrang Row J. In that case the insolvent succeeded to certain property as reversioner subsequent to the date of the order of adjudication and before his discharge. He sold the property to the plaintiff in that case who sued to recover possession on the strength of the said sale deed. The suit was dismissed on the ground that the property vested in the Official Receiver and that the insolvent had no title to convey. It was contended before Pandrang Row J. that the dismissal was improper on the ground that inasmuch as the Official Receiver did not intervene, the insolvent had title to convey relying on the decision in (1890) 25 Q B D 262,[2] but the learned Judge took the view that the doctrine in (1890) 25 Q B D 262[2] did not apply to cases arising under S. 28 (4), Provincial Insolvency Act, and in coming to this conclusion he relied on the decision of the Privy Council in 54 Cal 595.[3] It is contended by Mr. Ramachandra Row before us that this view is wrong, that the rule of English law as laid down in (1890) 25 Q B D 262,[2] namely,

> until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property whether with or without knowledge of the bankruptcy are valid against the trustee

has been applied to cases in India arising both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act and if that rule is given effect to, the transfer in favour of his client ought to be recognized. He relied also on a number of cases including the latest Full Bench decision of this Court reported in I L R (1938) Mad 578,[4] with which we shall presently deal. The question therefore is how far this contention is tenable. Section 28 (4), Provincial Insolvency Act, runs thus:

> All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver.

Unfettered by authority and on the plain language of the section all property acquired by an insolvent subsequent to the date of adjudication and before his discharge vests in the Official Receiver the moment the acquisition was made. The word 'forthwith' in the section leaves no room for any other interpretation. Section 28 (4), Provincial Insolvency Act, (5 of 1920), which governs this case is almost identical in language with S. 16 (4) of Act 3 of 1907, Provincial Insolvency Act. It runs thus :

> All such property as may be acquired by or devolve on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver.

Lord Salvesen in delivering the judgment of the Judicial Committee in 54 Cal 595[3] interpreted the section thus :

> This provision is perfectly clear. *The moment the inheritance devolved* on the insolvent Amulya, who was still undischarged, *it vested in the receiver already appointed*, and he alone was entitled to deal with the equity of redemption.

(The italics are ours.)

Later on he remarked thus :

> The Court only acts through a receiver, and any estate acquired by or devolving on an insolvent is vested in him as from the date of acquisition or devolution whatever the date of the receiver's actual appointment.

The question in that case arose thus : There was a suit in January 1915 for foreclosure instituted against one Tara Prasanna Bose whose son the insolvent was. The suit was subsequent to the adjudication in insolvency, namely 21st February 1914. There was a compromise entered into between Tara Prasanna Bose and the mortgagees and the deed of compromise was filed on 6th March 1915. Under the deed of compromise time was given for the payment of the mortgage debt and in default of payment on the due date the mortgage was to be foreclosed. Before any decree could be passed in terms of the compromise Tara Prasanna Bose died leaving the insolvent as his sole heir. Thus the equity of redemption devolved by inheritance on the insolvent. The mortgagees brought the insolvent on record who ratified the compromise and obtained a preliminary decree on 15th March 1916. The Official Receiver put in applications to set aside the decree but they were rejected and a final decree was passed. Thereupon the receiver instituted a suit to set aside the

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1. ('35) 22 AIR 1935 Mad 694: 157 I C 1002, Lingayya v. Venkatapathy.
2. (1890) 25 Q B D 262: 59 L J Q B 409 : 63 L T 206 : 38 W R 551 : 7 Morrell 207, Cohen v. Mitchell.
3. ('27) 14 AIR 1927 P C 108: 101 I C 442: 54 Cal 595 : 54 I A 190 (P C), Kalachand Banerjee v. Jagannath Marwari.
4. ('38) 25 AIR 1938 Mad 420: 175 I C 398: I L R (1938) Mad 578 : (1938) 1 M L J 413 (FB), Sobanadri v. Nagayya.

said decrees and for redemption. Their Lordships of the Privy Council held he was entitled to do so. After placing the above interpretation on S. 16 (4), Provincial Insolvency Act, 1907, their Lordships observed as follows :

> *The latter alone* (i. e., the Official Receiver) *is entitled to transact in regard to it* and *he and not the insolvent has the sole interest* in the subject-matter of the suit. To him therefore must be given the opportunity of redeeming the property.

(The italics are ours.)

Therefore, this decision is absolutely clear on the point, viz., the property from the moment of its acquisition vests only in the receiver and he is the person having the sole interest therein competent to deal with it thus excluding the idea of any property vesting in the insolvent at all and leaving no scope for any theory of intervention. Since the decision in 54 Cal 595[3] the question was considered by both the Bombay and Allahabad High Courts and they reached the same conclusion. In 60 Bom 141,[5] Beaumont C. J. remarked :

> Unless we disregard the word 'forthwith' altogether, we cannot say that the property did not vest until the receiver intervened.

Wadia J., who concurred with him observed that this view was confirmed by the said decision of the Privy Council. To a similar effect are the observations of Sulaiman C. J., in the Full Bench decision in 58 ALL 132[6] (*see* pp. 135 and 136). The Lahore and Rangoon High Courts have taken the same view and they rely on the plain language of the section: *vide* 16 Lah 392[7] and 4 Rang 125.[8] It must be noticed that though the 16 Lahore case was after the decision of the Privy Council, no reference was made to it. The preponderance of opinion is thus in favour of the view that it is not permissible to invoke any doctrine of intervention in construing the plain language of S. 28 (4). Mr. Ramachandra Rao contends that the Provincial Insolvency Act is based on the English Bankruptcy Act and that S. 28 (4) must be read in the light of the English decisions and therefore subject to the rule laid down in (1890) 25 Q B D 262.[2] He placed considerable reliance on 45 M L J 827[9] and 8 Pat 478,[10] which applied the said rule. To test the soundness of this contention we think it necessary to briefly advert to the relevant provisions of English law and to the cases based thereon. (1890) 25 Q B D 262[2] was decided under the English Bankruptcy Act of 1883. The relevant provisions of the said Act are Ss. 44 and 54. Portions of the said sections so far as material to the present case run thus :

> *44.* The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt . . . . . shall comprise the following particulars :
>
> (1) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve on him before the discharge . . . . .
>
> *54.* (1) Until a trustee is appointed the Official Receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.
>
> (2) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

In (1890) 25 Q B D 262[2] the facts were as follows: The bankrupt before he obtained his discharge was carrying on business in buying and selling agricultural machines. He had a right of action for damages against a person who wrongfully took possession of some of the machines. He sued the wrongdoer and obtained judgment for damages. After the action was commenced the bankrupt assigned his right of action to the plaintiff. After the judgment was recovered the trustee in bankruptcy intervened and claimed to recover the amount. The question was whether the plaintiff or the trustee was entitled to do so. The plaintiff was held entitled to recover. Lord Esher proceeded on the admission of the counsel in the case and on prior authorities particularly (1844) 5 Q B 965[11] and *Ex parte Dewhurst ; In re Vanlohe.*[12] Fry L. J. dealt with the provisions of the statute and remarked thus:

> If one merely confined one's attention to the words of the section, the reader might suppose that both those kinds of property vested absolutely in the trustee—vested in him in precisely the same manner. But the inconvenience of such a conclusion has been apparent not only from the present

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5. ('36) 23 A I R 1936 Bom 164 : 162 I C 253 : 60 Bom 141 : 38 Bom L R 211, Girikant Shivlal v. Vadilal Vrijlal.
6. ('35) 22 A I R 1935 All 675 : 157 I C 41: 58 All 132 : 1935 A L J 709 (FB), Abdul Rahman v. Nihal Chand.
7. ('34) 21 A I R 1934 Lah 809 : 155 I C 938 : 16 Lah 392 : 36 P L R 185, Diwan Chand v. Manak Chand.
8. ('26) 13 A I R 1926 Rang 179 : 97 I C 221 : 4 Rang 125, Ma Phaw v. Maung Ba Thaw.
9. ('24) 11 A I R 1924 Mad 223 : 76 I C 805 : 45 M L J 827, Ramanadha Iyer v. Nagendra Iyer.
10. ('29) 16 A I R 1929 Pat 97 : 114 I C 465 : 8 Pat 478 : 9 P L T 969, Jagadish Narain Singh v. Mt. Ramsakal Kuer.
11. (1844) 5 Q B 965 : 2 D & L 49 : D & Mer 723 : 13 L J Q B 209 : 8 Jur 812 : 114 E R 1512, Herbert v. Sayer.
12. (1872) 7 Ch 185 : 41 L J Bk 18 : 25 L T (N S) 731 : 20 W R 172.

statute, but from many statutes which have preceded it, which contain substantially the same language.

After so remarking he observed that there was no difficulty in divesting out of the bankrupt and vesting in the trustee the whole of the property that belonged to the bankrupt at the commencement of the bankruptcy but there was the greatest difficulty in supposing so with reference to the subsequently acquired property, but that difficulty had been met by establishing a distinction and recognizing that in the case of subsequently acquired property it vests in the trustee absolutely from the moment of intervention and the bankrupt takes some kind of interest therein. He followed (1844) 5 Q B 965.[11] The decision in (1890) 25 Q B D 262,[2] therefore, proceeded wholly on prior authority based, as it was stated, on substantially the same language of the Acts prior to the Bankruptcy Act of 1883. If one might say with respect to the eminent Judges who dealt with the bankruptcy enactments in England the language might afford scope for the above interpretation based on the argument *ab inconvenienti*. But if the language is so worded as to vest *eo instanti* the acquisition was made, it would not be possible to apply this argument. And the effect of the language may well be to exclude the theory of intervention. This is clear from the following observations of Tindal C. J. in (1844) 114 E R 1512[11] at page 1518 :

> The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute ; and it is most consistent with convenience ; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt.

Let us now turn to the consideration of the language of Ss. 44 and 54, English Bankruptcy Act of 1883. What S. 54 says is, "immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee." The property of the bankrupt is defined in S. 44 (1) as including subsequentlyacquired property. As Fry L. J. pointed out in (1890) 25 Q B D 262[2] there is no difficulty in the property existing on the date of the bankruptcy being divested out of the bankrupt and vesting in the trustee immediately on a debtor being adjudged insolvent because it follows from the plain language of the section ; but immediately on the debtor being adjudged insolvent the future property cannot vest because the property has to be got or acquired and the word "immediately" has prima facie reference to the moment of adjudication. Section 54 (2) only provides that as and when the trustee is appointed (*vide* S. 21 of the same Act) the property will pass from the receiver to the trustee. Thus, it was possible to give effect to the argument based on inconvenience and hardship. But the language of S. 28 (4) is explicit and unambiguous and to use the expression of Tindal C. J. in (1844) 5 Q B 965[11] transfers immediately the property from the insolvent to the Official Receiver.

Though the rule as laid down in (1844) 5 Q B 965[11] and (1890) 25 Q B D 262[2] was wide enough to cover realty and personalty and the reason of the rule might well apply to both, when the question arose as to subsequently acquired realty, Chitty J. declined to apply it : *vide* (1892) 2 Ch 138[13] and the decision of Chitty J. was followed in later cases until Parliament intervened and enacted S. 47, Bankruptcy Act of 1914. Thus, the English law up to 1914 was that in the case of realty the moment it was acquired it vested in the trustee, whereas in the case of personalty it did not vest in him until he intervened. The reason assigned by Lindley L. J. in the course of the argument for this distinction was "the real estate passes by conveyance and not by delivery." Even if this is the basis of the rule, the decree in the present case requires a conveyance and the decree cannot, therefore, vest in the insolvent. There is no distinction between realty and personalty in Indian law; either the principle of simultaneous vesting or that of vesting being deferred until intervention must apply to both. We shall now briefly examine the Insolvency law in India and see if the Legislature intended to incorporate the English rule and if so, how far it has succeeded in doing so. Up to 1909 in Presidency towns and Rangoon the law as to insolvency was governed by 11 and 12 Vict., Ch. 21 and so far as the provincial insolvency is concerned, up to 1907 the law was regulated by the provisions contained in the various Civil Procedure Codes enacted from time to time and they were very limited in scope. The provision relating to the vesting of property in 11 and 12 Vict. was S. 7 and the portion of the said section relevant for discussion ran thus :

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13. (1892) 2 Ch 138 : 61 L J Ch 323: 66 L T 404: 40 W R 295, In re New Land Development Association and Gray.

All future estate, right, title, interest and trust of the said petitioner in or to any real or personal estate or effects .... which may revert be devised or bequeathed or come to him .... do vest in the Official Assignee for the time being of the said Court.

Their Lordships of the Privy Council placed the following interpretation in 8 M I A 339[14] at pages 355 and 356 :

Under the statute, 11 and 12 Vict., Ch. 21, the Assignee has a right to the subsequently acquired property of an insolvent, unless the insolvent has obtained a certificate and discharge; but the Assignee's right to the subsequently acquired property is subject to two qualifications. In the first place if the insolvent has acquired property subject to liens and obligations then any property taken by the assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the insolvent. The second qualification is this, that if the insolvent carried on trade at a subsequent period, with the assent of the assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency.

It will thus be seen that the interpretation placed by their Lordships would apply both to real and personal property and the property would vest in the assignee as and when acquired subject to the two qualifications mentioned by their Lordships. So far as the first qualification is concerned, it is clear that the acquisition when made must be subject to the lien or charge. In regard to the second qualification the doctrine of acquiescence or estoppel on the part of the official assignee would apply and no question of intervention was suggested by their Lordships of the Privy Council in regard to the vesting. In 17 Mad 21[15] a question arose whether the mortgage of a subsequently acquired property was valid as against the official assignee. Collins C. J. held it was valid applying the case in (1890) 25 Q B D 262[2] in construing S. 7 of the said Act. But, on appeal, Best J. took the view that in order to be binding on the official assignee the charge on the after-acquired property must come within the scope of one or the other of two qualifications stated in 8 M I A 339[14] and (1890) 25 Q B D 262[2] was merely an authority for the proposition

that when an insolvent is allowed to carry on trade or other business, the Official Assignee's assent thereto (required under the second of the two qualifications mentioned in 8 M I A 339[14]) will be presumed upto such time as he may intervene.

Muttuswami Ayyar J. was of the view that the language of S. 7 threw no light on the point beyond the fact that the word "vest" was used with reference to both kinds of property, that he saw no substantial difference on the point between the Indian Insolvency Act and the English Bankruptcy Act, that the English cases dealt with the question as one of reasonable construction and that the whole of the reasoning was applicable under the Indian Insolvency Act, that as the rule in (1890) 25 Q B D 262[2] was qualified with reference to real property by the decision in (1892) 2 Ch 138[13] following the later decision he would hold the mortgage to be invalid. In 30 Mad 145,[16] White C. J. and Subramania Ayyar J. took a view different from both Best and Muttuswami Ayyar JJ. They held that the rule in (1890) 25 Q B D 262[2] would apply to both moveable and immovable property and that, as in the case they were dealing with, the official assignee had not intervened, the plaintiff, an undischarged insolvent was held entitled to maintain the suit for partition and recovery of his share of the property which was devolved on him by inheritance subsequent to the date of adjudication. It was in this state of the law the Presidency Towns Insolvency Act was passed in 1909. It was based on the Bankruptcy Acts of 1883 and 1890. Its provisions Ss. 17 and 52 which relate to vesting are almost identical in language with Ss. 44 and 54, Bankurptcy Act of 1883. The question therefore would be whether in interpreting the said provisions of the Presidency Towns Insolvency Act the view in 30 Mad 145[16] or the view of Best J. or Muttuswami Ayyar J. in 17 Mad 21[15] is to be followed.

So far as the Provincial Insolvency Act is concerned, the only provision as to vesting before 1907 was contained in S. 354, Civil P. C., 1882, namely, "Every order under S. 351 ..... shall operate and vest in the receiver all the insolvent's property." In 1907, i. e., two years earlier than the passing of the Presidency Towns Insolvency Act, Act 3 of 1907 was passed for placing the law of insolvency in the mofussal on a satisfactory basis. In regard to the provisions as to vesting instead of adopting the language of Ss. 44 and 54, English Bankruptcy Act, 1883, as was done in the case of the Presidency Towns Insolvency Act, S. 16 was enacted which contains a specific provision by way of cl. 4 separately as to vesting of subsequently acquired property, thus leaving no

14. (1859-61) 8 M I A 339 : 14 Moo P C 452 : 1 Sar 778 : 4 W R 61 : 1 Suther 426 : 4 L T 712 (P C), Kerakoose v. Brooks.
15. ('94) 17 Mad 21, Rowlandson v. Champion.
16. ('07) 30 Mad 145 : 17 M L J 14, Sriramulu Naidu v. Andalammal.

scope for any other construction than what the language according to its plain meaning would warrant and which construction was placed by the Privy Council in 54 Cal 595.[3] Why this distinction was made between the two Acts it is not possible to understand. Certain provisions of this Act were amended in 1914 (Amending Act 10 of 1914) the year in which the English Bankruptcy Act of 1914 was passed enacting S. 47 of the Act adopting the principle of (1890) 25 Q B D 262[2] both in regard to realty and personalty and yet no provision corresponding to S. 47 was enacted nor even in 1920 when Act 5 of 1920 was passed. It is not for the Court to divine the reason why the Legislature did not think it fit to do so. The Court is only bound to consider the enactment as it stands uninfluenced by any consideration of what the English law is. It was contended before us that as the provisions of the Presidency Towns Insolvency Act are being construed in the light of the English decisions the Legislature could not have meant to enact a different law for the mofussal and a different construction would lead to hardship and inconvenience. As we have pointed out, what the rule of English law to be applied to those sections is, is itself a matter of doubt. The argument, *ab inconvenienti* which found favour in English Courts, is of no use when the language of a statute is plain. As stated in Craies' Statute Law at page 87 :

> The argument *ab inconvenienti* is only admissible in construction where the meaning of the statute is obscure. Where the language is explicit, its consequences are for Parliament, and not for the Courts, to consider. In such a case the suffering citizen must appeal for relief to the lawgiver, and not to the lawyer.

In 45 M L J 827[9] the learned Judges followed 30 Mad 145,[16] a decision based on 11 and 12 Victoria, remarking that they saw no reason why they should not follow the principle laid down in that case and that no authority had been cited to show to the contrary. We have already pointed out the difference of view in regard to the interpretation of S. 7 of that Act. 8 Pat 478[10] does not carry the matter any further. Both these decisions were before the Privy Council decision in 54 Cal 595.[3] With due respect, the interpretation placed by the learned Judges in the said decisions can no longer be tenable in view of the clear pronouncement of their Lordships of the Privy Council which we feel bound to follow. The learned Judges in the Full Bench decision in I L R (1938) Mad 578[4] thought it unnecessary to go into this question and left it open as in that case the official assignee intervened and the property vested in him and not in the bankrupt.

We have therefore come to the conclusion that the decree for costs vested in the Official Receiver the moment it was passed and that he was the only person entitled to transfer it and the transfer in question is therefore invalid. In the result the appeal fails and is dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 718

LAKSHMANA RAO J.

Public Prosecutor — Appellant

v.

Nagappan Servai — Respondent.

Criminal Appeal No. 55, Criminal Revn. No. 52 and Criminal Revn. Petn. No. 51 of 1941, Decided on 12th March 1941, against order of acquittal by Assistant Sessions Judge, Ramnad Division at Devakottai, D/- 15th October 1940.

Penal Code (1860), S. 397 — Scope.

Section 397 does not require the user of a deadly weapon to be against the person robbed.

[P 719 C 1]

A. S. Sivakaminathan — for Appellant.

N. T. Raghunathan — for Respondent.

Judgment. — The appeal and revision case arise out of Sessions Case No. 103 of 1940 in which two persons were tried by the Assistant Sessions Judge of Ramnad with a jury, accused 1 for an offence under S. 392 read with S. 397, Penal Code, and accused 2, under S. 394, Penal Code. The jury unanimously found accused 1 guilty under S. 392, Penal Code, and accused 2 under S. 394, Penal Code, and accepting the verdict the Assistant Sessions Judge sentenced accused 1 to rigorous imprisonment for two years and accused 2 to rigorous imprisonment for 18 months. The Crown appeals against the acquittal of accused 1 of the offence under S. 397, Penal Code, and the revision case has been preferred by the Public Prosecutor for enhancement of sentence. The case is simple, and as found by the jury P. W. 2 was robbed of her jewels on her way to Nattarsakottai along with her mother, P. W. 3 and brother P. W. 4. M. O. No. 1, the knife, was used by accused 1 to frighten P. Ws. 3 and 4, and it struck and caused hurt to P. W. 2. Accused 2 then removed the jewels and both the accused were caught soon after, accused 1 with M. O. NO. 1, the knife with human blood on it, and accused 2 with M. Os. Nos. 2 to 5, the stolen jewels. The knife,

M. O. No. 1, is a deadly weapon and it was used at the time of committing the robbery. Section 397, Penal Code, does not require the user to be against the person robbed, and the guilt of accused 1 under S. 392, Penal Code, read with S. 397, Penal Code, admits of no doubt. The appeal is, therefore, allowed and accused 1 is convicted under S. 392 read with S. 397, Penal Code, and sentenced to the minimum punishment of rigorous imprisonment for seven years. The revision case becomes unnecessary as regards accused 1 and the sentence of accused 2 who is a first offender cannot be said to be inadequate. The revision petition is, therefore, dismissed.

C.R.K./K.S. *Order accordingly.*

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* (28) A. I. R. 1941 Madras 719

LEACH C. J. AND SOMAYYA J.

Marti Satyanarayana — Petitioner

v.

Gujavarti Anjareddi — Respondent.

Civil Revn. Petn. No. 832 of 1938, Decided on 12th March 1941 to revise decree of Court of Sub-Judge, Masulipatam, D/- 2nd Angust 1937.

*** (a) Civil P. C. (1908), S. 95 — Word "plaintiff" in S. 95 is confined to the plaintiff and does not include next friend — Injured party however can sue to recover compensation from next friend.**

The word "plaintiff" in S. 95 is confined to the plaintiff alone and does not include a next friend. Consequently, the Court has no jurisdiction to order the next friend of the minor plaintiff to pay compensation under S. 95 but this does not prevent an injured party from instituting a suit to recover from the next friend compensation should he wish to do so : ('35) 22 AIR 1935 Mad 886, *Approved*; ('31) 18 AIR 1931 Mad 249; (1847) 1 De G & S M 245 and (1908) 2 K B 458, *Disting.*

[P 720 C 1]

(b) Interpretation of statutes — Words must be given ordinary meaning unless context otherwise demands.

In construing a statute the words used must be given their ordinary meaning unless the context otherwise demands. [P 720 C 1]

P. Somsundaram and P. Suryanarayana — for Petitioner.

A. Lakshmayya — for Respondent.

Leach C. J. — In this petition the Court is called upon to decide whether the word "plaintiff" in S. 95, Civil P. C., must be deemed to include the next friend of a minor plaintiff. Section 95 provides that where in a suit in which an arrest or attachment has been effected or a temporary injunction granted under S. 94 it appears to the Court that the application was made on insufficient grounds, or the suit fails and it appears that there was no reasonable or probable ground for its institution, the defendant may apply to the Court, and the Court may award against "the plaintiff" reasonable compensation not exceeding Rs. 1000, for the expense or injury caused to him. An order determining an application of this nature bars a suit for compensation. In the present case the petitioner, as the next friend of a minor, filed in the Court of the Subordinate Judge of Masulipatam a suit against the respondent and at the same time filed an application for the attachment before judgment of property belonging to the respondent. The claim was on a promissory note. The application for attachment before judgment was granted, but in the course of the suit it became apparent that the application ought not to have been made and the respondent applied for an order against the petitioner and the minor plaintiff under S. 95. The Subordinate Judge held that the minor plaintiff was not responsible for the filing of the application for attachment before judgment. Clearly he was not. The responsibility rested entirely with the petitioner. Accordingly the Subordinate Judge passed an order against the petitioner directing him to pay to the respondent a sum of Rs. 200 by way of compensation.

Section 95 only speaks of the award of compensation against the "plaintiff". The Court must be very careful in interpreting the expression not to extend the meaning unduly. To do so might lead to difficulty in respect of other provisions of the Code. Order 32, R. 14 permits a minor plaintiff on attaining majority to apply to the Court for the dismissal of a suit instituted in his name by his next friend on the ground that it was unreasonable or improper, and the Court may grant the application and order the next friend to pay the costs of all parties. There is here strong indication that in using the word "plaintiff" in S. 95 the Legislature intended to confine the application under that section to an application against the plaintiff himself, because when providing for an order against the next friend in O. 32, R. 14 it makes express provision to this effect. In 69 M L J 487,[1] Varadachariar J. observed:

> The section only says that the award of compensation is to be against the plaintiff, and the plaintiff in the action is unboubtedly the minor and not the guardian.

Although the question now before us did not fall for decision in that case the learned

1. ('35) 22 AIR 1935 Mad 886 : 158 I C 831 : 69 M L J 487 : 59 Mad 415, Ramahari Patro v. Govindarona.

Judge was obviously disinclined to read the word "plaintiff" in S. 95 as including the next friend, and we consider that he was right. In 53 Mad 716[2] a Bench of this Court held that the Court had power to direct the next friend of a minor who had sued in forma pauperis to pay the court-fee to Government. This decision was based on the opinion that S. 35, Civil P. C., which refers to costs, was wide enough to cover a direction to the next friend to pay the court-fee. Section 35 is couched in very wide terms. It gives the Court full power to determine by whom or out of what property and to what extent costs are to be paid, but S. 95 is limited in its wording.

Two English cases have been referred to in the course of the argument : (1847) 1 De G & Sm 245[3] and (1908) 2 K B 458.[4] In the former of these cases it was held by Knight Bruce, Vice-Chancellor, that the petition of an infant plaintiff in a cause was the petition of his next friend, and the next friend was ordered to pay the costs. The ground for the order for costs was that the Vice-Chancellor had always understood that in a cause in which there was an infant suing by his next friend, a petition presented by the infant plaintiff was treated as the petition of the next friend. In the present case, the Court is concerned with the construction of a section in an Act of the Indian Legislature, and in construing a statute the words used must be given their ordinary meaning unless the context otherwise demands, which is not the case here. In (1908) 2 K B 458,[4] the Court was concerned with the construction of the rules of a friendly society. The rules there under consideration have nothing in common with S. 95. We do not regard anything said in the judgment in that case as having application here. We hold that the word "plaintiff" in S. 95 must be confined to the plaintiff. We can see no reason why it should be deemed to include a next friend. Our decision is based on a strict construction of the section, but this construction does not prevent an injured party from instituting a suit to recover from the next friend compensation should he wish to do so. In making an order against the petitioner requiring him to pay compensation to the respondent the Subordinate Judge acted without jurisdiction. Consequently, the petition will be allowed with costs here and below.

C.R.K./G.N. *Petition allowed.*

2. ('31) 18 AIR 1931 Mad 249 : 128 I C 156 : 53 Mad 716 : 58 M L J 623, Elumalai Naicker v. Kuppammal.

3. (1847) 1 De G & Sm 245 : 11 Jur 511 : 75 R R 95, Jones v. Lewis.

4. (1908) 2 K B 458, Catt v. Wood.

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(28) A. I. R. 1941 Madras 720

HORWILL J.

In re B. Titus and others — Accused 1 to 3 — Appellants.

Criminal Appeals Nos. 474, 647 and 672, Criminal Revision Case No. 800 and Criminal Revision Petn. No. 754 of 1940, Decided on 31st January 1941, against order of Sess. Court, Cuddapah Division, D/- 6th July 1940.

(a) Evidence Act (1872), S. 21 — Magistrate holding enquiry — Person making statements which do not implicate him subsequently becoming accused—Statements are admissible.

A person who subsequently becomes an accused may have made many admissions which do not implicate himself in any criminal charges; and these would be admissible under S. 21. Therefore statements made to a Magistrate holding an enquiry by persons who are not even under arrest are admissible as against them as admissions: ('39) 26 A I R 1939 P C 47, *Disting.* [P 722 C 1]

(b) Penal Code (1860), S. 348—Persons who are not concerned with investigation, detained for more than 24 hours by police officer—Latter is guilty.

Police officers during the investigation of a case have necessarily to call persons and keep them from going to some other place where they would prefer to be; but where a police officer detains a person who is not concerned with any investigation for more than 24 hours, he is guilty under Section 348. [P 723 C 1]

(c) Criminal P. C. (1898), S. 562—Object of section explained — Experienced men deliberately flouting law and committing offences — S. 562 has no application.

Section 562 is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals, who may lead them further along the path of crime and to help even men of more mature years, who for the first time may have committed crimes through ignorance or inadvertence or the bad influence of others and who, but for such lapses, might be expected to make good citizens. In such cases a term of imprisonment may have the very opposite effect to that of which it was intended. Such persons would be sufficiently punished by the shame of having committed a crime and by the mental agony and disgrace that a trial in a criminal Court would involve. It was not intended that S. 562 should be applied to experienced men of the world who deliberately flout the law and commit offences which they know are strongly condemned by their superior officers, but which they have persisted in doing in order that it might not be said of them that they have not been able to detect a petty crime. [P 723 C 2; P 724 C 1]

K. S. Jayarama Ayyar for G. Gopalaswami, V. V. Srinivasa Ayyangar and Kasturi Seshagiri Rao — for Appellants.

K. Venkataraghavachari for Public Prosecutor — for the Crown.

Judgment. — The three appellants, who are police officers at Rayachoti, were charged in the Sessions Court of Cuddapah under Ss. 348 and 330, Penal Code, with wrongful confinement for the purpose of extorting a confession and voluntarily causing hurt for the same purpose. The appellant in Criminal Appeal No. 474 of 1940 was accused 1 in the lower Court. He has been found guilty under both counts and sentenced to three years rigorous imprisonment and fine for each offence. The appellant in Criminal Appeal No. 647 of 1940 was accused 2 in the lower Court. He has been found guilty only under Ss. 323 and 342, Penal Code, because, although the learned Sessions Judge thought that he had committed some of the acts of which complaint was made, he was not satisfied that they were done for the purpose of extorting a confession. The appellant in Criminal Appeal No. 672 of 1940 was found guilty under S. 342, Penal Code, for the same reason. He was accused 3 in the lower Court. The learned Sessions Judge was not even sure that this appellant caused any injury to any of the complainants. Both accused 2 and 3 were directed to be released on their executing bonds for good behaviour. The Crown has preferred a criminal revision case, contending that these orders were not an adequate punishment for the offences.

The prosecution story is that P. W. 18, the wife of the hotel-keeper, P. W. 19, lost a billa on the evening of 7th September 1939, which she had removed from her hair only a short time before its loss was discovered. She suspected P. W. 1, a maid-servant in her house, aged about 14, her younger sister P. W. 3, aged about eight, and P. W. 2, a dhobi woman aged about 50 years, who was in the hotel when this billa was lost. P. W. 19 seems to have been on very friendly terms with the local police and the station writer promised to send two constables. One of them was accused 3. This accused came and said to P. W. 19; "I am not a man if I do not get your billa back." Then he adopted the cowdung procedure, in order to give the accused persons an opportunity of returning the billa without implicating themselves. Each of them was told to bring a ball of cowdung and put it in a pot, the reason for this being that if they had the billa they could put it in the middle of the dung and so conceal the return of the jewel. That procedure was however unsuccessful and the search was abandoned for the night. On the following morning, P. W. 19 told the Circle Inspector, P. W. 37, at about 8 A. M. about his loss. Accused 1, who was the station house officer, was absent on that day from the station; and so the Circle Inspector told accused 2, who was the Prohibition Sub-Inspector of the same place, to look into the matter. Accused 2 at once sent P. W. 41 to fetch the three suspected persons to the station, where they were subjected to third degree methods, being beaten in various petty ways, rapped on the knuckles, knees, elbows, etc, by this accused. At about 12-30 P. M., a search was made of P. W. 2's house and P. W. 2 was taken from the station to her house for that purpose. She was there put to certain indignities and struck by accused 2. Accused 3 kicked her husband. Nothing being found there, P. W. 2 was taken by accused 3, under accused 2's instructions, to the house of accused 1, where, at about 2 P. M., she was locked up by accused 3. At about 4 P. M. accused 2 returned to accused 1's house and beat P. W. 2. He then left instructions for P. W. 2 to be brought back to the station. Throughout this time P. Ws. 1 and 3 were detained at the station. At about 6 P. M. she was brought to the station by P. W. 40.

On the way to the station they were met by accused 1 who had just returned to Rayachoti, and from that time onwards accused 2 left the matter almost entirely in accused 1's hands. He actually left the station at 8 P. M. but he continued to play a minor part in this drama. Accused 1 now began to turn his attention to P. W. 1, who had so far escaped lightly. He struck her over the knees and knuckles and threatened her in various ways. In the meanwhile, P. W. 3 had run home and P. W. 16 had to be sent to fetch her back. She came back with her parents. During this time, P. W. 1 was interrogated not only about the billa but even more about a chembu that was said to have been stolen from P. W. 19. She admitted having sold a chembu to one Narayana (P. W. 15) and she was taken there and the chembu recovered. When this chembu was shown to P. W. 19 he said that it did not belong to him. This questioning took place at the house of accused 2 at about 10 P. M., where it was intended to draw up a panchayatnama, respectable persons having been brought there for that purpose. In view, however, of P. W. 19's statement, no document was written. P. W. 2 was then taken on to the house of accused 1, where she remained for the rest of that night. P. W. 3 was detained all night at the station;

but P. W. 2 was brought to accused 1's house just before midnight. P. Ws. 1 and 2 remained in accused 1's house all that night. P. W. 1 complains that during that night she was raped; but that was the subject of a charge in another sessions case which is under appeal and will be discussed elsewhere. At cockcrow P. W. 1 was taken to the house of accused 2, where she remained for some hours until her parents came and took her away. P. W. 2 was brought to accused 2's house at about 8 A. M. As she was found to have blood on her saree which, P. W. 2 says, was the result of a kick in the abdomen by accused 1 at the station, accused 2 told her to change her saree and she was given a fresh one. Accused 2 told somebody there to put the saree behind the door and from there it was recovered two days later.

Although the appellants denied in the Sessions Court that the investigation proceeded on the lines spoken to by the very many prosecution witnesses, there can be no doubt from the abundance of evidence in this case that the story is substantially true. In fact, the three appellants made statements to the Sub-Divisional Magistrate of Cuddapah who was deputed to enquire into their conduct; and while the three appellants denied that any beating or improper confinement had taken place, their account of the lines on which the enquiry proceeded is substantially that of the prosecution witnesses. Mr. Jayarama Ayyar has argued that these statements to the Sub-Divisional Magistrate are not admissible; but I do not see why not. They do not purport to be statements recorded under S. 164, Criminal P. C.; for the Magistrate was then merely holding an enquiry into the conduct of these police officers and the appellants were not even under arrest. Sections 21 to 27, Evidence Act, do not suggest that statements that would be admissible in civil cases as admissions are not admissible in criminal cases. A person who subsequently becomes an accused may have made many admissions which do not implicate himself in any criminal charges; and these would be admissible under S. 21, Evidence Act. Mr. Jayarama Ayyar quotes a decision of the Privy Council in 18 Pat 234[1] and argues that the Committee held that statements that are described as admissions in civil actions are confessions in criminal cases. I do not however find anything to that effect in their judgment. On the other hand, they have given an illustration of a case of an admission which would not amount to a confession. They however ruled out the statement in question, which was that the accused had slept on the night of the offence in the house of the person who was killed—not because it was either a confession or admission but because it had to be excluded under S. 162, Criminal P. C., as being a statement made to the police during the course of investigation.

Very many of the prosecution witnesses are constables attached to the Rayachoti Station, either under accused 1 or under accused 2, and their evidence is criticised on the ground that they were accomplices. With this contention I quite agree. They depose as approvers. I find nothing in the evidence which suggests that the constables who assisted the appellants in the acts complained of did so unwillingly. It cannot be doubted that they thoroughly approved of everything that was being done, and supported their chiefs with relish. They were merely carrying on an ancient practice which, although rather frowned upon by the higher police officials today, has still not lost its popularity. These police witnesses saw nothing wrong in what was being done; and they have undoubtedly given evidence because they were told to do so. They knew that if they did not do so, they would be punished for the parts which they had played. That does not however mean that they have been concocting evidence against their former superior officers. That was not expected of them; and I do not think that any of them would wish to do so. In giving evidence they were governed by several considerations; they had to say something, they would wish to minimize the part that they themselves had played and, unless they had some personal grievance against the appellants, they would want to help them. (After referring to certain groups of witnesses and their evidence, his Lordship proceeded.) The evidence against accused 1 is very strong. His beating of P. W. 1 at the station and his kicking of P. W. 2 has been well corroborated by P. Ws. 16, 33 and 39; and the object of such beating was undoubtedly to extort confessions from the suspected persons. Even the words used by accused 1 were quoted by the witnesses; and the words as well as the deeds show the purpose for which these persons were beaten. It has been argued on

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1. ('39) 26 AIR 1939 P C 47 : 180 I C 1 : 40 Cr L J 364 : I L R (1939) Kar P C 123 : 66 I A 66 : 18 Pat 234 (PC), Narayanaswami v. Emperor,

behalf of all the appellants that the evidence does not disclose an offence of unlawful confinement. As the learned counsel for the appellants rightly pointed out, police officers during the investigation of a case have necessarily to call persons and keep them from going to some other place where they would prefer to be; but P. Ws. 1 to 3 were detained at one place or the other for 24 hours, which was far beyond anything that was required for investigation. In fact, as far as P. Ws. 1 to 3 were concerned, there was no investigation at all. From the first they denied all knowledge of the whereabouts of the billa; and the only purpose for which they were detained was that they might subsequently furnish information which would lead to the recovery of the jewel. Accused 1 was therefore clearly guilty of the offences with which he was charged.

For want of corroboration, the learned Sessions Judge has rejected certain parts of the evidence against accused 2; but, on the points on which there is corroboration, the evidence is undoubtedly worthy of acceptance. It was this accused who kept P. Ws. 1 to 3 at the station on the morning of the 8th and told the parents of P. Ws. 1 and 3 that they must bring the meals of their daughters as they would not be allowed to leave. It was he, too, who instructed accused 3 to keep P. W. 2 in the house of accused 1. Accused 3 locked her in; but the subsequent conduct of accused 2 shows that he approved of her being locked in; for he later went and beat her there. P. W. 2's evidence is corroborated by P. W. 17, who saw appellant 2 beat P. W. 2 twice on the back. P. W. 20 also heard accused 2 questioning P. W. 2 about the billa and saw him strike her. He is corroborated by P. W. 21. The learned Sessions Judge, while believing that appellant 2 confined and beat P. W. 1 or P. W. 2, rather curiously came to the conclusion that the evidence did not indicate that this appellant did so for the purpose of extorting a confession. I can think of no other purpose for which appellant 2 beat and confined P. W. 2. It had not been proved that she committed any offence. She did nothing to irritate or annoy this appellant; and his conduct is inexplicable except on the ground that he was trying to extort from her a confession. He kept P. Ws. 1 to 3 under his control the whole of the 8th September until appellant 1 returned to the village. However, the Crown has not appealed against the acquittal of accused 2 and 3 under Ss. 348 and 330, Penal Code, and so the convictions for the lesser offences, although wrong, must stand.

The evidence with regard to accused 3 is less than against the other appellants; but his conduct throughout the enquiry shows that he was readily filling the part that was assigned to him by his superiors, accused 1 and 2. It was he who boasted on the night of the 7th that he was not a man if he could not recover the billa. During the search of P. W. 2's house, although he did not beat P. W. 2, he kicked her husband for protesting against the ill-treatment of his wife by accused 2; and it was he who locked up P. W. 2 in the house of appellant 1. However, he too has been convicted only of a lesser offence. From what has been said above, it will be evident that there is very little to choose between accused 1 and 2; yet accused 1 has been sentenced to three years rigorous imprisonment on two counts and ordered to pay a substantial fine, while appellant 2 has been released under S. 562, Criminal P. C., as if he had been some ignorant and misguided man who had been led away from the path of rectitude by some superior whom he dared not disobey. The only real difference between the two is that accused 1 was unfortunate enough not to secure the support of his subordinates to the same extent as accused 2 did. While no excuse can be made for the conduct of appellant 1, it is important, in considering the fitting sentence to be awarded, not to lose one's sense of proportion. His whole life has been blasted as a result of the departmental enquiry and of the proceedings in the criminal Courts which have led to his conviction on two serious charges. It must be remembered that he caused no serious injury: small swellings and abrasions which disappeared after a day or two. Yet the learned Sessions Judge has on one count awarded him the maximum punishment. In view of the fact that he has been reduced to a state of penury, a sentence of four months rigorous imprisonment and a fine of Rs. 25 on each count will be sufficient to meet the ends of justice. It is difficult to see how this appellant is going to pay a big fine after he has lost his job. The order of compensation to P. Ws. 1 and 2 will stand; but not that to P. W. 3.

Section 562 is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals, who may lead them further along the path of crime, and to help

even men of more mature years, who for the first time may have committed crimes through ignorance or inadvertence or the bad influence of others and who, but for such lapses, might be expected to make good citizens. In such cases a term of imprisonment may have the very opposite effect to that of which it was intended. Such persons would be sufficiently punished by the shame of having committed a crime and by the mental agony and disgrace that a trial in a criminal Court would involve. It was not intended that this section should be applied to experienced men of the world who deliberately flout the law and commit offences which they knew are strongly condemned by their superior officers, but which they have persisted in doing in order that it might not be said of them that they have not been able to detect a petty crime. The criminal revision case is therefore allowed, and the order under S. 562 set aside. Accused 2 is sentenced to two months rigorous imprisonment and a fine of Rupees 20 on each count; and accused 3 to one month's rigorous imprisonment and a fine of Rs. 10. The sentences on accused 1 and 2 will run concurrently.

C.R.K./K.S. *Order accordingly.*

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(28) A. I. R. 1941 Madras 724

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Boganatham Arunachalam Chetty and another — Appellants

v.

Boganatham Krishnaveni Ammal and another — Respondents.

Appeal No. 279 of 1937, Decided on 5th April 1940, against decree of Dist. Court, North Arcot at Vellore, in O. S. No. 12 of 1936.

Hindu law—Inheritance—Mother—Nature of estate taken by mother is same as that of widow inheriting to her husband — Waste — Moveable property — Mother not shown to be actually guilty of specific act of waste or mis-management but reasonable apprehension of waste made out—Court has power to give appropriate relief to reversioner to secure property from being spent away — But she should also be protected from unnecessary harassment by reversioners.

The nature of the estate taken by a mother inheriting the property of her son is the same as that taken by a widow inheriting the property of her husband. [P 725 C 2]

Though no specific acts of waste or mismanagement are proved yet where the property is moveable or cash and her conduct is such as to raise a reasonable apprehension that if she is allowed to have uncontrolled possession of it, she would not administer it in accordance with the powers which the law confers upon her it is open to the Court to give such appropriate relief to the reversioner as would secure the property from being spent away for purposes other than those sanctioned by Hindu law : ('21) 8 A I R 1921 Mad 234, *Ref.*; 6 M I A 433 (P C) and 31 Cal 214, *Rel. on.* [P 725 C 2]

In giving the appropriate relief the principle which has to be kept in view is that while the mother or widow should not be allowed to deal with the property in excess of her powers under Hindu law, she must at the same time be protected from unnecessary harassment at the hands of the reversioners. [P 726 C 2]

K. V. Ramachandra Iyer and S. Thyagaraja Iyer — for Appellants.

Advocate-General and B. C. Seshachala Aiyar — for Respondents.

Venkataramana Rao J.—This appeal and the memorandum of objections arise out of a suit filed by the plaintiffs as reversioners of the estate of one Kumaraswami Chetti for restraining defendant 1, the mother of the said Kumaraswami Chetti, from committing waste of the property inherited by her from her son. Plaintiff 1 was related to the said Kumaraswami as his great grandfather's brother's son. Plaintiffs 2 and 3 are the sons of the deceased brothers of plaintiff 1. Plaintiff 1 died during the pendency of the suit in the lower Court and plaintiffs 2 and 3 were declared as his legal representatives. Defendant 2 Subbammal is the grandmother of the deceased Kumaraswami Chetti being his father's father's wife. Defendant 3 is the wife of Kumaraswami's great grandfather. Defendants 2 and 3 are admittedly persons entitled to maintenance out of the estate of Kumaraswami. In the plaint the plaintiff alleged that defendant 1 was entirely in the hands of her father, one Muthukrishna Chettiar, that the bulk of the property was moveable property, being fixed deposits in Banks and that the conduct of the widow was such as to raise a reasonable apprehension that the corpus of the estate would be endangered if defendant 1 was allowed to have a free hand with the management of the property inherited by her. Defendant 1 denied that she was guilty of any act of waste and that no case was made out for restraining her right to the possession of the property inherited. The learned District Judge found that on the date of the death of Kumaraswami Chetti the estate consisted of two houses and a vacant site lying at Vellore and a sum of Rs. 18,500 in the shape of fixed deposits in the Co-operative Urban Bank, Vellore, in the Karur Vysia Bank, Karur, and in the Kannikaparameswari Bank at Dindigul, that of the two houses, defendant 1 was living in one house and the

other was required for the residential purpose of defendant 2, that no income was derived from the immovable properties, that only a sum of Rs. 670 per year was the income from the cash deposits and the balance that remained after the payment of house tax was the net income of the widow, and that she was also bound to pay maintenance to defendants 2 and 3 at the rate of Rs. 7 and Rs. 10 per month respectively. But, by the date of the decree in the lower Court defendant 3 seems to have died. In regard to the allegation regarding waste the learned District Judge found that the plaintiffs were unable to adduce any specific acts of waste committed by defendant 1. He was however of the opinion that there were sufficient grounds for the plaintiffs to entertain a reasonable apprehension that the cash which forms the bulk of the estate would disappear unless some safeguard was provided. He therefore passed the following decree:

> In the result, there will be a decree in favour of the plaintiffs directing that defendant 1 may be at liberty to renew the deposits now lying in the Vellore and Karur Banks and that if at any time she desired to withdraw the deposits or re-invest them in other securities, public or private, she shall be entitled to do so but only on her application to the Court and after notice to the plaintiff of her intention to do so. The object of this notice would be to enable the reversioners to take such steps as they may be advised to take, with a view to prevent defendant 1 from dealing with the money in the manner proposed by her. In other words, such questions as may be raised in that behalf shall not be liable to be investigated or determined in the course of the execution of this decree but only in a separate suit. In view of the fact that the plaintiffs have made exaggerated allegations and their success is partial, I would direct that each party shall bear his or her own costs of the suit.

The plaintiffs have filed the appeal objecting to the decree on the ground that, on the findings arrived at, the lower Court should have granted an injunction in the terms of the plaint. Defendant 1 has filed a memorandum of cross-objections urging that on the findings arrived at by the lower Court no case was made out for restraining her from dealing with the property. The learned Advocate-General on behalf of defendant 1 contended that, in view of the finding of the learned District Judge that no specific acts of waste or mismanagement by defendant 1 were proved by the plaintiffs, the learned Judge ought to have dismissed the suit. He relied on 44 Mad 984[1] and the decision in 6 M I A 433[2] in support of his contention. It is no doubt true that the nature of the estate taken by a mother inheriting the property of her son is the same as that taken by a widow inheriting the property of her husband, that she is not a trustee for the reversioners and that whether the property is moveable or immovable, she is entitled to have possession thereof and enjoy the same in accordance with the powers which the Hindu law confers on her. But her powers of disposal over the corpus of the estate are limited. She can only deal with and dispose of the property for purposes which are sanctioned by Hindu law; but where she acts in excess of her powers, there can be no doubt that she can always be restrained. Though no specific acts of waste or mismanagement are proved yet, where the property is moveable or cash and her conduct is such as to raise a reasonable apprehension that if she is allowed to have uncontrolled possession of it she would not administer it in accordance with the powers which the law confers upon her it is open to the Court to give such appropriate relief to the reversioner as would secure the property from being spent away for purposes other than those sanctioned by Hindu law. Such reliefs have always been given by Courts: *vide* 31 Cal 214.[3] That the Court's power of interference is not limited to cases where a widow has been actually guilty of any specific act of waste or mismanagement but extends to cases where reasonable apprehension of waste is made out, is clear from the decision in 6 M I A 433.[2] The Right Honourable Pemberton Leigh after referring to the case of Cassinath Bysack v. Hurrosoondary Dassee observed that the law was perfectly settled by that decision and it was followed by Sir Lawrence Peel, the learned Chief Justice of Bengal, whose judgment was under review in the said case. With reference to the facts of the particular case before him he applied the principle of that decision thus:

> Can it be said that the respondent, who, according to the ordinary Hindu custom, keeps in her house a certain portion of the money having in the course of three months, invested Rs. 39,000, three-fourths or at least two-thirds, of the money in other securities, was guilty of a devastavit, or showed the slightest intention of committing a devastavit in this respect? Their Lordships are of opinion that no such case is made out.

It is clear from this observation that it is not necessary that the widow should be guilty of an actual devastavit and it is enough if there was the intention of com-

1. ('21) 8 A I R 1921 Mad 234 : 66 I C 10 : 44 Mad 984 : 41 M L J 279, Venkanna v. Narasimham.
2. (1854-57) 6 M I A 433 : 1 Sar 561 (P C), Hurrydoss Dutt v. Uppornah Dassee.
3. ('04) 31 Cal 214 : 8 C W N 11, Durganath Pramanik v. Chintamani Dassi.

mitting a devastavit. The reference to the judgment of Sir Lawrence Peel makes this matter clear. The learned Chief Justice in the course of his judgment observed thus at pp. 438 and 439 in 6 M I A 433[2] :

> It is only where she is about to deal with the property in a mode contrary to the Hindu law in extension of her powers over it, and in derogation of the rights of those who may succeed to it, that the Court would be justified in restraining her in the use, custody and dispositon of it .... There is nothing whatever admitted to show that the money is in any danger. The mode of custody is not shown. It was stated in argument that she has it in her private dwelling, but that even is not admitted. Now this is nothing like waste or like that sort of dealing with the property which would justify a Court of equity in interfering.
> ..... Here she does not even change the security. It does not proceed from her act, but she is paid off. If she were about to invest in an unsafe security, that might justify the interference of the Court.

This judgment therefore seems to indicate that the relief which the reversioner can get is not limited only to cases of actual mismanagement but conduct justifying danger to the reversion would be enough, such as the intended investment in an unsafe security. In this case, defendant 1 is only about 24 years of age and she is obviously under the influence of her father who is now living with her and has a large family of his own. It is not shown that he is possessed of any property. In the course of the suit defendant 1 made an application for withdrawal of a sum of Rs. 1900 on the ground that a part thereof, namely Rs. 1500, had to be paid to her father who was alleged to have lent that sum to her. The case of the plaintiff was that the loan by the father could not be true as he was not possessed of any means to lend that sum of money and that that sum also was not needed for any purpose which would justify her to borrow under the Hindu law. Defendant 1 made no attempt to substantiate that her father lent the money and that it was necessary to repay that loan. In fact, nothing has been shown that such a sum was spent for any purpose binding on the reversioners. The father has not gone into the witness box to prove the loan. She admitted in her deposition that her father and herself maintained accounts but those accounts were not produced. The inference therefore is that she wanted to draw this large sum of money and appropriate it for her own purposes. The Court was therefore warranted in inferring that she would deal with the property in a mode contrary to Hindu law in extension of her powers. An occasion has therefore arisen for the interference of the Court to give such equitable relief as would safeguard the interests of the reversioners. The relief will have to be moulded according to the circumstances of the case. As the learned Judge points out, no case for an injunction or for a receiver has been made out. Therefore, in giving appropriate relief in this case the principle which has to be kept in view is that while defendant 1 should not be allowed to deal with the property in excess of her powers under the Hindu law, she must at the same time be protected from unnecessary harassment at the hands of the reversioners. In this case the conduct of the reversioners was such that they would not hesitate to harass the widow even without any justifiable cause.

The question now is, was the decree given by the learned Judge such as would justify this principle? We are inclined to think that it does not and we therefore propose to modify the decree thus. Defendant 1 will be at liberty to renew the deposits now lying in Vellore, Karur and Dindigul banks, and if at any time she desires to withdraw the deposits or re-invest them in other securities, she shall be entitled to do so but only with the sanction of the Court but no sanction is necessary for realizing interest on the sums in deposit or invested in securities. If the application is for investment in securities other than those authorized by the Trusts Act or if she desires to withdraw the moneys and the withdrawal in the opinion of the Court does not appear to be prima facie justifiable or if the purpose of withdrawal is justifiable but the amount proposed to be withdrawn appears to the Court to be prima facie more than necessary, the Court shall issue a notice to the plaintiffs. If the plaintiffs appear and object and the Court after considering their objections comes to the conclusion that the withdrawal is not for a justifiable purpose, it shall dismiss the application. But if the Court comes to the conclusion that the purpose is justifiable, it shall allow such amount as it considers reasonable. A copy of this order will be served on the several banks where the money is now in deposit at the plaintiffs' expense. We dismiss this appeal. Respondent 1 will take her costs of the appeal from the estate. The memorandum of objections is dismissed but without costs.

C.R.K./K.S. *Appeal dismissed.*

(28) A. I. R. 1941 Madras 727

ABDUR RAHMAN J.

Subbayyan Chettiar and another — *Appellants*

v.

T. R. Ponnuchami Chettiar — *Respondent.*

Second Appeal No. 225 of 1938, Decided on 29th October 1940, against decree of Sub-Judge, Dindigul, in A .S. No. 65 of 1936.

(a) Civil P. C. (1908), O. 21, R. 63 — Suit by defeated claimant — Onus to prove that his claim should not have been dismissed lies on claimant — Deed of settlement — Claimant's objection as to invalidity of deed for want of consideration rejected—Suit under O. 21, R. 63 — Claimant must establish want of consideration.

In a suit under O. 21, R. 63 by the defeated claimant the onus of proving that his claim should not have been dismissed obviously lies on him. This onus can only be discharged by proving the allegations which he asserts to secure the relief prayed for by him. It is for the claimant, within the words of R. 63 to "establish the right which he claims to the property in dispute." Consequently, where the objection by claimant that the deed of settlement was invalid for want of consideration is rejected it is for him in his suit under O. 21, R. 63 to establish that this was so : ('27) 14 A I R 1927 P C 237, *Disting.*; ('40) 27 A I R 1940 Mad 444, *Ref.*; ('27) 14 A I R 1927 Mad 950, *Rel. on.* [P 728 C 2 ; P 729 C 1]

(b) Deed—Deed of settlement by Hindu father — Sons not parties—Claim by sons for father's share — Recitals in deed are binding on sons whether they claim as heirs or as coparceners.

Where a Hindu father executes a deed of settlement in respect of certain property and the sons who were not parties to the deed institute a suit claiming their father's share in that property, the recitals in the deed are prima facie binding on them at least to the extent of their father's share whether they claim as heirs or coparceners. [P 729 C 1]

(c) Hindu law — Widow — Maintenance — Husband by deed of settlement giving certain property to his wife to "live in and enjoy for her maintenance" — Wife becoming unchaste after husband's death—In absence of dum casta clause in deed widow held not divested of her life estate on ground of subsequent unchastity.

The husband by a deed of settlement gave certain property to his wife to "live in and enjoy for her maintenance." Since it was established that she had become unchaste after the lifetime of her husband, it was contended that the life estate must be taken to have been forfeited by her on account of her misconduct :

Held that in the absence of any dum casta clause in the deed under which the estate had come to vest in the widow for her life, no forfeiture could be incurred by her on the ground of her subsequent unchastity : 5 Cal 776 (P C), *Rel. on*; ('35) 22 A I R 1935 P C 180; 17 Mad 392; ('21) 8 A I R 1921 All 152 and ('28) 15 A I R 1928 Pat 375, *Disting.*; 34 Bom 278 and ('15) 2 A I R 1915 Mad 25, *Expl.* [P 730 C 1]

(d) Contract Act (1872), S. 23—Person alleging agreement to be invalid as opposed to public policy must prove grounds which would bring it within S. 23.

A person who asks an agreement or a conveyance to be declared invalid on account of its being opposed to public policy must prove the grounds which would bring it under S. 23. [P 730 C 2]

(e) Contract Act (1872), S. 23—Plea as to deed being invalid as opposed to public policy is one of mixed law and fact — It cannot be raised for first time in second appeal.

The plea as to the invalidity of a deed on the ground of its being against public policy is a mixed question of law and fact and therefore cannot be raised for the first time in second appeal : 27 All 266, *Disting.* [P 730 C 2 ; P 731 C 1]

B. Sitarama Rao — for Appellants.

K. Narasimha Ayyangar — for Respondent.

Judgment. — Kamayan Chetti suspected the fidelity of his first wife. He had two sons by her. These are the plaintiffs in the suit out of which this appeal arises. He married a second wife Alagammal, but did not have any children or expect to get any by her. He married a third one, Veerammal by name, some time in 1919. She is defendant 2 in the present litigation. A settlement deed was executed by Kamayan Chetti on 15th April 1919 (EX. 1A). Under this deed he settled some property on his second wife, some on the third and some on the third wife's father Ramalingam Chetti. The deed contains the following recitals :

As per agreement entered into at the time of the said marriage between the said third wife Veerammal, the aforesaid person No. 3, Ramalingam Chetti, the father of the said person Veerammal and myself, the third wife, Veerammal shall during her life live in and enjoy for her maintenance the B schedule properties out of the undermentioned properties worth Rs. 1500 the second wife Alagammal shall during her life enjoy for her maintenance the A schedule properties, and the aforesaid Ramalinga Chetti shall look after the aforesaid properties in the A and B schedules. If a male child is born to any one of the second and third wives, individual No. 3 Ramalinga Chetti shall as remuneration for his labours enjoy the dry land bearing survey No. 1610, letter A, having an extent of one acre and seven cents and dry land bearing letter B, the said survey number having an extent of one acre and seven cents making in all two acres and 14 cents of dry land in the aforesaid properties mentioned in the schedule. The remaining properties in the A and B schedules shall be enjoyed by the male children to be born hereafter. If no issue is born to the second or third wife, after their life (lives) and that of mine, the aforesaid Ramalinga Chetty shall get the entire property in the A and B schedules and enjoy them. I shall live by turns for one year with each of the second and third wives, look after their affairs and get on with my livelihood. If they do not properly feed and maintain me or live amicably with me, I shall take out Rs. 500 from the properties in the A and B schedules for the said maintenance.

Veerammal incurred certain debts and defendant 1 obtained a decree against her. In execution her interest in the properties given to her under the above-stated deed of settlement was attached. The plaintiffs and their father Kamayan Chetti objected to the attachment. The execution Court held that the transfer under the settlement deed was not binding on the plaintiffs. Their objections were consequently accepted to the extent of their two thirds share on 30th June 1933 (EX. E). The father's petition was, however, dismissed in regard to his share. The decree-holder made a default subsequently and the execution was dismissed with the result that the attachment effected on his application was raised. Kamayyan died on 3rd July 1933. Another application for execution (E. P. No. 1793 of 1933) was presented after his death by the decree-holder, but in view of what had happened in the objections raised by the plaintiffs and their father to the earlier attachment, the decree-holder only asked for the attachment of Kamayan's one-third share in the property this time. An objection was put in against this attachment on behalf of the plaintiffs but it was rejected on the ground that the matter had been already decided in June 1933 (EX. B). This led to the institution of the present suit with the object of getting the claim order EX. B vacated and a declaration to the effect that the properties attached by defendant 1 were not liable to be sold in the execution of his decree granted to the plaintiffs. They alleged in their plaint that the deed of settlement was a gift in fact and did not for that reason bind them. It was also attacked on the ground of defendant 2's unchastity in consequence of which the grant in her favour, it was urged, should be held to have been, as it was for her maintenance, forfeited. The plaintiffs mentioned other grounds for the invalidity of the deed of settlement also but being questions of fact, the decision in regard to those has become final and has not been questioned before me in this appeal. The suit was decreed by the District Munsif of Periakulam, but his judgment was reversed by the learned Subordinate Judge of Dindigul on appeal and the suit was ordered to be dismissed. Aggrieved by that judgment and decree the plaintiffs have come up to this Court in second appeal.

The first question to decide in this appeal relates to the validity of the deed of EX. 1-A. Learned counsel for the appellant contends in the first instance that there was no evidence on the record to show that there was an anti-nuptial arrangement between his client's father Kamayyan Chetti and defendant 2, in consideration of which this document could have been executed in her favour. Since the alienation was by the plaintiff's father and was only maintained by the execution Court in June 1933 to the extent of his one-third share, it was not disputed that it would be binding on the plaintiffs if it were found to be for a valid consideration. Nor was it, in view of the Full Bench decision in 45 Mad 612[1] disputed that the bargain "to receive the land" by defendant 2 "in discharge of the claim to future maintenance" would not be for an illegal or invalid consideration; but it was urged by learned counsel for the appellants that the burden of proof in respect of such an agreement would be on the party who asserted it and that the recital in the deed would not, in so far as his clients were not parties to the same, shift the onus to them. Had the plaintiffs not been defeated in the execution Court and had they not brought this suit to get the order passed by the execution Court vacated, there might have been some justification for this contention. But having regard to the decision of the execution Court disallowing their objection, it was for them to establish that the agreement executed by their father was invalid. It is true that the execution Court had not decided the objection raised by the plaintiffs after Kamayan's death, on the merits; but this was because they had been heard and decided by that Court in June 1933 and it was not necessary that they should be considered in the same manner once again. The position would not have been very different if the Court had passed the order against the plaintiffs not on account of the previous decision but on account of the objections having been designedly or unnecessarily delayed. Such an order would have been, although not passed on the merits, conclusive against the party against whom it was made unless he sued to get it set aside within one year and succeeded in getting a decree to that effect. The terms in which O. 21, R. 63, Civil P. C., is couched seem to leave no doubt on that point. When it is incumbent upon a defeated claimant to bring a suit, the onus of proving that his claim should not have been dismissed would obviously lie on him. And this he can only discharge

1. ('22) 9 A I R 1922 Mad 311 : 68 I C 687 : 45 Mad 612 : 42 M L J 410 (FB), Madam Pillai v. Badracali Ammal.

by proving the allegations which he asserts to secure the relief prayed for by him. It is for him, within the words of R. 63 to "establish the right which he claims to the property in dispute." The plaintiffs alleged in this case that the deed of settlement was invalid for want of consideration or in other words that there was no ante-nuptial agreement. It was therefore for them to establish that this was so. Reliance was placed by Mr. Sitarama Rao on a decision of their Lordships in 5 Rang 852[2] but it was explained by me in 51 M L W 34[3] when I, sitting with my esteemed brother Venkataramana Rao J. drew attention to the observations which fell from their Lordships during the course of arguments in that appeal. The facts of the Privy Council decision have been given in a somewhat cryptic manner and, unless they are closely examined, one is liable to be led astray. It is quite sufficient to say that it does not support the contention advanced on behalf of the appellants.

Nor is it possible to accept the contention put forward by learned counsel for the appellants that the recitals in the deed Ex. 1-A would not bind his clients as they were not parties to the document. It might have been otherwise if they were claiming their own shares but they are not doing so. Their shares were released in June 1933. The claim in the present suit is in respect of their father's share; and to that extent at least, whether they are suing as heirs or as coparceners, they would be bound, prima facie anyhow, by the recital in the deed. In either case, it was incumbent on the plaintiffs to prove that there was no ante-nuptial agreement and the statement by their father in the deed was not correct; or in other words that the deed of settlement was really a deed of gift and was not binding on them. There is no evidence on the record on this point, and the plaintiffs must consequently fail. The observations in 53 M L J 763[4] support the view in regard to onus which I have taken. I would therefore agree with the lower appellate Court that the plaintiffs have failed to establish that the deed Ex. 1-A was invalid for want of consideration.

The property was stated in Ex. 1-A to have been given to defendant 2 to "live in and enjoy for her maintenance." Since it was established that she had become unchaste after the lifetime of her husband, the second contention put forward by learned counsel for the plaintiffs was to the effect that the life estate must be taken to have been forfeited by her on account of her misconduct and she would not have been entitled to retain the property that was given to her by her husband for the purpose of her maintenance. Reliance was placed in support of this contention on the decisions in 17 Mad 392,[5] 57 ALL 672,[6] 43 ALL 650[7] and A I R 1928 Pat 375.[8] The right of a Hindu widow to maintenance is conditional upon her leading a life of chastity. Unchastity on her part would disentitle her to any maintenance at least until such time that she did not mend her conduct and return to better ways; but the question to be decided here is different. It cannot be disputed that the property mentioned in Ex. 1-A had, on its execution, come to vest in her. The question to decide is if she should be held to have been divested of the same on account of her subsequent unchastity. The cases on which reliance was placed by learned counsel for the appellant are authorities for the general proposition but do not touch the real question that arises in this case for decision. There is no suggestion even, not to say proof, that defendant 2 was unchaste at the time when she came to hold the life estate under Ex. 1-A or even during her husband's lifetime. Had she been proved to have been unchaste at the time when the estate was going to be vested in her, her unchastity would have prevented it from doing so. But she has been found to be unchaste only after the death of her husband. It would therefore follow that she was in possession of the property given to her by the deed Ex. 1-A for as long as her husband lived after its execution and even for some time after his death. Can she be held then to be divested of that property on the ground of her immoral conduct after his death? The answer to that question must be in the

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2. ('27) 14 A I R 1927 P C 237 : 105 I C 788 : 5 Rang 852 (PC), V. E. A. R. N. Firm v. Maung Ba Kyin.
3. ('40) 27 A I R 1940 Mad 444 : 190 I C 740 : 51 M L W 34, Mahomed Kassim Sahib v. Subramanian Chettiar.
4. ('27) 14 AIR 1927 Mad 950 : 105 I C 845 : 53 M L J 763, Muthuswami Goundan v. Palani Goundan.
5. ('94) 17 Mad 392, Nagamma v. Virabadra.
6. ('35) 22 AIR 1935 P C 180 : 157 I C 869 : 57 All 672 : 62 I A 250 (PC), Lakshmichand v. Mt. Anandi.
7. ('21) 8 AIR 1921 All 152 : 63 I C 883 : 43 All 650 : 19 A L J 675, Mohamed Muinuddin v. Jamal Fatima.
8. ('28) 15 AIR 1928 Pat 375 : 111 I C 762 : 9 P L T 397, Sitadevi v. Gopal Saran Narayan Singh.

negative. It was held by their Lordships in 5 Cal 776[9] that a "widow, who not having been degraded or deprived of caste had inherited the estate of her deceased husband", would not be "liable to forfeit that estate by reason of subsequent acts of unchastity." In the face of this authority it is impossible to contend otherwise. The decisions cited by learned counsel for the respondent, 34 Bom 278[10] and 27 M L J 305,[11] although to some extent relevant to show that the principle enunciated by their Lordships in 5 Cal 776[9] was perhaps borne, by the learned Judges when deciding those cases, in mind, do not carry me any further. I would agree with the learned Subordinate Judge and hold that in the absence of any dum casta clause in the deed Ex. 1-A, under which the estate had come to vest in defendant 2 for her life, no forfeiture can be found to have been incurred by her on the ground of her subsequent unchastity.

The third and the last contention raised by learned counsel for the appellant was that the deed of settlement should be held to be void as the grant to the said defendant 2's father Ramalinga was—being in consideration of his giving his daughter in marriage—immoral and opposed to public policy under S. 23, Contract Act, and if a portion of the deed Ex. 1A was found to be invalid or void, the remaining portions of the deed of settlement would have to share the same fate under the principles contained in S. 24, Contract Act. The objection on behalf of the respondent that the transaction was carried out in this case was met by the plea that Kamayan's estoppel would not bind his sons, the present plaintiffs, and that any property being joint family property could be sued for and recovered by them if it was found to have been conveyed under a deed which is found to be void. It was also urged on behalf of the appellants that the onus to establish that the transaction was a valid one would be on the alienee or one who was supporting her cause and it would be for the defendants to establish that the alienation was for a valid consideration and therefore binding on the family. Since a Hindu coparcener's right in Madras has been held to be transferable merely on equitable grounds, it was contended that any transfer without a legal or for an insufficient consideration must be held to be invalid. I have in an earlier portion of this judgment determined the question of onus and I see no reason to change that view even if the contention is, as it has been, put more plausibly. It is really the same contention as was advanced before although clothed in a different garb this time. A person who asks an agreement or a conveyance to be declared invalid on account of its being opposed to public policy has to prove the grounds which would bring it under S. 23, Contract Act. The apparent tenor of the document is against this contention.

The contention in regard to the invalidity of the deed, Ex. 1-A, on the ground of its being against public policy and hence wholly void was not raised either in the pleadings or before the lower appellate Court. It was not even mentioned in the grounds of appeal taken on behalf of the appellants in this Court. Their learned counsel does not dispute these facts but contends that the point raised by him is purely one of law and he is entitled to do so even at the hearing of this appeal. Reliance was placed by him in this connection on the decision in 27 ALL 266[12] where following certain English decisions it was held by a learned Judge of the Allahabad High Court that when the consideration for a contract which is asked to be enforced is found by a Court to be either wholly or in part unlawful, such Court is bound to take notice of that fact and give effect to the same, notwithstanding that the contract appeared on the face of it to be legal or that the unlawfulness of the consideration therefor was never pleaded by the defendant. No exception can be taken to the statement of the law as contained in this decision; but the point to determine is whether the objection taken by learned counsel for the appellant raises a pure question of law or a mixed question of law and fact. No party can be allowed to spring surprises on his opponent in a Court of law and it would be tantamount to springing a surprise if it were possible for the respondent to show that he could have pleaded and proved something that would have met the appellant's contention but cannot do so as the objection is being raised in appeal. The whole of the argument advanced by Mr. Sitarama Rao, learned counsel for the appellants, on the question of illegality of Ex. 1-A assumes that

9. ('80) 5 Cal 776 : 7 I A 115 : 6 C L R 322 : 4 Sar 103 (PC), Moniram Kolita v. Keri Kolitani.
10. ('10) 34 Bom 278 : 5 I C 960 : 12 Bom L R 196, Parami Ramayya v. Mahadevi Shankarappa.
11. ('15) 2 AIR 1915 Mad 25 : 25 I C 900 : 27 M L J 305, Bomayya Hegade v. Srinivasa Hebbare.
12. ('05) 27 All 266 : 1 A L J 632, Alice Mary Hill v. William Clarke.

the alienation to Ramalingam Chetty was in consideration of his daughter's marriage. There is nothing in the deed which would lead me to infer this beyond any reasonable doubt. There is a mention of the agreement with Ramalinga having been arrived at in the deed at the time when the marriage contract between his daughter Virammal and Kamayan Chetty was entered into, but this does not necessarily show that the two contracts were really parts of the same transaction. It is quite possible that the two agreements between these three parties were separate and independent and did not constitute to be two terms of the contract of marriage, although the fact that they were entered into at or about the same time does give rise to a certain amount of suspicion that they might have been inter-dependent. But there is no evidence or even a suggestion on the record that the agreement with Ramalinga formed a consideration for the agreement of his daughter's marriage with Kamayan Chetty and this was presupposed by learned counsel for the appellant as a basis for his arguments. Mr. Venkatachari on behalf of the respondent urged — and I am inclined to agree with him —that if this question had been raised on behalf of the plaintiffs in the trial Court it would have been open to his client to show that the grant was really made in favour of Ramalinga Chetty for the services that he was called upon to render in regard to the management of Kamayan Chetti's property. There is a reference to that fact in the deed itself. In view of these facts I am of opinion that the contention raised by learned counsel for the appellants is one of mixed law and fact and should not be permitted to be raised at this stage.

It is unnecessary in these circumstances to consider what the decision would have been if it were found that the conveyance to Ramalinga Chetty was made in consideration of his daughter's marriage and not on account of any other duties to be rendered by him. Learned counsel for the respondent contended that this case would have to be, in view of the facts that it was a completed conveyance and executed even according to the plaintiff for an illegality or immorality which had been already committed, governed by the principle on which the cases in AIR 1925 ALL 474,[13] 5 Pat 646[14] and 42 Mad 154[15] were decided. But having regard to what I have said before, it does not appear to be necessary to go into this question now. For the above reasons the appeal fails and is dismissed with costs. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

13. ('25) 12 A I R 1925 All 474 : 85 I C 459, Mt. Mahtabunnissa v. Rifaqat Ulla.

14. ('26) 13 AIR 1926 Pat 582 : 99 I C 782: 5 Pat 646 : 7 P L T 821, Ramasumaran v. Gobinda.

15. ('19) 6 AIR 1919 Mad 500 : 49 I C 666 : 42 Mad 154 : 36 M L J 242, Nanjundaswami Chetti v. Kanakaraju Chetti.

(28) A. I. R. 1941 Madras 731

PANDRANG ROW AND KING JJ.

Kandasami Chettiar and another — *Appellants*

v.

Messrs. Gokuldas Madanji & Co., Tuticorin, and others — *Respondents.*

Appeal No. 342 of 1939, Decided on 19th March 1941, against order of the Sub-Judge, Ramnad at Madura, D/- 5th October 1937.

(a) Limitation Act (1908), Art. 182 (5) — Application to transfer decree to Bombay for execution — Court's order "copy of decree has not been received from High Court, Bombay, returned" on application held final within Art. 182 (5).

On an application to transfer a decree to Bombay for execution the Court passed the following order : "Copy of the decree has not been received from the High Court, Bombay; returned" :

Held that the order passed on the application for transfer was a final order within the meaning of Art. 182 (5) inasmuch as the Court must be taken to have decided that it would have nothing to do further with the application. [P 732 C 1, 2]

(b) Limitation Act (1908), Art. 182 (5) — Court transferring decree to another Court for execution — It still retains jurisdiction to take certain measures in execution and is proper Court within Art. 182 (5).

When a Court transmits a decree to another Court for execution, it does not thereby divest itself of all its jurisdiction. It still retains that jurisdiction to take certain measures in execution and must be deemed to be a proper Court within the meaning of Art. 182 (5) : ('38) 25 A I R 1938 Mad 113, *Rel. on.* [P 732 C 2]

K. S. Ramamurthi — for Appellants.

T. K. Subramania Pillai — for Respondents.

King J. — The question which arises in this appeal is one of limitation. The appellants are the decree-holders who filed an application in 1932 upon which the final order was passed on 30th August 1932. That order was to transmit the decree for execution to Bombay. In February 1935 another application was made by the decree-holders, again with the request that the decree should be transferred to Bombay for execution. That application was disposed of on 27th February in the following language by

an endorsement upon the petition : "Copy of the decree has not been received from the High Court, Bombay; returned." In March 1937 the original petition which had been presented in 1935 was again presented before the Court. It was signed by a fresh vakil as the original vakil who had signed it in 1935 was then dead, and the new date 22nd March 1937 was appended to his signature. But at the same time the vakil mentioned to the Court that he was re-presenting the old application. This application was disposed of in October 1937 by the order from which this appeal has been preferred. It treats the application as a re-presentation of the application of 1935 and holds on the authority of two Madras rulings that the application is clearly barred by limitation. It goes on to say :

> The order relied on by decree-holder as the final order to save limitation is not the final order and consequently this application is not in time.

Against this the decree-holders have appealed. It is difficult to see the logic upon which the learned Subordinate Judge has based his decision. If in fact the application was one filed in 1935, it seems obvious that it was filed in time, and the only method of disposing of it adversely to the decree-holders would seem to be to refuse to condone the two years delay in re-presentation. If, on the other hand, the application be treated as a new one presented for the first time in 1937, then the question whether the order of 27th February 1935 is or is not a final one will alone arise. In appeal, after some hesitation, the learned advocate for the appellants has decided to confine his case to the latter hypothesis, that in spite of the ambiguous language with which the application was presented in 1937, it was in reality a fresh application. He then argued that the order of 27th February 1935 was a final order. We are of the opinion that this argument must succeed. No doubt in most cases, when an application of this kind is returned to the applicant, it is returned for the definite purpose of remedying some defect and of being re-presented within a brief interval of time. In the present case, the Court has not stated that it required any action to be done by the applicant. It has merely used the word 'returned' after explaining the reason why the application was returned. We think the only interpretation that can reasonably be given to this language is that the Court had decided that it would have nothing further to do with the application, and if that interpretation is correct, the order of 27th February cannot be other than a final order within the meaning of any of the rulings of the Madras High Court which deal with the interpretation of that expression.

It is however argued for the respondent that the application of 1935 was an application which was not made to the proper Court, and therefore though the order of 27th February was a final order, it cannot be relied upon by the appellant to save limitation. The reason suggested by the respondent in support of this argument is this : that in 1932 the Subordinate Judge of Ramnad had transmitted the decree to Bombay. In 1935 that decree was still in Bombay and had not been returned. Until it was returned from Bombay, the Ramnad Court had no jurisdiction to order it to be sent to Bombay, and the Bombay Court alone had jurisdiction to deal with it. A very similar question has been dealt with by a Bench of this Court in I L R (1938) Mad 326.[1] The facts are not of course precisely similar, for the question there dealt with was an application asking for a decree to be transmitted to an entirely new Court, but the principles upon which the learned Judges have based their decision clearly apply to the present case. They have analysed various provisions of the Civil Procedure Code and have held that when a Court transmits a decree to another Court for execution, it does not thereby divest itself of all its jurisdiction. It still retains that jurisdiction for some specific purposes which are set out by them. Article 182 defines the "proper Court" as the Court whose duty it is to execute the decree or order, and if in spite of the transmission of the decree to another Court there still remains the duty in the transmitting Court to take certain measures in execution, it is obvious, it seems to us, that it is the proper Court within the meaning of this definition. As we are thus in agreement with the decision in I L R (1938) Mad 326,[1] we do not consider it necessary to examine the decisions of any other High Courts. The result is therefore that there is no formal defect in the application filed in February 1935. It was an application made in accordance with law and made to the proper Court within the meaning of Art. 182. As we have already said the order returning that application was a final order. The present application in 1937 was made within three years of that

1. ('38) 25 AIR 1938 Mad 113 : 176 I C 753 : I L R (1938) Mad 326, Muthu Rama Reddi v. Motilal Daga.

order and is therefore in time. This appeal is accordingly allowed and the execution application directed to be restored to the file of the learned Subordinate Judge and disposed of according to law. The respondent will pay the appellant's costs throughout.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 733

PANDRANG ROW AND HORWILL JJ.

Ivaturi Veera Subramanyam and others — *Plaintiffs* — *Appellants*

v.

President, District Board, Narasapur — *Defendant* — *Respondent.*

Appeal No. 341 of 1937, Decided on 5th April 1940, against decree of Sub-Judge (Principal), Ellore, in O. S. No. 26 of 1936.

(a) Tort — Non-feasance — Public body — Whether public body in India is liable for acts of non-feasance *(Quære)*.

Whether public bodies in India are liable for acts of non-feasance such as negligence in the maintenance of their roads causing loss or injury to persons using them or the failure to cut down the trees in dangerous condition on the margin of roads. [P 735 C 1, 2]

(b) Tort — Misfeasance — Tree on margin of road belonging to District Board falling on road and causing loss to plaintiff — Suit by plaintiff for damages on ground that District Board's servants had so weakened tree by cutting away roots that it fell during storm on night of accident — Essentials to be proved by plaintiff stated.

The plaintiff's wife and two sons were killed on a stormy night by the fall of a tree on their cart which was passing along the road. The tree stood on the margin of the road belonging to the District Board. The plaintiff brought an action against the District Board alleging that there was an act of misfeasance, in that the District Board had through its servants weakened the tree to such an extent by cutting away the roots, that it had fallen during the storm on the night of the accident. The District Board set up a plea of vis major and contributory negligence alleging that the accident occurred during a very heavy storm, and that the plaintiffs were negligent in travelling along the road while such a heavy storm was raging, knowing that trees were likely to fall:

Held that to establish his claim it was necessary for the plaintiff to prove, (1) that the District Board through its servants, did actually cut the roots, (2) that the tree fell, and not merely the branch, as alleged by the defendant Board, and (3) that the cutting of the roots contributed to the fall of the tree. [P 735 C 2]

Held further that the plea of vis major and contributory negligence was rightly rejected. [P 734 C 1]

(c) Madras Local Boards Act (14 of 1920), S. 225—Roads and trees on margin of roads are vested in local body — Tree on margin of road menace to persons passing along road — Local Board's wrongful neglect to cut down tree amounts to neglect or default—Suit for damages falls under S. 225.

Roads and the trees on the margin of roads are vested in the local body in order that the local body may maintain the roads and trees for the benefit of the public using the roads. The Local Board therefore has the right to cut down trees which interfere with the use of the road by the public but that does not give them a right to the fallen tree or to the fruit: ('35) 22 A I R 1935 Mad 810, *Rel. on.* [P 736 C 1]

Consequently, the wrongful neglect of the Local Board to cut down a tree on the margin of a road which was a menace to persons passing along the road amounts to a neglect or default on the part of the Local Board in the execution of the Act and a suit in respect thereof falls within S. 225 and is governed by the limitation prescribed thereby. [P 736 C 1]

(d) Madras Local Boards Act (14 of 1920), S. 225—Suit against Local Board falling within S. 225 filed after expiry of limitation prescribed by S. 225 — Mere fact of plaintiff having cause of action under Fatal Accidents Act cannot save him from bar of limitation under S. 225.

Where a suit against the Local Board falling within S. 225 is filed after the expiry of limitation prescribed by S. 225 the mere fact that the plaintiff has a cause of action under the Fatal Accidents Act which prescribes a larger period of limitation cannot save the plaintiff from the bar of limitation under S. 225. [P 736 C 1]

(e) Tort—Negligence—Damages — Wrongful neglect by Local Board to cut down dangerous tree on margin of road—Plaintiff's wife and two sons aged three years and one year killed — Plaintiff held entitled to damages for pecuniary loss only—Possibility of little sons being of some help to father in distant future held too speculative to serve as basis for calculating damages—Fact that wife was source of solace to plaintiff held no ground for awarding damages.

The plaintiff's wife and two children aged two years and one year respectively were killed by the falling of a tree standing on the margin of the road. The plaintiff brought an action against the Local Board for damages alleging wrongful neglect on the part of the Local Board to cut down the dangerous tree:

Held that (1) the only damages for which the defendant could be liable were those arising out of any financial or pecuniary loss which the plaintiff had suffered on account of the death of the wife and children; (2) the possibility that two little boys would, in some far distant time, have been of some help to their father in his declining years was too speculative to be the basis of any calculation for damages; (3) the fact that the plaintiff's wife was a source of solace to him could not be a ground for awarding damages. [P 736 C 1, 2]

A. Satyanarayana and B. Lakshminarayana — for Appellants.

V. Suryanarayana — for Respondent.

Horwill J.—The plaintiffs, a father and his three minor children, have brought this suit for damages under the Fatal Accidents Act on account of an accident alleged to have been caused by the negligence of the

defendants, which was responsible for the fall of a tree on a cart passing along the Narasapur Nidadavole Road, with the result that the wife and two small sons, aged three years and one year, of plaintiff 1 were killed. The amount of damages claimed was Rs. 6000. The Subordinate Judge of Ellore, who tried this suit, found that the District Board of West Godavari had been negligent in the sense that the attention of the Board had been drawn from time to time to the dangerous condition of some of the trees on this road and that they had taken no steps in spite of the complaints to cut down the trees. The District Board, which was the contesting defendant, set up a plea of vis major and contributory negligence, it being alleged that the accident occurred during a very heavy storm, and that the plaintiffs were negligent in travelling along the road while such a heavy storm was raging, knowing that trees were likely to fall. Both these issues were very rightly decided against the Board. The defendant, however, succeeded on three grounds. The first was that the Board was not liable for any act of mere non-feasance ; the second that the suit was barred by limitation, in that it had not been preferred within six months of the accident; and the third was that the plaintiff had not proved that he had sustained any damage of a pecuniary nature.

The question whether the defendant can avoid liability merely on the ground that the failure to cut down the tree, which was an act of non-feasance, is not actionable is a difficult one. We have been taken through a large number of English cases which deal with somewhat similar questions ; and there seems to us little doubt that the present law in England is that the only exception in favour of a statutory body to the general principle that a person or body must so control the property under its control that it does not cause injury to others, is that a statutory body charged with the maintenance and upkeep of a highway is not liable for damages for not performing its duty of keeping the highway in proper repair. At one time it was considered that statutory bodies, with respect to common obligations, were in precisely the same position as private persons ; but later, an exception was recognised, and Courts consistently held that a statutory body responsible for the repair of roads was not liable for damages if it did not do so. There can be no doubt that the principle of non-liability for non-feasance was extended to other omissions of a corporate body at one time ; but the trend of decisions in England later narrowed the exceptions to the one case of non-repair of highways. Bevan, in his book on "Negligence," after discussing all the authorities on the question of liability of statutory bodies for breaches of common law obligations sums up by saying:

> The liability to repair in the case of highways and bridges is an exception from the general law. At common law the remedy for want of repair in highways and bridges was not by suit against the surveyor or justices but by presentment or indictment against the county or against some individuals thereof for or in the name of all the rest.

There was thus a historic reason for making an exception in favour of corporate bodies in this connexion; because when roads were vested in the vestry or hundred or justices as the case may be, they were not made liable for an action for non repair, one of the reasons being the impracticability of making a large number of persons liable for acts of non-feasance. When later the repair of the roads became the duty of the surveyor and of local bodies, the legislation which introduced these changes imposed no liability either on the surveyor or on the local bodies. It was therefore held that as there was no right of action for non-repair of roads against the vestry or hundred or justices and the Legislature had not created any right of action by the legislation which introduced the changes, it must be assumed that even after the roads were vested in the surveyor or the corporate bodies, there was no right of action against either the surveyor or the local body.

There is no clear reason why this exception peculiar to the common law of England should be applied to India, where no such historic reason for the exemption of a local body from liability for negligence by non-feasance exists. Moreover, the public were not without a remedy in England ; because they could proceed against those who had been guilty of negligence by "indictment" or. " information," which remedy is not available to the public in India. However, it seems that not only has this one exception in favour of local bodies been presumed to exist in India, but the extended principle enunciated in some of the earlier English decisions has been applied to India, the decisions placed before us suggesting that local bodies can never be proceeded against for acts of non-feasance ; this is what in fact the learned advocate for the District Board contends. That seems also to have been the contention put forward in the lower Court

and accepted by it. There is certainly authority for that position. In 28 Bom 240,[1] the English authorities seem to have been cited in full during the course of arguments; but in a very short judgment of a few lines, the learned Judges said that as the plaintiff's case was one of non-feasance, there was no liability on the local body. In 42 Mad 331,[2] the learned Judges who decided that appeal concluded, after discussing the English authorities, that

> It must be taken now as well established that for mere non-feasance no action for damages will lie against a public body.

On the other hand, the learned counsel for the appellant has been unable to cite a single authority in which a local body has been made liable for an act of non-feasance of any kind. With very great respect for the view of the Indian authorities on this question, we still venture to doubt whether local bodies in India should be exempt from liability for such acts of negligence in the maintenance of their roads as cause loss or injury to persons using them.

With regard to trees growing on the margins of the roads we feel that the case of local bodies for exemption from the common law liability arising out of the failure to cut down trees in a dangerous condition is even weaker. In (1898) 14 T L R 55,[3] a man travelling in a tram was struck by a branch overhanging from a tree in a public park and in consequence lost his eye. It is very doubtful, however, whether that decision is still good law; because the trees had no relation at all to a highway, and the decision seems to be based on a principle that was earlier accepted in one or two cases, that local bodies were never liable for non-feasance. If trees growing on the margins of roads were in olden days in the charge of the vestry or hundred or justices, as they presumably then were, the same historic reason which exempts local bodies from liability for not repairing the road would probably exempt them from liability for not cutting down dangerous trees. But this is not at all certain. Trees are not planted on the margins of roads in England as they are in India. There, people do not want trees which will shade them from the sun; on the contrary, they welcome the warming rays of the sun. No case has been brought to our notice dealing with the liability of local bodies in England to protect the users of road from injury by falling trees. The only authority in India is 42 Mad 331,[2] where a suit for an injunction was brought by a private owner of property against a local body, requiring them to lop off certain branches from the trees overhanging the plaintiff's property; and it was held that he had no cause of action. That case could perhaps have been decided on other grounds; but the actual reasons given for dismissing the suit were, (1) that no negligence had been proved and (2) that in any event local bodies were not liable for acts of non-feasance. In 41 Mad 538,[4] which was a case in which misfeasance had been committed by a local body, the learned Judges were invited to consider the law relating to the liability of local bodies for non-feasance; but Napier J. remarking that it was a difficult subject on which he would prefer not to express an opinion, declined to commit himself to any opinion on this question. He held that as there was a misfeasance in that case the local body was liable. We too feel that in view of the fact that the appellant has to fail on other grounds, it would be better if we do not express any opinion on this difficult question.

The plaintiffs alleged in their plaint that there was an act of misfeasance, in that the District Board had through its servants weakened the tree to such an extent by cutting away the roots that it had fallen during a storm on the night of the accident; but they made no attempt to prove this during the course of the evidence. It would have been necessary for them to prove, (1) that the District Board through its servants did actually cut the roots, (2) that the tree fell, and not merely, the branch as the defendant Board says, and (3) that the cutting of the roots contributed to the fall of the tree. None of these things has been proved. It is true that no issue was raised on this point; but the other issues in the case made it incumbent on the plaintiffs to let in evidence with regard to the nature of the negligence of which the Board had been guilty. We are not prepared to allow the plaintiffs an opportunity of repairing this omission by adducing further evidence.

The suit was filed exactly one year after the accident occurred, and it is filed under the Fatal Accidents Act for which the period

1. ('04) 28 Bom 340 : 6 Bom L R 75, Achratlal v. Ahmedabad Municipality.
2. ('19) 6 AIR 1919 Mad 477 : 50 I C 809 : 42 Mad 331 : 36 M L J 372, Krishnamurthi Iyer v. Taluk Board of Mayavaram.
3. (1898) 14 T L R 55, Tregelles v. London County Council.
4. ('18) 5 AIR 1918 Mad 264: 44 I C 308 : 41 Mad 588, Municipal Council of Vizagapatam v. Foster.

of limitation is one year. If, however, the Local Boards Act requires a suit like the present one to be filed within a shorter period, then the mere fact that the plaintiffs had a cause of action under the Fatal Accidents Act would not save them from the bar of limitation. Section 225, Local Boards Act, deals with suits against local boards in respect of any acts done or purporting to be done in execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act. Section 225 (2) lays down a period of six months within which such a suit must be brought. Roads and the trees on the margin of roads are vested in the local body in order that the local body may maintain the roads and trees for the benefit of the public using the roads. In 42 M L W 417[5] the learned Judges were dealing with the question of the right to the usufruct of trees growing on the site of a punta situated in a zamindari. They pointed out that the punta and the trees were vested in the Taluk Board; but that did not mean that the Board had full proprietary rights over the soil of the puntas. They held,

that the property vested in the Board is such property, and such property only, as is necessary for the control, protection and maintenance of the punta for public use.

The Board would therefore have the right to cut down trees which interfered with the use by the public of the punta; but that did not give them a right to the fallen tree or to the fruit. It would therefore appear that such rights as the defendant in this suit had over the tree which caused the fatal accident were such that arose out of the Act itself, vesting this tree in the defendant. If therefore the defendant wrongfully neglected to cut down this tree which was a menace to persons passing along the road, it follows in the words of S. 225 (1), that there was a neglect or default on the part of the defendant in the execution of the Act. The suit should therefore have been brought within six months and as this was not done, the suit had to fail.

It is quite clear, as the lower Court says, that the only damages for which the defendant can be liable are those arising out of any financial or pecuniary loss which the plaintiffs have suffered on account of the death of the wife and children of plaintiff 1. The ages of the two little boys who were killed were three years and one year respectively; and it would be absurd to argue that any of the plaintiffs suffered any financial loss on account of their death. The possibility that these two little boys would, in some far distant time, be of some help to their father in his declining years is too speculative to be the basis of any calculation for damages. With regard to the death of plaintiff 1's wife, it is true that all the plaintiffs must be suffering some inconvenience by the loss of the services of the mother, who would presumably cook and look after them; but, on the other hand, she would have to be maintained and clothed. The only evidence let in by the plaintiffs on this question of damages arising out of the loss of services of plaintiff 1's wife is that she was a source of solace to him. This may be true; but that cannot be a ground for awarding damages. The lower Court therefore quite rightly dismissed the suit. We may point out, while dealing with this question of damages, that even if we had been disposed to decide the other points in favour of the plaintiffs and to have given them an opportunity of proving misfeasance or material damage, the fantastic claim for Rs. 6000 by way of damages would make it impossible for them to reap any advantage from the filing of the suit; for such directions as we would be compelled to make with regard to the payment of the court-fee due to Government would make it impossible for the plaintiff to meet the burden imposed on him by that order out of any amount that might be awarded to him by way of damages. Plaintiff 1 was presumably advised, because he had filed the suit in forma pauperis and was not called upon to pay any court-fee immediately, that he could put any fancy figure he pleased as the value of the suit; but, in doing so, he made it impossible to gain any benefit from the suit however it was decided. The appeal is dismissed with costs. The plaintiffs will be liable for the court-fee payable by them to the Government on the memorandum of appeal.

C.R.K./G.N. *Appeal dismissed.*

5. ('35) 22 AIR 1935 Mad 810 : 157 I C 913 : 69 M L J 269 : 42 M L W 417, Jagannadha Raju Garu v. Taluk Board, Rajahmundry.

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(28) A. I. R. 1941 Madras 736

LEACH C. J. AND HAPPELL J.

Boganathula Venkataswami — *Petitioner*

v.

Jangiti Pedda Madduleti and others — *Respondents.*

Civil Misc. Petn. No. 6958 of 1940, Decided on 12th February 1941, to issue a writ of certiorari.

Madras Debt Conciliation Act (11 of 1936), S. 10 (1) and (2) — Application by mortgagor under Act — Mortgagee stating in statement under S. 10 (1) that mortgage deed was with his brother who had filed partition suit against him and that his brother was entitled to moiety of amount due under mortgage and requesting Board to issue notice to his brother and call statement of account from his brother as payments made by mortgagor were endorsed on mortgage bond — Board declaring debt to be discharged under S. 10 (2) — Order under S. 10 (2) held most unjust and must be quashed.

On the application by the mortgagor under the Act the mortgagee who was mentioned as the only creditor stated in his statement under S. 10 (1) that the payments made on account of the mortgage debt were endorsed on the mortgage bond which was in the possession of his brother who had filed a partition suit against him and that his brother was also entitled to a moiety of the amount due under the mortgage. He further requested the Board to issue a notice to his brother and call the statement of account from him. The Board thereupon passed an order under S. 10 (2) discharging the debt :

Held that the order discharging the debt under S. 10 (2) was most unjust and must be quashed.

[P 737 C 2]

K. Krishnaswami Ayyangar and K. S. Jayaram —for Petitioner.

S. Venkatesa Ayyangar — for Respondents.

Leach C. J. — This is an application to quash an order passed by the Debt Conciliation Board, Nandyal. The Court has frequently had to set aside an order of a Debt Conciliation Board because it has been passed without jurisdiction or in abuse of the powers conferred by the Madras Debt Conciliation Act. In some cases the action taken by the Board has been of a most arbitrary character and the order now complained of is of that nature. Respondents 1, 2 and 3 applied to the Board for the settlement of a debt under the Madras Debt Conciliation Act, 1936. According to their petition, they had only one creditor, the petitioner, whose debt was secured by a mortgage in respect of immovable property. The Board issued notice to the petitioner, who was thereupon required by reason of the provisions of S. 10 (1) to submit a statement of the debt owing to him by the respondents. He appeared before the Board and filed the following statement :

The mortgage bond executed by the petitioners is with my brother Boganathula Venkata Guraviah who has filed a partition suit against me, O. S. No. 2 of 1938 in the Court of the District Judge, Kurnool. The document is with him and therefore I cannot mention the exact amount due to us. He also is entitled to a moiety of the amount, and therefore, notice may be kindly issued to him. I will pay the expenses of the notice. I therefore request that a statement of account may be called for from Boganathula Venkata Guruviah, resident of Mahadevapuram, Sirvel Taluk.

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The reason for his request was that the sums paid on account of the mortgage debt were endorsed on the document. In these circumstances, this was a very reasonable request for the petitioner to make to the Board, but instead of complying with it and despite the fact that the debtor respondents had admitted the mortgage debt and were asking for a settlement the respondent Board passed an order in purported exercise of the powers conferred upon it by S. 10 (2) of the Act declaring the debt to be discharged. It is difficult to imagine a more unjust order. In my opinion this Board has shown itself to be unfitted to discharge its duties under the Act. The order will be quashed with costs against all the respondents.

C.R.K./G.N. *Order quashed.*

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* (28) A. I. R. 1941 Madras 737

LEACH C. J. AND
VENKATARAMANA RAO J.

Pakshi Ramaswami Chettiar and another — Appellants

v.

Kesavan Chettiar and others — Respondents.

Letters Patent Appeal No. 30 of 1940, Decided on 21st April 1941, against decree and judgment of King J., *Reported in ('41) 28 A I R 1941 Mad 406.*

*** Limitation Act (1908), S. 20 (2) — Usufructuary mortgagee continuing in possession of property even after decree is in possession as mortgagee — Receipt of income comes under S. 20 (2) : (1941) 1 M L J 116=('41) 28 A I R 1941 Mad 406, *REVERSED.***

A usufructuary mortgagee goes into possession under the contract of mortgage and where he continues in possession even after decree the decree does not change the character of his possession. His possession is in no way dependent on the decree. He was in possession qua mortgagee before the decree and he continues in possession qua mortgagee. Hence, receipts by him of the profits must be treated under S. 20 (2) as receipts by a mortgagee : (1941) 1 M L J 116=('41) 28 A I R 1941 Mad 406, *REVERSED*; 28 Mad 473 (FB), *Rel. on*; ('26) 13 A I R 1926 Mad 816, *Expl., and Disting.*; 34 Cal 150 (P C), *Expl.* [P 738 C 1, 2 ; P 739 C 1]

K. S. Sankara Ayyar and M. S. Venkatrama Iyer — for Appellants.

K. Bhashyam Ayyangar and T. R. Srinivasan — for Respondents.

Leach C. J.—There is only one question in this appeal, a question of limitation. The suit out of which the appeal arises was filed by the appellants in the Court of the District Munsif of Mayavaram to enforce payment of two mortgages one dated 1st November 1921 for Rs. 1000 and the other dated 8th November 1921 for Rs. 100. The

first one was a usufructuary mortgage. The appellant obtained a preliminary mortgage decree on 10th March 1932 and a final decree on 18th September 1933, but did not apply for the sale of the mortgage property until 17th March 1938. Throughout he had remained in possession of the property as a usufructuary mortgagee. The mortgagors contended that as more than three years had elapsed from the date of the final decree an application in execution was barred by the law of limitation. The District Munsif decided the question against the mortgagors and allowed the application for execution to proceed. His decision was affirmed on appeal by the Subordinate Judge of Mayavaram. The mortgagors then appealed to this Court and the appeal was allowed by King J., who gave a certificate which has permitted the appellant to file this appeal under Cl. 15, Letters Patent. The decision turns on the interpretation to be placed upon S. 20, Limitation Act. Sub-s. (1) of that section states that where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. Sub-s. (2) says that where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of the land shall be deemed to be a payment for the purpose of sub-s. (1). There is added to the section an explanation which states that the word "debt" includes money payable under a decree or order of Court. Therefore, when a usufructuary mortgagee is in possession, what he receives by way of rent or produce from the mortgaged property shall be taken to represent interest on the mortgage debt, and each receipt starts a fresh period of limitation. The explanation makes it quite clear that the provisions of sub-s. (2) apply even when a decree has been passed in favour of the mortgagee.

The appeal was allowed by King J. because he was of opinion that once the final decree had been passed in the mortgage suit, the appellant could not be regarded as being in possession as a mortgagee, and he relied on the decision of the Privy Council in 34 Cal 150,[1] where Lord Davey in delivering the judgment of the Board said that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. In 34 Cal 150,[1] the Privy Council did not hold that a usufructuary mortgagee ceases to be in possession of the mortgaged property as mortgagee simply because a final decree for sale is passed in his favour. Notwithstanding that the matter is taken from the domain of contract and the rights of the parties fall to be regulated by the decree, the mortgagee may nevertheless still retain his character of mortgagee until the property is sold. His security for the loan made by him is the property which had been mortgaged to him. The final decree has decided what is due by the mortgagor to him and settles the question of interest. It also gives the mortgagee the right to sell, but the mortgagor in law has the right to redeem his property until the sale held in pursuance of the mortgage decree has been confirmed. The provisions of O. 34, Civil P. C., make this quite clear.

Our attention has been drawn to an observation of Wallace J. in 49 Mad 691[2] to the effect that after the preliminary decree for sale has been passed, the right to redeem is extinguished, but I do not regard that case as having any bearing in the present case. There was no question of limitation. The Court was considering the question whether, after a preliminary decree for sale on a mortgage has been passed, the mortgagor can institute a suit for redemption when the mortgagee has failed to execute the final decree and has remained in possession. A more apposite judgment is that in 28 Mad 473.[3] In the judgment in that case, it was expressly stated that where a usufructuary mortgagee remains in possession after the mortgage decree has been passed, receipts by him of the profits must be treated under S. 20, Limitation Act, as receipts by a mortgagee. King J. did not accept this statement as he regarded it as a mere obiter dictum. He was right in describing the statement as

1. ('07) 34 Cal 150 : 34 I A 9 : 5 C L J 106 : 11 C W N 249 (P C), Sunder Koer v. Rai Sham Krishen.

2. ('26) 13 AIR 1926 Mad 816 : 96 I C 607 : 49 Mad 691 : 50 M L J 612, Ellarayyan v. Nagasami Iyer.

3. ('05) 28 Mad 473 : 15 M L J 126 (F B), Vaidhinathasami Iyer v. Somasundaram Pillai.

obiter dictum, but I consider that he should have accepted it as embodying a correct statement of the law. The observation appears to me to be fully justified on the wording of the section. A usufructuary mortgagee goes into possession under the contract of mortgage and the decree does not change the character of his possession. His possession is in no way dependent on the decree. He was in possession qua mortgagee before the decree and he continues in possession qua mortgagee. As the appellant was qua mortgagee in receipt of the income of the property within three years from the date of the application, I consider that he is entitled to the benefit of the section. For the reasons stated, I would allow the appeal with costs here and below.

Venkataramana Rao J. — I agree. Section 20, Limitation Act, would certainly apply to this case. Sub-section (2) to that section states that the receipt of rent or produce by a mortgagee shall be deemed to be payment within sub-s. (1) of that section. The explanation to S. 20 enacts that debt includes a decree debt. Therefore, under S. 20 (1), a debt would include a decree debt and therefore money payable under a mortgage decree. What is contended by Mr. Bhashyam in this case is, the moment a decree for sale has been passed on a mortgage, the mortgagee ceases to be a mortgagee and assumes the character of a decree-holder and therefore the possession of the mortgaged property would be held by him not in the character of mortgagee. This is the contention which prevailed with my learned brother King J. I am not able to agree with him in this contention. When the plaintiff filed the suit, he was in possession of the mortgaged land as mortgagee, and the decree for sale does not divest his possession. When the property is sold under the decree, what would be sold is the interest of the mortgagee as well as the interest of the judgment-debtor. Therefore, till the property is sold, he does not cease to be a mortgagee, though he also becomes a decree-holder by virtue of the debt having been merged in the decree and the amount payable under the mortgage having been precisely defined. It is not denied that the property in the possession of the decree-holder is mortgaged land, because until the property is sold it will be mortgaged land.

Considerable reliance was placed by Mr. Bhashyam on O. 34, R. 5, Civil P. C., under which the moneys due and payable under a final decree for sale must be paid into Court before a mortgagor can be allowed to redeem the property. Under the Transfer of Property Act, before the repeal of S. 89, it was held that once a decree for sale had been passed the security became extinct and when the day fixed for redemption has passed, the property is no longer liable to be redeemed. That was the view held by the Privy Council in more cases than one, but after the repeal of that section, the security is no longer extinct. So long as it is not extinct, the mortgage is liable to be redeemed and until redemption it cannot be said the mortgagee loses the character of the mortgagee. 34 Cal 150[1] only stated that the interest payable after a mortgage decree for sale will be the interest as defined in the decree and not under the contract, but that would not prevent the application of S. 20 (2), Limitation Act, because what is received by the mortgagee after the decree will be payment towards the decree and therefore towards interest due and payable under the decree debt. Again, considerable reliance was placed by Mr. Bhashyam on the decision in 49 Mad 691.[2] What was decided in that case was that after the final decree, the right to redeem is lost. The learned Judges were not dealing with any question of limitation. No doubt, there are certain obiter dicta on which Mr. Bhashyam relied, but if I may say so with respect, the learned Judges have not given due weight to the repeal of S. 89, Transfer of Property Act. Order 34, Rule 5 gives not only a power of redemption after the final decree but even after confirmation of sale. Therefore, until confirmation of sale, it cannot be said that the character of mortgagee is lost. It seems to me, and I agree with my Lord the Chief Justice, that the view of the learned Judges in 28 Mad 473[3] that even after the mortgage decree the payments received by the mortgagee would be payments within the meaning of S. 20, Limitation Act, is correct. I would therefore agree with my Lord the Chief Justice in allowing the appeal.

C.R.K./K.S. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 739

VENKATARAMANA RAO J.

Maddimsetti Ramayya — Appellant

v.

Liquidator of Bollanka Co-operative Credit Society, Ramachandrapur Taluk and another — Respondents.

Second Appeal No. 269 of 1940, Decided on 14th March 1941, against decree of Dist. Court, East Godavari at Rajahmundry, in A. S. No. 147 of 1939.

Madras Co-operative Societies Act (6 of 1932), S. 48 and S. 65, Rules under, R. 22 (17) (a) and (c) — Scope of S. 48 — Suit under R. 22 (17) (c) to set aside order of sale officer comes within saving provided in S. 48 — Registrar's leave is not necessary.

S. 48 only contemplates cases where proceedings have to be initiated against a society and not to cases where a society itself was a party to an order in proceedings instituted by virtue of the Act. [P 741 C 1]

A suit under R. 22 (17) (c) to set aside the order of the sale officer comes within the saving provided in S. 48 and therefore the leave of the Registrar under S. 48 is not necessary. The society itself by its liquidator being a party to the order in the claim proceedings the suit is only a continuation of the claim proceedings. Since the society itself is a party to an order in the claim proceedings no further leave of the Registrar is necessary before the institution of the suit under R. 22 (17) (c) which is only a continuation of the claim proceedings : 35 Cal 202 (P C), *Rel. on.* [P 740 C 2]

K. Bhimasankaran — for Appellant.

A. Lakshmayya — for Respondents.

Judgment. — The question for decision in this second appeal is whether the plaintiff's suit is barred by S. 48, Madras Co-operative Societies Act. Both the lower Courts have dismissed the suit on the ground that it is so barred. The question is whether this view is tenable. The facts briefly are as follows. Defendant 1 co-operative society obtained a decree against defendant 2 in claim No. 2235 of 1932-33 for Rs. 604-13-4 and in execution of the same brought the properties to sale. The plaintiff preferred a claim under R. 22 (17) (a) of the rules made under the Madras Co-operative Societies Act on the ground that he was a purchaser of the property under a registered sale deed dated 7th February 1922. But the said claim was dismissed by the sale officer on 29th July 1938. The plaintiff thereupon filed the present suit on 16th November 1938 within six months of the said order to set aside the said sale and to establish his right to the property. The view taken by both the lower Courts is that under S. 48, Co-operative Societies Act, the plaintiff should have obtained leave of the Registrar to institute the suit, that the said leave is a condition precedent to such institution and he having failed to do so, his suit must fail. Section 48, Co-operative Societies Act, runs thus :

Save in so far as is expressly provided in this Act, no civil Court shall take cognizance of any matter connected with the winding up or dissolution of a society under this Act, and when a liquidator has been appointed no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar and subject to such terms as he may impose.

It will be seen that the section itself saves cases which are expressly provided in the Act and it is only in cases where no such provision is made that the condition that no suit or legal proceeding shall lie against the society except by leave of the Registrar operates. Section 65, Co-operative Societies Act, provides that the Local Government may make rules to carry out all or any of the purposes of this Act, and one of the purposes provided for is the investigation of claims and objections that may be preferred against any attachment effected by the Registrar or an officer empowered by him. In pursuance of this provision rules have been made and S. 65 (4) provides that all rules made under that section shall be published in the Fort St. George Gazette and on such publication shall have effect as if enacted in this Act. Such rules have been published and they take effect as if enacted in this Act and therefore form part of the Act. Rule 22 (17) (a) to (c) provides for investigation of claims and objections. Rule 22 (17) (a) provides that where a claim or an objection is preferred, the sale officer should investigate the claim or objection and dispose of it on the merits and R. 22 (17) (c) is to the effect that where a claim or objection is preferred, the party against whom the order is made may institute a suit within six months from the date of the order to establish his right which he claims to the property in dispute; but subject to the result of such suit, the order shall be conclusive. Therefore this clause expressly provides that a suit should be instituted within six months to set aside the order of the sale officer to establish the claimant's right to the property. As this suit is expressly provided for by the Act, it would come within the saving provided in S. 48. The society itself by its liquidator was a party to the order in the claim proceedings and the suit is only a continuation of the claim proceedings : *vide* 35 Cal 202.[1] It is not possible to understand why, when the society itself was a party to an order, any further leave is necessary from the Registrar. That is why no restriction is placed in R. 22 (17) (c) that the leave of the Registrar should be obtained before the institution of the suit. It would hardly be in the contemplation of the Legislature that leave should be sought from the Registrar at whose instance the sale was ordered. If the Registrar should decline to give leave or delay giving leave for six months there will

1. ('08) 35 Cal 202 : 35 I A 22 : 7 C L J 36 : 12 C W N 169 (PC), Phul Kumari v. Ghanshyam Misra.

be no remedy for the plaintiff and according to R. 22 (17) (c) the order on the claim petition would be conclusive. Section 48 only contemplates cases where proceedings have to be initiated against a society and not to cases where a society itself was a party to an order in proceedings instituted by virtue of the Co-operative Societies Act. It seems to me therefore that the suit is maintainable. I therefore set aside the decrees of both the lower Courts and remand the suit for disposal according to law. Two cases were relied on by Mr. Lakshmayya on behalf of the respondent, namely 1939 2 M L J 604[2] and I L R 1940 Mad 929,[3] but none of them has any bearing on the question in issue in this case. In the result the appeal is allowed and the suit remanded to the file of the District Munsif of Ramachandrapur for disposal. The respondents will pay the costs of the appellant throughout. The appellant will be entitled to refund of court-fee. Leave to appeal granted.

C.R.K./G.N. *Appeal allowed.*

2. ('39) 26 A I R 1939 Mad 967 : 188 I C 200 : (1939) 2 M L J 604, Subbayya v. Thippa Reddi.
3. ('40) 27 A I R 1940 Mad 831 : I L R (1940) Mad 929 : (1940) 2 M L J 241, Kuppu Govinda Chetti v. Uttukottai Co-operative Society.

(28) A. I. R. 1941 Madras 741

WADSWORTH AND PATANJALI SASTRI JJ.

Thallapaka Srinivasayya and another — *Petitioners*

v.

Nagallapati Obula Raju and another — *Respondents.*

Civil Revn. Petns. Nos. 1689 and 1690 of 1939, Decided on 28th February 1941, to revise decree of Dist. Munsif, Nandalur, in S. C. S. Nos. 11 and 12 of 1939, respectively.

Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii), proviso (D) — Sharer in shrotriam — Proportionate share of jodi payable by him less than Rs. 100—He is not excluded from category of agriculturists even if his share is theoretically liable for whole of jodi of shrotriam.

The share or portion of an estate in S. 3 (ii), proviso (D) does not mean the separately registered share or portion. A sharer in a shrotriam village whose proportionate share of the jodi payable by him is less than Rs. 100 is not excluded by S. 3 (ii), proviso (D) from the category of agriculturists even though his share may be theoretically liable for the whole of the jodi of the shrotriam so far as the Government is concerned. [P 742 C 1, 2]

Kasturi Seshagiri Rao — for Petitioners.

P. Basi Reddi — for Respondents.

Wadsworth J. — These civil revision petitions arise out of two small cause suits for recovery of debts, in which the defendants pleaded that they were entitled to relief under Madras Act, 4 of 1938, as agriculturists and it was objected that they were landholders of a shrotriam paying a jodi of Rs. 169-3-10 and were therefore excluded from the benefit of the Act with reference to proviso D to S. 3 (ii). The defendants, while admitting that they were shrotriamdars contended that they were entitled to only a half share in the shrotriam and had alienated considerable portions of that half share and that the jodi payable in respect of their half share was less than Rs. 100, so that they were not excluded from the definition of "agriculturist." The lower Court found that the alienations by the defendants were irrelevant as they had sold only their kudivaram right and that with reference to the division of the shrotriam into two halves this did not affect the liability to the Government which can impose the burden of the jodi on any portion of the shrotriam and that therefore more than Rs. 100 was payable by the defendants as jodi and that they were disentitled to be considered as agriculturists.

The shrotriam in question was originally held by one Venkataramaniah who was the father of the defendants. After his death it came to be owned by the defendants and their cousins and they divided the shrotriam into two shares. One of the cousins who has given evidence, said that he is the proprietor of the estate. Presumably he is the person recognized by the Government, but it does appear that each of the two branches of the family owns a localised share in the village. Proviso (D) to S. 3 (ii) excludes from the definition of "agriculturist" a person who is the holder of an estate under the Madras Estates Land Act; or of a share or portion thereof, in respect of which estate, share or portion any sum exceeding Rs. 100 is paid as jodi. The question is whether in interpreting these words we must have regard to the liability of the share to the Government or to its proportionate liability having regard to the rights of the sharers inter se. It is no doubt true that when, as in this case, the whole of the village is liable for the whole of the jodi, the Government can recover the full amount of the jodi by the sale of a portion of the village, so that in this sense there is a liability imposed on each of the shares for the whole of the jodi. But we doubt very much whether that fact was in the contemplation of the Legislature when they enacted this

proviso. The object of the proviso is clearly to exclude from the category of agriculturists those who are big landholders and to include those who are only petty landholders. The use of the words "estate, share or portion" seems to contemplate (a) a whole estate, (b) a fractional share and (c) a localised portion.

In the ordinary case of a permanently settled estate, if part of it is alienated and the alienated portion is separately registered, then each of the separately registered portions becomes an estate so that there would be no point in talking of a separately registered portion of an estate as a portion. It is moreover to be noted that the words "is paid" are used, not the words "is payable." Without laying too much emphasis on this distinction, it may perhaps be said that the use of the word "paid" instead of the word "payable" may indicate an intention to adopt as the criterion not so much the theoretical liability to the Government, as the practical apportionment of that liability between the sharers. To interpret this proviso as saving only those whose share of the estate has been separately registered, would, in fact, rob the words "share or portion" of most of their practical effect. It does not seem likely that the Legislature intended, in the case of a shrotriam paying a jodi of a little over Rs. 100 but held by a large number of shrotriamdars in fractional shares, to determine whether or not each of these shrotriamdars is an agriculturist by reference to the jodi of the shrotriam as a whole and not by reference to the proportionate share of the jodi payable by the particular sharer. We have little doubt that the use of the words "in respect of which estate, share or portion any sum exceeding Rs. 100 is paid as jodi" was intended to exclude from the definition of "agriculturist" the landholder of an estate or of a share or portion of an estate in respect of which estate a jodi of over Rs. 100 was paid or in respect of which share or portion the proportionate jodi paid was over Rs. 100 regardless of whether the revenue authorities had separately registered this share or portion or not.

It is also to be remarked that to adopt the view that the share or portion of a shrotriam village means only the separately registered share or portion would have very little meaning in view of the fact that the Madras Land Revenue Assessment Act (1 of 1876) provides only for the separate assessment of alienated portions of permanently settled estates and it is doubtful whether this Act has any application to shrotriams not covered by the permanent settlement. We are therefore of opinion that on the assumption that the defendants are owners of only a half of this shrotriam and that the proportionate jodi payable by them is less than Rs. 100, they are not excluded from the category of agriculturists, even though there may be a theoretical liability for the whole of the jodi laid upon each of the two halves so far as the Government is concerned. We therefore allow the civil revision petitions with costs and remand the suits to the trial Court for fresh disposal in the light of this judgment.

C.R.K./G.N. *Petitions allowed.*

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* (28) A. I. R. 1941 Madras 742

KING J.

Jayanthi Rudrayya—Appellant

v.

Jayanthi Subbarayappa and others—Respondents.

Second Appeal No. 213 of 1938, Decided on 21st February 1941, against decree of the Dist. Court, Bellary, D/- 8th November 1937.

(a) Limitation Act (1908), Arts. 62 and 96 — Case falling under both—Art. 96 must be applied.

If the facts of a particular case fall within both Art. 62 and Art. 96, Art. 96 must be applied as it is the more specific and the less general of the two articles : ('25) 12 A I R 1925 Mad 1255, *Foll.* [P 743 C 2]

(b) Limitation Act (1908), Art. 96—Applicability.

Article 96 cannot be applied to a case in which the plaintiff himself has not been the victim of any mistake : ('27) 14 A I R 1927 Cal 117, *Rel. on.* [P 743 C 2]

*** (c) Limitation Act (1908), Art. 96—Auction purchaser subsequently finding that judgment-debtor had no interest in property by decision in claimant's suit—Suit against decree-holder for refund of money—Art. 96 applies — Limitation runs from date of such decision—In such suit plaintiff should assert that there was mistake, though not explicitly.**

Where the auction purchaser files a suit claiming refund of money paid to the decree-holder putting forward as the basis of his claim a discovery which he has made that the property which he purchased was one in which the judgment-debtor had no interest by a decision in favour of a claimant of such property, the suit is governed by Art. 96. In such cases it is necessary that the plaintiff should assert though not explicitly, that there was mistake, and limitation runs from the date of the final adjudication in favour of the claimant : ('36) 23 A I R 1936 Mad 50 (FB), *Expl.*, *and Rel. on.* [P 744 C 1, 2]

B. Sitarama Rao—for Appellant.

V. S. Narasimhachar—for Respondents.

Judgment.—The appellant in this appeal obtained a decree in 1921 and in execution of the decree brought certain property to sale. The property was purchased by the predecessor-in-title of the present plaintiffs and the purchase money was duly paid over to the decree-holder on 12th March 1925. Before the sale of the property had taken place, there had been a claim petition put in by a mortgagee and that petition had been dismissed. The mortgagee subsequently filed a suit to set aside the order on the claim petition and to that suit the auction purchaser was made a party. The suit was decreed on 4th December 1926 on the ground that the judgment-debtor had no interest in the property and this finding is of course res judicata as against the auction purchaser and his representatives. On 12th June 1928 the legal representatives of the auction purchaser filed the suit from which the present appeal arises to recover from the decree-holder the money which they had paid for the property purchased. It was contended on behalf of the decree-holder that this suit was barred by limitation but both the Courts below have held that the suit was within time and they decreed the plaintiffs' claim. This is now a second appeal by the decree-holder against that method of disposing of the suit.

The only question which arises is one of limitation. It is argued on behalf of the appellant that this is a suit which falls under Art. 62, Limitation Act. It is argued on the other hand for the respondents that the proper article applicable to the suit is Art. 96. There is one authority directly in favour of the appellant with regard to the application of Art. 62 and that is a decision of Cornish J. sitting singly reported in 68 M L J 630.[1] The facts in that case are undoubtedly similar to the facts here; but that was a case in which no argument was put forward with regard to the possibility of applying Art. 96. And indeed on an examination of the facts and dates it will appear that no such arguments could possibly have been successfully put forward on behalf of the party concerned. It is clear that the plaintiff in that case knew on 12th December 1919 that he had paid the money under a mistake, if mistake there was, and that he did not file his suit until July 1925. There was therefore no point in his arguing that Art. 96 rather than Art. 62 applied to the case as under either of these articles his suit would be undoubtedly barred. Although therefore Cornish J. does say that Art. 62 applies to the facts before him, he has said so without considering the possible alternative that the suit with which he was dealing might also fall under Art. 96. And, as has been pointed out in 49 M L J 228,[2] if the facts of a particular case fall within both Art. 62 and Art. 96, Art. 96 must be applied as it is the more specific and the less general of the two articles. Learned counsel for the appellant has also relied upon other rulings of this Court in 39 Mad 62,[3] 52 Mad 207[4] and a decision of mine sitting singly in (1938) 1 M L J 682.[5] It will be seen upon an analysis of the facts of these cases that in 39 Mad 62[3] and 52 Mad 207[4] it would have been impossible for the plaintiff to have put forward any case based upon a mistake made by himself. In both these cases the plaintiff was throughout asserting the same title under the same knowledge of his rights. In (1938) 1 M L J 682[5] it might plausibly be asserted that the claim of the Official Receiver in that case could be based upon a mistake under which the Court had been labouring in making certain payments. But as has been held in A I R 1927 Cal 117,[6] Art. 96 cannot be applied to a case in which the plaintiff himself has not been the victim of any mistake. No argument was adduced before me in (1938) 1 M L J 682,[5] with regard to the possible applicability of Art. 96. It was a mere question of choice between Art. 62 and Art. 120 and of course it may also be pointed out that the facts in that case were, in no sense, identical with the facts before me in the present case. There is therefore no clear authority that Art. 96 does not apply to the facts of the present case and any authority to the effect that Art. 62 may apply to these or similar facts cannot be binding upon me in the absence of any consideration whether Art. 96 also might apply.

Learned counsel for the respondents relies mainly upon the decision of the Full Bench

1. ('35) 22 A I R 1935 Mad 354 : 159 I C 750 : 68 M L J 630, Sivaramaraju v. Secretary of State.
2. ('25) 12 A I R 1925 Mad 1255 : 91 I C 151 : 48 Mad 925 : 49 M L J 228, Ramiah & Co. v. Sadasiva Mudaliar & Bros.
3. ('15) 2 A I R 1915 Mad 405 : 26 I C 219 : 39 Mad 62 : 27 M L J 640, Baijnath Lala v. Ramadoss.
4. ('29) 16 A I R 1929 Mad 409 : 120 I C 867 : 52 Mad 207 : 56 M L J 525, Municipal Council, Dindigul v. Bombay Co. Ltd.
5. ('38) 25 A I R 1938 Mad 532 : 178 I C 448 : (1938) 1 M L J 682, Shanmugham Chettiar v. Official Receiver of West Tanjore.
6. ('27) 14 A I R 1927 Cal 117 : 101 I C 62 : 31 C W N 82, Panna Lal v. Adjai Coal Co.

of this High Court reported in 59 Mad 202.[7] It is true that this decision does not deal directly with any question of limitation but it does deal with a claim made upon precisely similar facts to those now before me. In that case, as here, the auction purchaser was claiming refund of money paid to the decree-holder and he puts forward as the basis of his claim a discovery which he has made that the property which he purchased was one in which the judgment-debtor had no interest. The question before the Full Bench was whether any such suit lay at all and in order to decide this question the learned Judges had to analyse the nature of the plaintiffs' claim. What they say is this (on p. 208):

> The facts are that a decree-holder brings a certain property to sale bona fide believing it to belong to his judgment-debtor. The Court also under the same belief orders the sale of the property. The auction purchaser also under the same bona fide belief purchases it. Afterwards it turns out that the property does not belong to the judgment-debtor at all. Thus the auction purchaser purchases nothing, though he paid consideration for it under a mistake. The decree-holder gets a certain amount without really having brought any of the properties of the judgment-debtor to sale, i. e., under a similar mistake. Under the circumstances, it is unconscionable that the decree-holder should retain the benefit of the money so obtained and the auction purchaser should lose it, and one would think that the auction purchaser would have a right of action for money had and received under the general law and not under any code of procedure.

It seems to me quite clear that in this analysis of the claim of the plaintiff the learned Judges were stressing the fact that the plaintiff, the defendant and the Court were all alike acting upon a mistaken belief as to the true state of affairs. It follows therefore that in order to found a claim to recover the money the plaintiff must assert, whether he does so explicitly or not, that these facts exist, i. e., that he paid the money under a mistake or that the Court paid over his money to the defendant under a mistake. The idea of a mistake in the minds of all persons concerned is thus clearly emphasised. Now, if the learned Judges had been considering whether the suit before them was or was not barred by limitation it seems to me they would have been compelled by this very reasoning to hold that Art. 96 was the article to which recourse would have to be made. Article 96 is an article relating to a suit for relief on the ground of mistake and here, as I have already mentioned, the fundamental basis of the claim made by the plaintiff is the existence of such a mistake. If Art. 96 applies, the time begins to run only when the mistake becomes known to the plaintiff. In the present case it cannot be successfully argued that the plaintiff became aware of his mistake until the decree in the suit by the claimant was passed in 1926. Till that time the plaintiff in opposition to the claim was asserting that the judgment-debtor had an interest in the land and therefore that the sale to the plaintiff is valid and it could not have been until the final adjudication of this question between him and the claimant that the plaintiff could be said in any real sense of the word to have become aware of the mistake under which he had purchased the property. The suit is admittedly brought within three years of the date of the decree in the claimant's suit and must therefore be held to have been brought in time. In the result therefore this appeal must fail and is dismissed with costs of respondents 1 and 2. Leave to appeal is refused.

C.R.K./K.S. *Appeal dismissed.*

7. ('36) 23 A I R 1936 Mad 50 : 159 I C 625 : 59 Mad 202 : 69 M L J 750 (F B), Macha Koundan v. Kottara Koundan.

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(28) A. I. R. 1941 Madras 744

LAKSHMANA RAO J.

Muthuswami Tevar — Petitioner

v.

Rajah Ram Pandian, Ramnad — Respondent.

Criminal Revn. Case No. 323 and Petn. No. 312 of 1940, Decided on 27th September 1940, to revise order of Joint Magistrate, Ramnad, D/- 8th January 1940.

Criminal P. C. (1898), S. 146 (1) — Attachment of undivided share of village is not permissible.

The attachment of an undivided share of a village is not permissible under S. 146 (1).

[P 744 C 2]

K. S. Jayarama Ayyar and G. Gopalaswami — for Petitioner.

U. Somasundaram — for Respondent.

Public Prosecutor — for the Crown.

Order. — The attachment of an undivided share of a village is not permissible under S. 146 (1), Criminal P. C., and the order of the Joint Magistrate is set aside.

C.R.K./G.N. *Order set aside.*

(28) A. I. R. 1941 Madras 745

BURN AND MOCKETT JJ.

Naina Muhammad Rowther — *Appellant*

v.

Periappa Rowther — *Respondent.*

Appeal No. 272 of 1939, Decided on 24th March 1941, against order of Sub-Judge, Dindigul, D/- 15th April 1939.

Civil P. C. (1908), O. 21, R. 16—Assignment of decree—Agreement between assignee who is benamidar of one of judgment-debtors and such judgment-debtor that decree should not be executed against him but only against other judgment-debtors and that satisfaction should be entered whenever called upon is not enforceable.

The Court will not allow its processes to be used for the purpose of enforcing frauds at the hands of parties who participated in them. [P 746 C 2]

Hence an agreement between an assignee of a decree who is said to be a benamidar of one of the judgment-debtors and such judgment-debtor that the decree should not be executed against him but only against the other judgment-debtors and that the assignee should enter satisfaction whenever called upon to do so is an agreement in contravention of the express provisions of O. 21, R. 16, proviso 2, and as such it cannot be enforced by any Court : ('24) 11 A I R 1924 Mad 189, *Disting.* [P 745 C 2 ; P 746 C 1]

K. Rajah Ayyar and K. S. Ramamurthy — for Appellant.

K. Bhashyam Ayyangar and T. R. Srinivasan— for Respondent.

Burn J. — This is an appeal by defendant 1 from an order passed in execution by the learned Subordinate Judge of Dindigul. The appellant was defendant 1 in O. S. No. 44 of 1929 which was a suit upon a promissory note. He was one of the executants of the promissory note. The decree in the suit was passed on 18th March 1930. On 22nd December 1935, the decree was assigned to the respondent and E. P. No. 85 of 1938 was filed by the respondent to execute the decree by arrest of defendant 1, the present appellant. Defendant 1 objected to execution against him. The learned Subordinate Judge overruled his objections and hence this appeal. The learned Subordinate Judge has held that the defendant's plea was barred by limitation. He has taken the defendant's plea as being one of satisfaction or adjustment of the decree and since he finds that the adjustment or satisfaction had not been certified under O. 21, R. 2, Civil P. C., within 90 days, he has held that the plea was barred by limitation. The appeal is based upon the plea that the learned Subordinate Judge was wrong in holding that the defendant's case was merely one of adjustment of the decree and that therefore the learned Subordinate Judge was wrong in basing his decision on the question of limitation alone.

The plea of the appellant before the learned Subordinate Judge was that the assignment of the decree to the respondent on 22nd December 1935 was virtually an assignment to himself (defendant 1). He said that he had found the money to purchase the decree from the original decree-holder and that Periyappa Rowther, the nominal transferee, was merely a benamidar for himself. He said that he had entered into an agreement with Periappa Rowther by which Periappa Rowther undertook not to execute the decree against him (judgment-debtor 1) but against the other defendants only. The respondent also agreed, he said, that whenever defendant 1 should consider it undesirable or unsafe to keep the decree alive any longer, the respondent would put in an application to enter up satisfaction of the decree. The time had come, the appellant thought, when he filed his counter statement before the learned Subordinate Judge, for the fulfilment of this agreement and he therefore called upon the assignee decree-holder to enter up satisfaction of the decree forthwith on the ground that he (defendant 1) now considered it unsafe and inexpedient to keep the decree subsisting. He prayed therefore that the Court would be pleased to record satisfaction of the decree and dismiss the execution petition.

I am of opinion that the decision of the learned Subordinate Judge is correct, although I do not think it should have been based upon the question of limitation. It is quite true that the counter statement filed by the appellant in the sub-Court contained the allegation that he (the appellant) had paid to the original decree-holder the value of the decree. If there were a payment of which the appellant desired the executing Court to take notice, such a plea would, of course, have been barred by O. 21, R. 2, which says that no payment out of Court shall be recognised by the Court executing the decree unless it has been certified by the decree-holder or unless the judgment-debtor has within the proper time taken the necessary steps to have it certified. The judgment-debtor therefore could not plead that the decree had been satisfied by his payment of the money to the original decree-holder. He was therefore obliged to

fall back upon his plea that he had arranged with his nominee to enter up satisfaction whenever he should think fit. Now this is an agreement which in my opinion no Court should recognise. The second proviso to O. 21, R. 16 says that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. The agreement which the appellant pleads that he made between himself and his nominee was an agreement that his decree should be executed against the remaining defendants in O. S. 44 of 1929. It was therefore an agreement in contravention of the express provisions of O. 21, R. 16, proviso (2), and, as such, it was an agreement which cannot be enforced by any Court.

Learned counsel for the appellant has attempted to contend that his objection to execution was really an objection to the competence of the transferee decree-holder. He has referred to the cases in which it has been held that a judgment-debtor against whom a transferee decree-holder seeks execution is entitled in execution to show that the transferee decree-holder is a mere benamidar and even a mere benamidar for himself. He has, therefore, attempted to show that his objection was not that the decree had been satisfied but that the transferee decree-holder had no authority to execute it. I have already shown however that that was not the plea which he raised in the sub-Court where he devoted himself wholly to an attempt to show that his transferee had agreed with him, firstly, to execute the decree against the other judgment-debtors and secondly to enter up satisfaction of it whenever he should be called upon. I am therefore clearly of opinion that that agreement is one which no Court ought to be asked to recognise or to enforce, and therefore I think that the learned Subordinate Judge was right in rejecting the appellant's objections to execution, although I think that his decision was not based upon proper grounds. I would therefore dismiss this appeal with costs.

Mockett J.—I entirely agree. The decision in 18 M L W 453[1] has been cited to us and the observations relevant to this inquiry are to be found at pp. 463 and 464. In that particular case an assignment had been recognised and the learned Judges referring to the remarks of Lindley L. J. in (1892) 2 Q B D 724[2] pointed out that when fraud was within the knowledge of the Court it should not allow a party participating in it to benefit by it. This case is wholly unlike that case. On the face of it there was nothing wrong with those proceedings but the appellant is asking us to allow the machinery of this Court to be used for the purpose of an elaborate inquiry which will enable him to establish that he has entered into a fraudulent arrangement with the decree-holder which we are to recognise and in conformity therewith to record satisfaction of the decree. It seems to me that that is in direct conflict with the principle that the Court will not allow its processes to be used for the purpose of enforcing frauds at the hands of parties who participated in them.

C.R.K./K.S. *Appeal dismissed.*

1. ('24) 11 A I R 1924 Mad 189 : 76 I C 845 : 18 M L W 453, Srirama Rao v. Bapayya.

2. ('1892) 2 Q B D 724: 61 L J Q B 738 : 4 R 42 : 67 L T 782 : 41 W R 116 : 57 J P 213, Scott v. Brown.

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(28) A. I. R. 1941 Madras 746

LAKSHMANA RAO J.

In re Nachal — Appellant.

Criminal Appeal No. 162 and Criminal Revn. Case No. 216 of 1941, Decided on 19th March 1941, against order of Addl. Sess. Judge, Coimbatore Division, in C. C. No. 215 of 1940.

Penal Code (1860), S. 304, para. 2 and S. 323 — Accused holding her father-in-law *A* by tuft and her daughters aged ten and eight years beating *A* with stones—*A* dying next day due to congestion of brain resulting from beating with stones — No suggestion of common intention to cause death or grievous hurt—Who caused fatal injury not known — Accused held guilty only under S. 323 and not under S. 304, para. 2.

The accused who was not on good terms with her father-in-law *A*, held *A* by the tuft while her daughters aged ten and eight years assaulted him with stones. *A* was found dead the next day, the death being due to congestion of the brain as the result of beating with stones. There was no suggestion of any common intention to cause death or grievous hurt and it was not known who caused the fatal injury :

Held that the conviction of accused under S. 304, para. 2 could not be sustained and since the accused only caught the deceased by the tuft she was guilty under S. 323. [P 747 C 1]

N. Somasundaram and P. A. Kailasam — for Appellant.

A. S. Sivakaminathan for Public Prosecutor —for the Crown.

Judgment. — The accused has been convicted under S. 304 (2), Penal Code, for causing the death of her father-in-law Irula Mooppan by beating with stones and sentenced to rigorous imprisonment for five

years. She appeals against the conviction and the same was taken up by Wadsworth J. on the ground that the offence committed would be voluntarily causing hurt. The accused and Irula Mooppan were not friendly, and Irula Mooppan went to P. W. 5's house on the evening of 23rd September last with some injuries, due to beating with stones. He told P. W. 5 that the injuries were caused by the accused and her daughters aged about ten and eight years, and went to P. W. 7's house for the night. He stated so to P. W. 7 also, and went to P. W. 8's house next morning. He told P. W. 8 that he was held by the tuft by the accused and assaulted with stones by her daughters and left saying that he would report to the Village Munsif. He was found dead at the Pillayar Koil about noon, and death was due to congestion of the brain as the result of beating with stones. These facts are not disputed and the conviction of the accused under S. 304 (2), Penal Code, is unsustainable. It is not known who caused the fatal injury and the deceased told P. W. 8 that the accused was holding him by the tuft. Even otherwise, it is not suggested that there was any common intention to cause death or grievous hurt, and the accused would be guilty only under S. 323, Penal Code. The conviction of the accused is therefore altered to one under S. 323, Penal Code, and considering that she was in remand since 25th September, she is sentenced to rigorous imprisonment for the period undergone.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 747

KING J.

M. Ramanathan Chettiar (minor) and another — Petitioners

v.

PR. KM. Subramaniam Chettiar — Respondent.

Civil Revn. Petn. No. 622 of 1940, Decided on 7th April 1941, to revise order of Sub-Judge, Sivaganga, D/- 23rd February 1940.

Madras Debt Conciliation Act (11 of 1936), Ss. 9, 17 and 25—Board dismissing application under S. 9 with permission to apply again—Second application filed more than twelve months after date of first application—Board's permission to apply again is without jurisdiction — Even if permission be valid S. 17 is contravened —Order refusing stay of execution by civil Court on second application is valid.

The Debt Conciliation Board dismissed under S. 9 an application filed under the Act with permission to apply again. While the first application was pending stay of execution of a decree against the applicant was in force. The second application under the Act was made more than twelve months after the date of the first application and the applicant again applied to the civil Court for stay of execution of the same decree. But the stay was refused:

Held that the permission granted by the Board in its order of dismissal to apply again was without jurisdiction and therefore the refusal to stay execution was justified : ('40) 27 A I R 1940 Mad 31 and ('40) 27 AIR 1940 Mad 791, *Rel. on.* [P 748 C 1]

Held further that assuming the Board had jurisdiction to keep the first application pending by granting permission to apply again in the order of dismissal the provisions of S. 17 were contravened as the second application was made more than 12 months after the date of the first application and therefore the refusal to stay execution on the second application was justified. [P 748 C 1]

B. K. B. Naidu — for Petitioners.

T. L. Venkatarama Iyer — for Respondent.

Order. — This petition raises a question under S. 25, Madras Debt Conciliation Act. The facts are that the petitioner applied to the Debt Conciliation Board under the Act in February 1939. His application was allowed to remain pending for eight months and was then dismissed, the Board granting him in its order of dismissal liberty to apply again. While the first application was pending, stay of execution of a decree against the petitioner was in force. The second application was made in February 1940 and the petitioner again applied for stay of execution of the same decree. Stay was refused by the learned Subordinate Judge, and the question at issue in this revision petition is whether the learned Judge had any jurisdiction to refuse stay.

It is conceded by the learned advocate for the petitioner in his argument before me that if the application to the Board of February 1940 is to be treated as a new application in respect of the same debt, no stay can be granted. This has been laid down by Judges of this Court in (1939) 2 M L J 727[1] and in (1940) 2 M L J 283.[2] He therefore contends that in effect the application made in February 1940, having been made under the express permission granted by the Board to renew the previous application, must be treated as if it was a restoration of the previous application and therefore that the rulings which have been cited present no obstacle to his obtaining an order for stay. He has cited in his favour a case decided by Wadsworth J. in (1940) 2

1. ('40) 27 AIR 1940 Mad 31 : (1939) 2 M L J 727, In re Ellapp Chettiar.
2. ('40) 27 AIR 1940 Mad 791 : (1940) 2 M L J 283, Roopchand Merlacha v. Sha Motaji Mokanji.

M L J 283.[2] That case dealt with an application which was rejected by the Board under S. 7, as it did not comply with the requirements of Ss. 5 and 6. But as pointed out in the latter decision (1940) 2 M L J 283[2] there is a very important distinction between an application dismissed under S. 7 and an application dismissed in the ordinary course under S. 9. The rejection of an application under S. 7, it is expressly provided, shall not preclude the applicant from making a fresh application whereas there is no such provision to be found in S. 9. It does not seem to me therefore that a case which deals with the rejection of an application under S. 7 can be of any assistance to the petitioner in the present petition.

This distinction between S. 7 and S. 9 would appear to make the permission granted by the Debt Conciliation Board in dismissing the application a permission which it had no jurisdiction to grant. Even if the Board had jurisdiction to allow a petition to be suspended in this way for an unlimited period it is clear that the effect of their decision in the present case has been to contravene the provisions of S. 17. Section 17 provides that an application must be dismissed if no amicable settlement has been arrived at under S. 14 within twelve months from its date. It will be seen that if the two applications in the present case are treated as one, more than twelve months had actually elapsed from the date when the application was first made to the date when the present petition for stay of execution was put in. On the ground that the Debt Conciliation Board had no jurisdiction to extend the consideration of the application over a period of more than twelve months and also on the ground that on the merits of the case I can see no reason whatever for the granting of any order of stay to the petitioner I refuse to interfere with the decision of the learned Subordinate Judge and dismiss this petition with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 748

LAKSHMANA RAO J.

In re Shaik Mastan Sahib—Accused.

Criminal Revn. Case No. 181 and Case Referred No. 8 of 1941, Decided on 25th March 1941, referred by Sess. Judge, Guntur, D/- 10th February 1941.

Criminal P. C. (1898), Ss. 348 and 349—Sub-Magistrate finding accused guilty under S. 411, Penal Code, and liable to more severe punishment as old offender than he was competent to inflict submitting case under S. 349, Criminal P. C., to Sub-divisional Magistrate who acquitted accused — Procedure held irregular — Sub-Magistrate ought to have committed accused to sessions under S. 348, Criminal P. C. — Irregularity held could have been cured by Sub-divisional Magistrate by reference to District Magistrate under R. 97, Criminal Rules of Practice and Orders.

The Sub-Magistrate being of opinion that the accused was guilty under S. 411, Penal Code, and was liable as an old offender to receive a more severe punishment than he was competent to inflict, submitted the case under S. 349, Criminal P. C., to the Sub-divisional Magistrate who on a perusal of the record acquitted the accused:

Held that the Sub-Magistrate should have committed the accused to the Court of Session under S. 348, Criminal P. C., and the irregularity could have been cured by the Sub-Divisional Magistrate by a reference to the District Magistrate under R. 97, Criminal Rules of Practice and Orders.

[P 748 C 2]

K. Raghuramiah — for Accused.

Public Prosecutor — for the Crown.

FACTS.—The Stationary Sub-Magistrate, Guntur, tried a case under Ss. 457, 380 or 411, Penal Code. He was of opinion that the accused was guilty under S. 411, Penal Code, and as the accused was an old offender liable to receive a more severe punishment than he was competent to inflict, he submitted the case to the Sub-divisional Magistrate, Guntur, under S. 349, Criminal P. C. The Sub-divisional Magistrate on a perusal of the record acquitted the accused. The Sessions Judge was of opinion that, in the circumstances of the case, the Stationary Sub-Magistrate should have committed the accused to sessions under S. 348, Criminal P. C. The action of the Sub-Magistrate in having submitted the case to the Sub-divisional Magistrate under S. 349, Criminal P. C., was found to be irregular and the order passed by the Sub-divisional Magistrate on the reference was held to be one without jurisdiction and the case was referred to the High Court under S. 438, Criminal P. C., for such action as the High Court may deem fit.

Order.—The Sub-Magistrate should have committed the accused to the Court of Session under S. 348, Criminal P. C., and the irregularity could have been cured by the Sub-divisional Magistrate by a reference to the District Magistrate under R. 97 of the Criminal Rules of Practice and Orders. But the materials on record do not warrant further proceedings and the records will be returned.

C.R.K./G.N. *Order accordingly.*

(28) A. I. R. 1941 Madras 749

MOCKETT J.

M. S. Ayyar and Co. by C. R. V. Das and others — Petitioners

v.

G. Srinivasalu Naidu — Respondent.

Criminal Revn. Cases Nos. 1100, 1101, 1103 and 1104 and Petns. Nos. 1045, 1046, 1048 and 1049 of 1940, Decided on 24th April 1941 to revise judgment of Senior Bench of Magistrates, Coimbatore, in B. Cs. Nos. 5329, 5335, 5333 of 1939 and B. C. No. 3868 of 1940, respectively.

Madras District Municipalities Act (5 of 1920), S. 306 (28)—Construction—Act does not enable District Municipality to tax advertisements — By-law framed under S. 306 (28) for taxing advertisements is ultra vires.

Section 306 (28) empowers the municipality to prohibit altogether advertisements in public streets or parks or to regulate their exhibition, for example, as to size and position and does not give a further power to levy license fees in respect of the advertisements. There is no direct or implied provision in the Act to enable a District Municipality to levy license fees for advertisements. Consequently the by-law framed under S. 306 (28) for taxing advertisements is ultra vires. [P 749 C 2 ; P 750 C 1]

K. Bhashyam Ayyangar for R. Desikan — for Petitioners.

Public Prosecutor — for the Crown.

Order. — *Criminal R. C. No. 1100 of 1940.* — The petitioner has been convicted and fined by the Senior Bench Court of Coimbatore for advertising without a license in Coimbatore in two manners, (1) in his bullock cart and (2) by means of a board hung over his roof. Mr. Bhashyam Ayyangar argues that the conviction is without jurisdiction because no offence has been committed. That depends on a consideration of the District Municipalities Act. There is an express provision in the Madras City Municipal Act, section 129A, which was introduced by the amending Act 10 of 1936 making special provisions for taxing advertisements but the only provision with regard to advertisements to be found in the District Municipalities Act is S. 306, cl. 28. Section 306 says:

> The Council may make by-laws not inconsistent with this Act or with any other law to provide .... (28) for the prohibition and regulation of advertisements in public streets and parks.

This section is in the same words as S. 349 (28), Madras City Municipal Act, 4 of 1919. There will be found in S. 306 several provisions relating to licenses, for example cl. 10 (c) for licensing of builders and surveyors, 18 (c) for licensing and controlling of brokers, etc., and 22 (b) for the levy of fees for the use of certain burial and burning grounds. "Licenses and fees" are comprehensively dealt with in Chap. 12, which is so headed. Therein are specified a number of acts for which licenses are required and for which fees may be levied. But there is no provision there for the granting of any license or levying of fees in relation to advertisements. The learned Public Prosecutor has rested his case entirely on S. 321 which reads as follows :

> (1) Every license and permission granted under this Act or any rule or by-law made under this Act shall specify the period, if any, for which, and, restrictions, limitations and the conditions, subject to which the same is granted, and shall be signed by the executive authority. (2) Save as otherwise expressly provided in or may be prescribed under this Act, for every such license or permission, fees may be charged on such units and at such rates as may be fixed by the Municipal Council.

There is a distinction in the Act between "license" and "permission" and "regulating" as an examination of the chapter shows, for example, under S. 255 a license to use a slaughter house is required, but under S. 250 permission is required to establish a factory. I observe too that, although private markets can be regulated by by-laws under Chap. 14, S. 306 (18) (b), license fees are leviable on them under Chap. 12. Chapter 14 is headed "rules, by-laws and regulations" and Chap. 12, as I have already stated, "license and fees." The Public Prosecutor contends that under S. 306, cl. (28) the "regulation of advertisements" would include giving permission to advertise and therefore, by further implication, a power to levy license fees. But, although in the Act advertisements may be prohibited, I can find nowhere that they are prohibited or permitted only by license as in the case of all the other numerous subjects mentioned. Licensing, permitting and regulating are, in my view, distinct matters and are dealt with distinctly and differently under the Act. The intention of S. 306, cl. (28) seems to me to empower the municipality to prohibit altogether advertisements in public streets or parks or to regulate their exhibition, for example, as to size and position—no doubt a necessary provision in the interests of the appearance of the streets and parks. I do not think — indeed I think it is contrary to a general reading of the Act—that it can be implied that a further power to levy license fees in respect of the advertisements is given. But under the by-laws which are attached to the record, it is expressly provided that fees shall be levied.

"Regulate," according to the Oxford Dictionary, means "to control by rule, subject to restrictions, moderate, adapt to require-

ments." It does not seem possible to stretch this meaning to include levying fees, especially when such elaborate provision is made in other parts of the Act for this purpose with regard to other specified matters. What the true meaning and sense of "regulate" in this Act is can be derived from its use in S. 306 (2) (3B) (9) (10) A, (11) (12), (18B) and (22A). It is a general principle that any provision by which a member of the public may be taxed should be clearly stated; so should, in my view, an analogous provision by which any payment can be compelled from them. My conclusion is therefore that neither directly nor by implication is there any provision in this Act to enable a District Municipality to levy license fees for advertisements any more than in the City Municipal Act before the introduction of the amending Act of 1936 which provided especially for taxation, for advertisements. It is for the Legislature to deal with this omission if it thinks fit. The by-law therefore appears to be ultra vires, and in consequence this revision petition will be allowed, the conviction set aside and the fine, if paid, refunded.

Criminal R. C. Nos. 1101, 1103 and 1104 of 1940.—The learned Public Prosecutor agrees that my order in Criminal R. C. No. 1100 of 1940 applies to these cases, and the order will be the same.

C.R.K./G.N. *Petitions allowed.*

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(28) A. I. R. 1941 Madras 750

LEACH C. J. AND SOMAYYA J.

Kuruvella Subba Rao — Petitioner

v.

Kavi Satyanarayanamurthi and another — Respondents.

Civil Misc. Petn. No. 7312 of 1940, Decided on 16th April 1941, to issue a writ of certiorari.

(a) Madras Debt Conciliation Act (11 of 1936), S. 10 (1)—No dispute as to amount due—Omission to sign and verify statement by creditor is purely technical defect.

Where there is no dispute between the debtor and the creditor as to the amount due, the omission to sign and verify the statement filed by the creditor is purely a technical defect and it has no consequence. [P 750 C 2]

(b) Madras Debt Conciliation Act (11 of 1936), S. 10 (2) — Debtor acknowledging debts and no dispute as to amount due—Creditor given time to produce accounts not appearing and explaining his position — Order of cancellation held should not be passed.

The debtor had acknowledged the debt and a statement had been filed by the creditor which agreed with the debtor's figure. The creditor took time to produce account books but on the day fixed had not obtained them and did not appear before the Board and explain his position as to why he was not able to produce them. On this the Board passed an order of cancellation :

Held that creditor was blameworthy in not having appeared before the Board but his failure to do so gave no warrant to the Board to pass the order of cancellation. [P 751 C 1]

M. S. Ramachandra Rao — for Petitioner.

M. Appu Rao — for Respondents.

Leach C. J.—This is another example of the disregard of principles of elementary justice which Debt Conciliation Boards of this province are apt to show. The petitioner is a creditor of respondent 1 for Rs. 2871-14-9, due under a registered mortgage. Respondent 1 applied to the Debt Conciliation Board, Rajahmundry, on 15th September 1939 for a settlement of his debts. In the schedule of debts he set out the amount due to the petitioner under his mortgage. The petitioner was required to file on 16th December 1939, the statement contemplated by S. 10 (1), Debt Conciliation Act. At this time the petitioner was a defendant in a partition suit in the Court of the District Munsif, Rajahmundry, and he had been compelled to produce in the Court his account books. On 16th December 1939 the petitioner appeared before the Board and explained the situation. He then applied for 15 days time to enable him to withdraw his books from the Court. This request was granted and he was given time to 6th January 1940 to file the statement required by S. 10 (1). He was not able to withdraw the books by 6th January, but on 4th January, that is, two days before his statement was due to be filed, he presented to the Board a statement of his claim against respondent 1. This statement agreed with the statement made by respondent 1 in his petition. In other words, there was no dispute between the debtor and the creditor as to the amount due. Except that the statement filed by the petitioner was not signed and verified in the manner prescribed by the Code of Civil Procedure, it complied with the requirements of S. 10 (1). The omission to sign and verify the statement was purely a technical defect and it had no consequence as the debtor and creditor were in agreement as to the amount.

On 6th January 1940 the petitioner asked for a further period of 25 days to enable him to withdraw the books from the Court. Time was granted until 29th January. The petitioner had not obtained his books by that date and should have appeared before

the Board and explained his position, but as he did not do so the Board passed an order declaring the debt due to him to be discharged under sub-s. (2) of S. 10. It is perhaps possible to imagine a more arbitrary order than we have here, but it is difficult. The respondent had acknowledged the debt and a statement had been filed by the petitioner which agreed with the respondent's figure. For the Debt Conciliation Board to pass an order of cancellation under S. 10 (2) in these circumstances we regard as being monstrous. If the order is allowed to stand the unfortunate creditor will be deprived of all that is due to him. The petitioner is blameworthy in not having appeared before the Board on 29th January, but his failure to do so gave no warrant to the Board to pass this order of cancellation. The order of the Board will be quashed and the Board will be directed to pay the costs which we fix at Rs. 200.

C.R.K./K.S. *Order quashed.*

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(28) A. I. R. 1941 Madras 751 (1)

LAKSHMANA RAO J.

Raju and another — Petitioners

v.

Abdul Rahiman Sahib and others — Respondents.

Criminal Revn. Case No. 156 and Criminal Revn. Petn. No. 148 of 1940, Decided on 12th September 1940, to revise order of Sub-Divisional Magistrate, Namakkal, D/- 20th January 1940.

Criminal P. C. (1898), S. 145—Petition under —Order based on statements to police not on record nor proved.

Where the order passed on a petition under S. 145 was to a large extent based on statements alleged to have been made by the petitioners to the Sub-Inspector of Police which were not on record nor were the petitioners questioned about those statements :

***Held* that the order should be set aside.**

[P 751 C 1]

K. S. Jayarama Iyer and M. C. Srinivasan — for Petitioners.

N. Somasundaram — for Respondents.

Public Prosecutor — for the Crown.

Order. — The order is to a large extent based on statements alleged to have been made by the petitioners to the Sub-Inspector of Police which are not on record nor were the petitioners questioned about those statements. The order is therefore set aside and the petition under S. 145, Criminal P. C., is remanded for fresh disposal by the District Magistrate or such other Magistrate as the District Magistrate may direct.

C.R.K./K.S. *Order set aside.*

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(28) A. I. R. 1941 Madras 751 (2)

PANDRANG ROW AND KING JJ.

Kancherla Veeraswami—Appellant

v.

Paramkusam Nammayya and others — Respondents.

Appeal No. 70 of 1939, Decided on 25th March 1941, against order of Dist. Court, East Godavari at Rajahmundry, D/- 13th August 1938.

Civil P. C. (1908), O. 21, R. 93—Order setting aside execution sale appealed against — Application by auction purchaser under O. 21, R. 93 for refund of poundage and interest on purchase money already recovered by him — Limitation runs from date of appellate decree.

Where the order setting aside an execution sale is appealed against the limitation for an application under O. 21, R. 93, by the auction purchaser for the refund of poundage and interest on the purchase money (already recovered by him) runs from the date of the appellate decree : 11 All 372, *Rel. on*; ('36) 23 A I R 1936 Mad 50 (F B), *Ref.*

[P 751 C 2; P 752 C 1]

K. Kameswara Rao—for Appellant.

Pandrang Row J. — This appeal raises a question of limitation and it is unfortunate that the respondents do not appear. The Court below has held that the application for refund of poundage and interest on the purchase money is barred by limitation. The application was by the auction purchaser under O. 21, R. 93, Civil P. C., for refund of the poundage and interest on the purchase money, the actual purchase money having been recovered by him through the Court on an earlier occasion. Apparently, the lower Court was of opinion that Art. 181 applied and that the starting point of limitation was the date on which the sale was set aside by the first Court, even though the decision of the first Court setting aside the sale was carried up to the High Court in appeal by not only the auction purchaser but also by others, and the appeals were disposed of only on 6th October 1937, though the original order of the first Court setting aside the sale was on 15th November 1934. The appellate decision is reported in 47 M L W 51.[1] It is not clear that Art. 181 necessarily applies to a case of this kind and that Art. 182 will have no application. It must be remembered that Art. 181 is what may be called the residuary article because the article reads as follows :

Applications for which no period of limitation is provided elsewhere in this schedule or by S. 48, Civil P. C.

It follows therefore that if Art. 182 would apply, Art. 181 cannot. It has been held in

1. ('38) 25 A I R 1938 Mad 307 : 183 I C 33 : 47 M L W 51, Satyanandan v. Nammayya.

some cases that applications for refund in circumstances like these, where a sale is set aside by the Court are in the nature of applications for restitution or, at any rate, applications in execution. For instance, in the Full Bench decision in 42 M L W 866[2] this right of the auction purchaser to obtain a refund is described as a right to obtain a refund in execution, as distinct from a right to obtain refund by way of a separate suit (see p. 871). The view taken in 11 ALL 372[3] appears to be undoubtedly a reasonable view even if Art. 181 is considered to be the article applicable, and Art. 182 would not apply. The sale was no doubt set aside by the executing Court, but the matter having been taken up in appeal, the right to apply for a refund could not be said to have become definite or conclusive so long as the validity of the sale remained sub judice and pending decision of the appellate Court; on the other hand it seems hardly reasonable to require that the auction purchaser who has appealed and who desires to contend that the sale is valid should nevertheless be bound to file an application for refund, merely because it is possible that more than three years would be taken for the decision of the appeal. On the whole we are of opinion that the more reasonable view to take in a case of this description is to take as the starting point the date of the appellate Court's decree. If so, it follows that the application is not barred by time. The appeal is accordingly allowed and the petition is directed to be restored to file and dealt with according to law. The appellant is entitled to his costs in this Court; the costs in the Court below should be provided for in the revised order of the lower Court.

C.R.K./G.N. *Appeal allowed.*

2. ('36) 23 A I R 1936 Mad 50 : 159 I C 625 : 59 Mad 202 : 42 M L W 866 : 69 M L J 750 (F B), Macha Koundan v. Kottora Koundan.

3. ('89) 11 All 372 : 1889 AWN 113, Girdhari Lal v. Sital Prasad.

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(28) A. I. R. 1941 Madras 752

LAKSHMANA RAO J.

Thoongavadan and others — Petitioners

v.

Perumal Goundan and others — Respondents.

Criminal Revn. Case No. 240 and Criminal Revn. Petn. No. 230 of 1940, Decided on 29th October 1940, to revise order of Sub-divisional Magistrate, Namakkal, D/- 25th February 1940.

Criminal P. C. (1898), S. 147 — Scope.

Under S. 147 it is open to the Magistrate to direct that a dam or bund put up by a party should be removed; but he cannot further direct that the party should not cause any obstruction to the flow of water. [P 752 C 2]

V. T. Rangaswami Ayyangar, T. R. Ramachandran and V. Balaramayya — for Petitioners.

K. S. Jayarama Ayyar and S. Arunachalam — for Respondents.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

FACTS.—The offence complained of was that the counter-petitioners by putting up bund over the surplus weir of a tank caused obstruction to the free flow of water and thereby the water in the tank stagnated to a higher level than usual and submerged the lands belonging to the petitioners and caused loss to their crops, and that when the petitioners attempted to remove the bund the counter-petitioners threatened to beat and murder them and there was likelihood of a breach of the peace. The learned Sub-divisional Magistrate found that the respondents had caused the obstruction and there was necessity to take action under S. 147, Criminal P. C., and directed that the "counter-petitioners should not retain the bund referred to above or any obstruction to the flow of water from the tank which would cause the submersion of and damage to the crops of the petitioners." Against this judgment the Cr. R. C. was filed on the ground that the learned Sub-divisional Magistrate had no jurisdiction to interfere in this case under S. 147, Criminal P. C., and that he has erred in passing the order he did.

Order. — There is no substance in the contention that S. 147, Criminal P. C., is not applicable and it was open to the Sub-divisional Magistrate to direct the petitioners to remove the dam put up by them on the surplus weir of the tank. But the further direction that they shall not cause any obstruction to the flow of water from the tank which would cause the submersion of and damage to the crops of the opposite party is beyond the scope of S. 147, Criminal P. C., and to that extent the order of the Sub-divisional Magistrate is vacated. Otherwise this petition is dismissed.

C.R.K./K.S. *Order accordingly.*

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(28) A. I. R. 1941 Madras 753

VENKATARAMANA RAO J.

Paleti Chandrayya and others — *Appellants*

v.

Yeruva Chinnappa Reddi and others — *Respondents.*

Appeal No. 49 of 1937 and Civil Misc. Petn. No. 5091 of 1939, Decided on 5th April 1940, against appellate order of District Court, Guntur, D/- 7th December 1936.

(a) Provincial Insolvency Act (1920), S. 37 — Adjudication — Consequence of, stated—Court appointing person under S. 37 and vesting property in him — Insolvent gets no title to property by reason of annulment—Effect of vesting of property in appointee under S. 37 stated.

The legal consequence of adjudication in bankruptcy is that the ownership of the insolvent in all the property owned and possessed by him on the date of adjudication is divested from him and vested in the Official Receiver : (1874) 9 Ch A 557, *Rel. on.* [P 758 C 1]

Until the property is again revested in the insolvent, the insolvent has no title to the said property. On annulment of the adjudication, if the Court chooses to appoint a person under S. 37 and vests the property in him, the insolvent gets no title to the said property by reason of the said annulment. The property comes completely under the insolvency Court and can only be disposed of under its direction and can only be distributed equally among all the creditors whose debts have been duly proved and no one creditor has got a right to appropriate the money of the insolvent to the exclusion of other creditors. Thus, there is a statutory trust created by virtue of the order under S. 37 in favour of the creditors. Consequently, a creditor obtaining a decree against the property in the hands of the Official Receiver can have satisfaction of the decree only in accordance with the provisions of the Insolvency law : ('35) 22 A I R 1935 Mad 826 (FB) and ('35) 22 A I R 1935 Mad 835, *Rel. on.* [P 758 C 1, 2]

(b) Provincial Insolvency Act (1920), S. 37 — Court vesting property in Official Receiver under S. 37 — Subsequently, one of creditors who had proved his debt filing suit against insolvent and Official Receiver for recovery thereof and obtaining decree — Application by Official Receiver for expunging debt on which decree was obtained from schedule of creditors on ground of its being bogus and for refund of amounts recovered under that decree — High Court in appeal holding that said debt could not be expunged — Relief as to refund of amounts recovered under decree held also must be deemed to have been negatived—High Court's decision being one in insolvency held binding on creditors.

Subsequent to the vesting of property in the Official Receiver under S. 37 one of the creditors who had proved his debt filed a suit against the insolvent and the Official Receiver for the recovery of his debt and obtained a decree. There was no appeal and the decision became final. The Official Receiver then filed an application for expunging the debt, on which the decree was obtained, from the schedule of creditors on the ground of its being bogus and for refund of the amounts recovered in execution of that decree. The High Court in appeal held that the debt could not be expunged from the schedule :

Held : (1) In refusing to expunge the debt the High Court must be deemed to have refused the relief incidental thereto, namely refund of the amounts recovered in execution of the decree. [P 758 C 2]

(2) The decision of the High Court being a decision of an insolvency Court was binding on the creditors as well. [P 759 C 1]

(c) Res judicata — Principle of constructive res judicata — Applicability.

The rule of constructive res judicata can only apply to matters actually decided by the judgment and to all matters which are necessarily deemed to have been decided by that judgment. But where the relief prayed is not dependent on the adjudication of a particular matter in issue it cannot be said that that matter must be deemed to have been also decided by the judgment, especially when the judgment has been appealed against and the appellate Court (where the whole matter is set at large) confines itself only to the decision of the particular matter in issue : ('15) 2 A I R 1915 Mad 106 (FB), *Rel. on.* [P 759 C 1, 2]

(d) Provincial Insolvency Act (1920), S. 37 — Money intended for distribution among all creditors — Question whether one creditor is entitled to priority can be determined by insolvency Court only in presence of creditors — Official Receiver cannot be said to represent creditors in regard to decision on question of priority.

The question whether one creditor is entitled to appropriate the money which is intended for the distribution among all the creditors in priority to other creditors can only be adjudicated in the presence of the creditors by the Court which has jurisdiction in insolvency and the Official Receiver cannot be held to represent the creditors in regard to the decision on this question of priority. [P 759 C 2]

(e) Provincial Insolvency Act (1920), S. 37— Insolvent's assets vesting in Official Receiver under S. 37 — Execution proceedings against insolvent's assets — Official Receiver acting in belief that under S. 37 property vested in him for benefit of insolvent and as his property — Official Receiver cannot be deemed to have represented creditors in execution proceedings.

Where in the execution proceedings against the insolvent's assets after the vesting of the same in the Official Receiver under S. 37 the Official Receiver acts in the belief that he held the property vested in him for the benefit of the insolvent and as his property he cannot be deemed to have represented the creditors in the execution proceedings, and any order passed against him in those proceedings cannot be held to be an order passed in a representative capacity against him so as to bind the creditors. The order can only be said to bind the Official Receiver in his individual capacity, that is, as representing the debtor, if at all he represented him. [P 760 C 1]

(f) Provincial Insolvency Act (1920), S. 37 — Vesting order under S. 37 passed — Insolvency

Court has power to direct creditor amenable to its jurisdiction to refund any sum taken by him in excess of what he is justly entitled to—Executing Court's order that certain decree is executable against insolvent's assets does not affect insolvency Court's power over funds at its disposal.

From the date of the vesting order under S. 37 the funds of the insolvent pass completely under the disposal of the insolvency Court to be administered according to the provisions of the insolvency law, and it is competent to that Court to direct a refund of any sum of money taken away by a creditor who is amenable to its jurisdiction in excess of what he is justly entitled to. The order of an executing Court that certain decree is executable against the insolvent's assets does not, in any way, affect the power of the insolvency Court over the funds at its disposal : (1874) 9 Ch A 557 ; (1897) 1 Q B 55 ; (1814) 2 Rose 55 ; (1789-1817) 15 Ves 479 and (1862-66) 46 E R 1019, *Rel. on.* [P 761 C 1]

K. Kameswara Rao — for Appellants.

K. Kotayya and B. V. Ramanarasu — for Respondents.

Judgment. — This civil miscellaneous second appeal is from the order of the learned District Judge of Guntur confirming the order of the Additional Subordinate Judge of Guntur dismissing the petition filed by five creditors of an insolvent Thomas Reddi in I. P. No. 42 of 1923 on the file of the District Court of Guntur for the grant of certain reliefs against respondents 1 and 2 in the appeal. Respondent 1 is another creditor of the insolvent and respondent 2, P. V. S. Rao, is the special receiver, Guntur. Several questions of law were argued during the hearing of the appeal. In order to appreciate them, a statement of facts is necessary. Thomas Reddi was adjudicated insolvent on 8th January 1924. The adjudication was annulled on 7th December 1927, by reason of the insolvent failing to apply for his discharge in time. While annulling the adjudication, the District Judge of Guntur passed the following order :

I think that in the interest of the general body of creditors the property should vest in Mr. P. V. S. Rao, Official Receiver and order accordingly.

On 17th March 1928 one Yeruva Chinnappa Reddi, respondent 1 herein, as assignee of a promissory note dated 10th May 1922 executed by Thomas Reddi instituted a suit in the Court of the Subordinate Judge of Guntur for recovery of a sum of Rs. 11,466-10-0 against the Official Receiver, Guntur, and Thomas Reddi. The debt due under the said promissory note was included in the schedule of debts filed by the insolvent. Both the defendants were ex parte and the following decree was passed :

Suit decreed for the plaintiff against defendant 2 (Thomas Reddi) and his properties in the hands of defendant 1 (Official Receiver) for the suit amount, costs and interest (further interest at six per cent. per annum) as prayed for.

This decree was passed on 31st March 1928. During the pendency of the suit, Chinnappa Reddy got an order for attachment before judgment of the moneys in the hands of the Official Receiver. Within four days of the obtaining of the decree Chinnappa Reddi filed an execution petition (E. P. No. 25 of 1928) for recovery of a sum of Rs. 7415 in the hands of the Official Receiver to the credit of the estate of the insolvent. The Official Receiver opposed the application on the ground that in spite of the annulment the insolvency must be deemed to continue, that the petition for execution was incompetent and that the amount in his hands was liable to be distributed among all the creditors of Thomas Reddi. His contentions were negatived and he was directed to deposit the money into Court. Accordingly the said money was deposited into Court and was drawn by the decree-holder, Chinnappareddi. No appeal was preferred against the said order and it became final. It was incumbent on the Official Receiver to have obtained the directions of the insolvency Court before the payment of the money into the executing Court. He should have also carried the matter in appeal having regard to the form of the order passed by the District Judge in vesting the property in him. His explanation is that on legal advice he dropped further proceedings and the advice was not to prefer an appeal in view of the decision in 1926 M W N 950.[1] After drawing the said money from Court, Chinnappa Reddi filed a second execution petition (E. P. No. 42 of 1929) for attachment of certain decrees obtained by the Official Receiver against the debtors to the estate of the insolvent. The Official Receiver opposed the application urging the contentions which he raised in the prior execution petition. The learned Subordinate Judge upheld the objections of the Official Receiver and dismissed the petition. C. M. A. No. 182 of 1931 was filed against the said decision and the order of the learned Subordinate Judge was reversed on the ground that the Official Receiver was bound by the rule of res judicata by reason of the order in the prior E. P. No. 25 of 1928 and the decree-holder was competent to proceed with the execution. One of the points in controversy was as to the effect and scope of the said decision which was delivered by the learned Judges Curgenven and King, and

1. ('26) 1926 M W N 950 : 98 I C 1060, Arunagiri Mudaliar v. Official Receiver of North Arcot.

reported in 59 Mad 62.[2] The Official Receiver seems to have learnt subsequently that the said Chinnappa Reddi with a view to help Thomas Reddi and as benamidar for him got an assignment of certain debts subsequent to the date of the annulment from various creditors who proved their debts in insolvency, and they were fictitious. He therefore sought to expunge the said debts from the schedule of the creditors filed by Thomas Reddi in insolvency and get appropriate reliefs in consequence thereof. He filed an application (O. P. No. 11 of 1932) in the said I. P. No. 42 of 1923 praying for the following reliefs :

(1) To order the entries relating to the respondent to be expunged from the schedule of creditors and (2) to direct the respondent to refund the sum of Rs. 7415 improperly received by him; or in the alternative to declare that in any case the respondent is not entitled to participate in the assets now realised and available for distribution or in any future distribution unless and until all the other creditors are paid an equal amount of percentage as the respondent has already received, and order necessary amendments to be made in the schedule.

It will be seen from the allegations in the petition that the Official Receiver alleged that the debt which formed the subject matter of the decree in O. S. No. 19 of 1928 was a bogus debt and that the other debts assigned to the respondent were also of a similar nature cooked up in the interests of the insolvent—and that consequently the respondent was not a true and bona fide creditor entitled to any dividend; and, in the alternative, alleged that even supposing that the debts assigned to the respondent were all true and the assignments were all real and bona fide, the respondent having already received a sum of Rs. 7415 far above any dividend that he could get, it was not just and equitable that Chinnappa Reddy should be allowed to participate in the assets available for distribution which would give the other creditors a dividend of only about 15 per cent. The basis on which various reliefs were asked will be clear from the allegations above referred to. The Official Receiver not only asked for a refund of Rs. 7415 but also wanted an injunction that Chinnappa Reddy should not participate in the assets which he had then in his hands and in effect that he should not be allowed to take away any more moneys for appropriation of his decree debt in O. S. No. 19 of 1928. On the date of the said petition, E. P. No. 42 of 1929 was pending and no amount was paid into the execution Court nor drawn by Chinnappa Reddy. The learned District Judge Mr. Chandrasekhara Iyer was of the view that as the Official Receiver was a party to the decree in O. S. No. 19 of 1928 he must be held to be bound by it and it was therefore not open to him to obtain the relief which he sought, namely, to expunge the debt which became the subject-matter of the said decree and in regard to the prayer for the refund of Rs. 7415 the Official Receiver having submitted to the attachment and paid over the moneys it was not open to him to seek a refund. His final conclusion was as follows : "I hold that this petition must fail on the preliminary ground mentioned by me above." He did not deal with the other reliefs sought in the petition. Against this order C. M. A. No. 21 of 1934 was preferred to the High Court. It was heard by Stone and Pandrang Row JJ., and their decision is reported in 69 M L J 839.[3] The learned Judges were of opinion that in regard to the debt which ended in a decree it may be that the matter was barred by res judicata, but the learned District Judge was wrong in dismissing the petition. They observed as follows :

The debts shown in the schedule as owed to the respondent are numerous. One of those debts has after annulment been the subject-matter of a suit to which the receiver was made a party and to which the insolvent was the principal defendant. That suit ended in a decree giving to the plaintiffs the right to attach the assets of the insolvent in the hands of the receiver. Having that in mind the learned District Judge has treated it as a matter of res judicata that all the debts and not merely the subject-matter of that suit, were owing. He has not gone at all into the question whether the other debts were not true debts. It will therefore have to go back for a determination whether the debts other than the debts the subject-matter of the suit should or should not be expunged . . . . . Remanded accordingly for disposal on the merits as to the debts other than the debts the subject-matter of the suit O. S. No. 19 of 1928.

One of the points in controversy raised in this appeal is as to the scope and effect of this decision. This order was passed on 28th August 1935. A few days before the order in this appeal was pronounced five creditors of the insolvent presented the application out of which this second appeal arises for the following reliefs :

(a) To remove respondent 2 from the estate vested in him on 7th December 1927 under S. 37, Provincial Insolvency Act, and vest the same in some fit and proper person with directions to complete the administration with the least possible delay; (b) for a declaration that the decree obtained by respondent 1 against respondents 2 and 3 in O. S. No. 19 of

2. ('35) 22 A I R 1935 Mad 835 : 157 I C 917 : 59 Mad 62 : 69 M L J 196, Chinnappareddi v. Official Receiver, Guntur.

3. ('36) 23 AIR 1936 Mad 125 : 160 I C 205 : 69 M L J 839, Srinivasa Rao v. Chinnappa Reddi.

1928 on the file of the Sub-Court, Guntur, is a nullity and that it is not binding on the property vested in respondent 2 under S. 37, Provincial Insolvency Act; (c) that the E. Ps. filed in that suit O. S. No. 19 of 1928 as E. P. Nos. 25 of 1928 and 42 of 1929 are incompetent in so far as they seek to affect such properties as aforesaid; (d) to direct respondent 1 to hand over the amount of Rs. 7415 with interest thereon at 9 per cent. from 11th August 1928 upto the date of payment to some person authorised by the Court for distribution among the creditors; (e) for an injunction restraining respondent 1 not to proceed with his E. P. No. 42 of 1929 on the file of the Sub-Court, Guntur, or with any other proceedings in execution of O. S. No. 19 of 1928 on the file of the Sub-Court, Guntur; (f) for directing respondent 2 to pay over to the person to be appointed by the Court in his place all moneys now with him and all the papers, documents etc., and the decrees and debt bonds taken by him; (g) in case the amount of Rs. 7415 cannot be recovered from respondent 1 in accordance with the orders of this Court to direct respondent 2 to pay Rs. 7415 or any portion thereof which amount cannot be recovered from respondent 1.

The learned Subordinate Judge dismissed the petition as in his opinion the matters urged must be decided in a regular suit. During the course of his order after referring to the various proceedings already had, he stated thus :

In view of these conditions and events I hold there is much force in the contention of the respondent and that it would be more satisfactory if a regularly framed suit be filed for setting aside the decree if there were grounds enough for the same. . . . Further, as pointed out by the learned vakil for the respondent, the payment of money already made to respondent 1 has not been set aside and unless the payment made is set aside and their Lordships stated in Ex. 5 that the Court of execution had jurisdiction enough to pass orders in execution, it cannot be that by virtue of a mere petition under S. 4 the petitioner should be entitled to get an order for refund of the money. The creditors would be perfectly entitled to file a regular suit, there being also a question germane to the matter whether they should file a suit representing the other body of creditors or not. Even if they should impugn the conduct of the Official Receiver in the suit on the ground of negligence, that is also a matter which they must establish in a suit and they would be entitled to do so : 70 M L J 90.[4] The respondent's vakil is also justified in contending that the orders passed by the High Court in E. P. No. 25 of 1928 and in C. M. A. No. 182 of 1931 operate as res judicata.

Against this order an appeal was preferred to the District Court and the learned District Judge was of the opinion that it was not necessary to refer the party to a regular suit as all the reliefs sought in the petition were concluded by orders in prior proceedings. He gave the following reason for his conclusion :

I think, however, that so far as the substantial prayers in this petition are concerned, namely, prayers Nos. 2, 3 and 4, the order of this Court in O. P. No. 11 of 1932 and the order of the High Court in the appeal therefrom, that is Exs. 6 and 7, operate as res judicata. O. P. No. 11 of 1932, as I have already stated, was a petition by the appointee, viz., the present second counter-petitioner with the following prayers : (1) to expunge from the schedule of creditors the entries relating to Chinnappa Reddy, that is, the present first counter-petitioner and (2) to direct him to refund Rs. 7415 improperly received by him. In his order, Ex. 6 my learned predecessor dismissed that petition holding that the decree of the Sub-Court cannot be got rid of nor the moneys paid thereunder recovered by means of that O. P. So far as these findings are concerned, the order of the High Court Ex. 7 has not reversed them. The High Court remanded that O. P. No. 11 of 1932 for determination of certain other debts which were sought to be expunged by that O. P. It follows therefore that so far as the expunging of the decree and the refunding of Rupees 7415 realised by the first counter-petitioner under that decree are concerned, the final order of the High Court Ex. 7 is conclusive. It operates as res judicata because the appointee, respondent 2 must be deemed to have filed O. P. No. 11 of 1932 in his capacity as the representative of the general body of creditors. The Full Bench ruling in A I R 1935 Mad 826[5] is authority for the position that for certain purposes the insolvency proceedings continue even after annulment.

He did not deal with the other prayers in the petition but however dismissed the appeal. It is against this decision the above civil miscellaneous second appeal has been preferred. The order of the learned District Judge was passed on 7th December 1936 and the present appeal was filed on 16th March 1937. Subsequent to the filing of this appeal respondent 1 drew a sum of Rs. 3928-5-10 from Court. It is necessary to explain the circumstances under which the said sum was so drawn. Subsequent to the date of the decision in 59 Mad 62[2] the decree-holder seems to have amended his petition (E. P. No. 42 of 1929) by also asking for an attachment of any moneys collected since the date of the filing of the petition and the attachment was ordered. Before the learned Subordinate Judge referred the parties to a regular suit by his order dated 4th March 1936, respondent 1 made an application to him requesting that the amount which he had attached might be paid over to him on his furnishing security of immovable property to the satisfaction of the Court but that application came for disposal after 4th March 1936 and the learned Subordinate Judge accordingly passed the following order on 12th March 1936 :

The respondents creditors are given time till the reopening of this Court to file an appeal against the order of the additional Subordinate Judge dis-

4. ('36) 23 AIR 1936 Mad 161 : 161 I C 723 : 59 Mad 770 : 70 M L J 90, Rama Vilas Nidhi Ltd. v. Pera Naicken.

5. ('35) 22 AIR 1935 Mad 826 : 158 I C 1060 : 58 Mad 908 : 69 M L J 364 (FB), Veeraya v. Official Receiver, Guntur.

missing their petition or to file an original suit as suggested in the order. Otherwise a cheque will be issued to the petitioner upon his furnishing security. Call on 23rd June 1936.

There was an appeal against the order of the learned Subordinate Judge referring the matter to a regular suit as aforesaid. While dismissing the appeal the learned District Judge passed the following order:

This is a sort of application for attachment before judgment. I have heard the C. M. A. itself. I do not think this is a fit case for directing respondent 1 to furnish security for the amount already taken by him. With regard to the amount that he might hereafter take respondent 1 should not be paid any unless he gives security to the satisfaction of the lower Court. Order accordingly.

What the learned Judge was referring to as the amount already taken by respondent 1 was the amount of Rs. 7000 drawn by him in pursuance of the order on E. P. No. 25 of 1928. The amount in respect of which the learned Judge was directing to give security was the amount which was claimed in pursuance of the prayer made in E. P. No. 42 of 1929. It will be noticed from this order that though the learned Judge dismissed the appeal of the creditors, still he directed security to be given in respect of the amount claimed in E. P. No. 42 of 1929. It may be that the learned District Judge wanted security to be given because an appeal might be preferred to the High Court and until the disposal of the appeal there should be security or the matter may have to be disposed of by Court in the exercise of its jurisdiction in insolvency. Anyhow, the order clearly indicates that the applicant can only withdraw the money on his furnishing security. After the learned District Judge passed this order, the original petition for the withdrawal of the money which was adjourned by the learned Subordinate Judge by his order dated 12th March 1936 seemed to have been ultimately disposed of by an order dated 21st September 1936 in and by which the Subordinate Judge who was then presiding over the Court directed the issue of a cheque to the petitioner. But the amount could only be drawn on security because the order which governs the parties was the order of the District Court passed on 7th December 1936. An application was presented on behalf of the creditors to the Sub-Judge inviting his attention to the order dated 7th December 1936. In spite of it, the learned Subordinate Judge would not accede to the request of the creditors to move even the District Court nor to direct security being taken. He passed the following order on 21st September 1937:

Application dated 11th December 1935 under S. 161 and R. 163 of the C. R. P. requesting to order payment of the money due to the petitioner under the decree on furnishing immovable property security. This application coming on this day before me in the presence of . . . this Court doth order and decree that a cheque for Rs. 3928-5-10 be issued in favour of Mr. V. Krishna Sastri, pleader for plaintiff decree-holder. No order as to costs.

On the very next day, the creditors moved the District Court to rescind this order. It appears from a letter dated 22nd September 1937 addressed by the vakil for the petitioner to the vakil for respondent 1 that he mentioned to the Sub-Court at 11-20 A. M. that he would move the District Court for orders to stop the issue of a cheque and that one of the vakils for the respondent was present in Court at 12-30 P. M. An order was passed by the District Court to the following effect: "The Sub-Judge is requested to stop the issue of the cheque for ten days." In spite of it, the cheque was issued by the learned Subordinate Judge and a letter was received by the advocate for the creditors that the cheque was duly cashed at 12-40 P. M. and the amount was paid over to the party immediately. I cannot help remarking that the action of the learned Subordinate Judge in issuing the the cheque was highly arbitrary and calls for a serious comment. It seems to me that respondent 1 and his advocates also acted improperly in withdrawing the money. However the money was drawn and Mr. Kameswara Rao has put in an application before this Court that the prayer No. (e) may be amended or a prayer may be added that respondent 1 be directed to refund the moneys which he has drawn from Court in pursuance of the order dated 21st September 1937 and I give him leave accordingly to amend the said petition by adding the necessary prayer.

On these facts the questions which arise for decision are (1) whether all or any of the reliefs are barred by the decision in O. P. No. 11 of 1932 and the order passed by the High Court on appeal therefrom; 69 M L J 839,[3] whether all or any of the reliefs are barred by the decision in 59 Mad 62[2] and 69 M L J 839,[3] whether the insolvency Court can call upon respondent 1 to refund the moneys which he has drawn from Court in execution of his decree and if so, what is the sum he is bound to refund. Before dealing with each of these questions, it is necessary to note the exact scope of the order passed by the learned District Judge under S. 37, Provincial Insolvency Act. The

legal consequence of adjudication in bankruptcy is that the ownership of the insolvent in all the property owned and possessed by him on the date of adjudication is divested from him and vested in the Official Receiver. As observed by Mellish L. J. in (1874) 9 Ch A 557[6] at p. 560:

> In bankruptcy, the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or his assignees.

So until the property is again revested in the insolvent, the insolvent has no title to the said property. On annulment of the adjudication, S. 37 provides that the property may revest in the insolvent provided the Court does not vest the property in any person whom it appoints. Therefore, if the Court chooses to appoint a person and vests the property in him, the insolvent gets no title to the said property by reason of the said annulment. The effect of such vesting was fully considered in a decision of the Full Bench reported in 58 Mad 908[5] at p. 925. King J. who delivered the judgment on behalf of the Full Bench explained the scope of the said decision in 59 Mad 62[2] at page 65 thus:

> It was there held that when the property of an insolvent is vested in the Official Receiver or any other appointee under S. 37, it is the insolvency Court which retains control of it and the insolvency Court must direct its disposal in the interests of the general body of creditors.

As regards the powers of the appointee, they were thus stated in 58 Mad 908[5]:

> He has only such powers as are necessarily implied by the vesting order which are . . . . . to carry out the directions of the Court, and those directions . . . . . should, so far as the realization and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act.

It is thus clear that the property comes completely under the insolvency Court and can only be disposed of under its direction. It is also clear that the property can only be distributed equally among all the creditors whose debts have been duly proved and no one creditor has got a right to appropriate the money of the insolvent to the exclusion of other creditors. The order which was passed in this case under S. 37 is clear; that is, that the property was vested in the Official Receiver in the interests of the general body of creditors. Thus, there is a statutory trust created by virtue of the order under S. 37 in favour of the creditors. When respondent 1 obtained the decree in O. S. No. 19 of 1928 he was himself one of the creditors entitled only to participate in a rateable distribution of the property vested in the Official Receiver. The decree which he obtained, namely, that he could recover the amount from the property in the hands of the Official Receiver can only mean that he could have satisfaction of the decree from the moneys in the hands of the Official Receiver in accordance with the provisions of the insolvency law. When E. P. No. 25 of 1928 was filed, the Official Receiver very properly opposed the application. As pointed out by King J. in 59 Mad 62,[2] the order of the learned Subordinate Judge directing an attachment of the moneys and the payment thereout to respondent 1 is wrong. The view taken in 59 Mad 62[2] is that the order passed in E. P. No. 25 of 1928 operates as res judicata. Subsequent to the date of the said decision, the Official Receiver filed O. P. No. 11 of 1928 in I. P. No. 42 of 1923 for a declaration that the debt on which the decree was obtained in O. S. No. 19 of 1928 was a bogus one and should be expunged from the schedule of creditors by the insolvent and for a refund of the said sum of Rs. 7415 drawn by him in pursuance of the order in E. P. No. 25 of 1928. The learned District Judge, Mr. Chandrasekhara Ayyar, declined to expunge it on the ground that the Official Receiver was a party to the said decree and it was not open to him to go behind it. In regard to the refund of Rs. 7415, he declined to order the refund on the ground that it was the duty of the Official Receiver to have raised an objection and to have preferred a claim on that finding and that he submitted to the judgment and handed over the moneys and that he cannot be heard to say that he was wrong in doing so and that he was not well acquainted with his rights.

It is unnecessary for me to consider the correctness or otherwise of this order because this order was made the subject of appeal to this Court and the learned Judges, Stone and Pandrang Row JJ. who heard the appeal came to the conclusion that the said debt could not be expunged from the schedule. There is thus a decision by the insolvency Court that the said debt could not be expunged and, therefore, the relief which has been prayed for as incidental thereto must also be deemed to have been negatived by the insolvency Court, that is the order directing the refund of Rs. 7415. The decision of the learned District Judge in this case so far as he observes that the decree of the Sub-Court in O. S. No. 19 of 1928 cannot be got rid of nor the moneys paid there-

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6. (1874) 9 Ch A 557 : 43 L J Ch 699 : 31 L T 5 : 22 W R 810, In re Oriental Inland Steam Co., Ex parte Scinde Ry. Co.

under recovered, must be held to be binding on the creditors, being thus an order passed in Court in insolvency having power to make orders regarding the disposal of the property vested in the Official Receiver under S. 37 of the Act. The appeal must therefore fail in so far as the petition seeks a refund of the sum of Rs. 7415.

The next question is, is the relief in respect of the sum drawn in pursuance of E. P. No. 42 of 1929 barred either by the decision reported in 59 Mad 62[2] or the decision of Stone and Pandrang Row JJ. reported in 69 M L J 839.[3] So far as the scope of the latter decision is concerned, the view taken by the learned District Judge in this case is wrong. Mr. Chandrasekhara Ayyar in his order did not deal with and dispose of the prayer in regard to E. P. No. 42 of 1923, and he omitted to do so. He also failed to notice that the relief in regard to the moneys attached in pursuance of that E. P. was a relief independent of the reliefs prayed in regard to the refund of Rs. 7415. The relief was not prayed as one to be granted in consequence of or incidental to the expunging of the debt in O. S. No. 19 of 1928; it was put upon quite a distinct basis as stated in sub-cl. (h) of para. 3 of the said petition which has already been extracted. The learned Judges, Stone and Pandrang Row JJ. also did not deal with this matter but confined themselves solely to the question of the expunging of the debt which was the subject-matter of O. S. No. 19 of 1928. This relief remained unaffected by the decisions of Mr. Chandrasekhara Ayyar or Stone and Pandrang Row JJ. Mr. Konda Kotayya sought to argue that by virtue of the rule of constructive res judicata the appellants' right must be held to be barred. I am unable to appreciate this contention. The rule of constructive res judicata can only apply to matters actually decided by the judgment and to all matters which are necessarily deemed to have been decided by that judgment. Seshagiri Ayyar J. in 39 Mad 1202[7] at p. 1206, quotes the following passage in Bigelow on Estoppel, which, in my opinion, correctly sets out the doctrine of constructive res judicata :

> A former judgment or verdict . . . is conclusive between the parties to contested causes . . . of all necessary inferences arising from it as well as of the matters actually in issue.

But where the relief prayed is not dependent on the adjudication of a particular matter in issue, by no conceivable reason it could be said that that matter must be deemed to have been also decided by the judgment. Mr. Konda Kotayya argued that as Mr. Chandrasekhara Ayyar dismissed the petition he must be deemed to have declined the relief in respect of the prayer concerning E. P. No. 42 of 1929. But his judgment was appealed against and the whole matter was set at large and the appellate judgment confined itself only to the decision of a particular matter in issue, i. e., the expunging of debts and did not deal with other matters arising in the petition. Therefore, any finality that might be constructively implied by the decision of Mr. Chandrasekhara Ayyar was taken away by the appeal. The next question is whether the relief is barred by res judicata by reason of the decision in 59 Mad 62.[2] All that the said case decided was that the decree is executable by reason of the prior decision in E. P. No. 25 of 1928. It seems to me that for more than one reason the power of the insolvency Court to call upon the first respondent to refund the money which he was not entitled to receive or the right of the creditors to request the Insolvency Court to make such an order remains unaffected by the said judgment. In the first place, the question whether one creditor is entitled to appropriate the money which is intended for the distribution among all the creditors in priority to other creditors can only be adjudicated in the presence of the creditors by the Court which has jurisdiction in Insolvency and the Official Receiver cannot be held to represent the creditors in regard to the decision on this question of priority. Further, the order of an executing Court that the decree is executable does not, in any way, affect the power of the Insolvency Court over the fund at its disposal.

The view that is strongly pressed upon me by Mr. Konda Kotayya is that in 59 Mad 62,[2] the learned Judges took the view that an executing Court has jurisdiction to make an order that the property in the hands of the Official Receiver is liable to be attached and therefore it is no longer open to the Official Receiver to question the propriety of that order. But that decision does not say that any dealing by the Official Receiver of the said fund without the orders of the insolvency Court can be held to be binding upon the Court or the creditors. To define the operation of the rule of res judicata laid down in 59 Mad 62[2] the position of the Official Receiver in E. P. No. 25 of 1928 must be clearly understood.

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7. ('15) 2 A I R 1915 Mad 106 : 26 I C 817 : 39 Mad 1202 : 27 M L J 529 (F B), Muthammal v. Secretary of State.

When the order in E. P. No. 25 of 1928 was passed, the view taken in 1926 M W N 950[1] was that an appointee under S. 37, Provincial Insolvency Act, held the property vested in him for the benefit of the insolvent and as his property. The Official Receiver acted in the belief that this view of the law was correct. He therefore could not have represented and did not represent the creditors. By no conceivable reason could the order passed against him in the said execution petition be held to be an order passed in a representative capacity against him so as to bind the creditors. The order could only be said to bind the Official Receiver in his individual capacity, that is, as representing the debtor, if at all he represented him. The question therefore is, what is the power of an insolvency Court to direct a creditor to refund a sum of money which he has received in excess of what he would be justly entitled to otherwise than through the process of an insolvency Court? The property of the insolvent is vested in an Official Receiver or trustee in bankruptcy in trust for the general body of creditors for an equal distribution among them. No creditor is entitled to seize any portion of the said property and appropriate it to the satisfaction of his debt otherwise than through an order of the insolvency Court. In (1874) 9 Ch A 557[6] at page 560 a similar question arose in the winding up of a company. The Oriental Inland Steam Company, was a company which had its chief office in London and carried on business in India. On 8th November 1867, the company was ordered to be wound up in London and on 23rd May 1867 before the order of winding up, the Scinde Company which carried also business in England obtained judgment against the Oriental Inland Steam Company for a large sum of money and after the order of winding up they proved their debt in liquidation on 12th March 1868. On 28th January 1869 the Scinde Company in execution of their judgment attached certain property in India and realised a considerable sum of money. The question was whether the Scinde Company was entitled to appropriate it in satisfaction of their debt. It was held they could not. James L. J. during the course of the judgment made the following observations :

> The English Act of Parliament has enacted that in the case of a winding up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; and being so, it has ceased to be liable to be seized by the execution creditors of the company . . . . . In this particular case there is no such difficulty. There were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. One creditor has by means of execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one cestui que trust getting possession of the trust property after the property had been affected with notice of the trust. If so, that cestui que trust must bring it in for distribution among the other cestui que trust. So I too am of opinion that these creditors cannot get any priority over their fellow creditors by reason of their having got possession of the assets in this way. The assets must be distributed in England upon the footing of equality.

No doubt the decision related to foreign assets of a company but the principle was equally applied in the case of foreign assets of an insolvent : *vide* (1897) 1 Q B 55[8] at p. 63. Though the decisions in these cases related to foreign assets and judgments were obtained against a company or insolvent without the official liquidator or trustee in bankruptcy being a party, still the principle underlying those cases is one of general application, namely, that if one cestui que trust gets possession of the trust property after the property had been affected with notice of the trust, that cestui que trust must bring it in for distribution among the other cestui que trust. In England, the power of a Court of bankruptcy to recall dividends paid to creditors whose debts are barred by limitation or paid to them on an erroneous principle of law was never doubted : *see* (1814) 2 Rose 55;[9] (1789-1817) 15 Ves 479=33 E R 836;[10] 46 E R 1019.[11] This power to refund is based on the principle laid down in (1874) 9 Ch A 557[6] already adverted to. The property is vested in the Official Receiver in trust for the general body of creditors, that is, the property has to be shared by the creditors rateably in proportion to the amount of one's debt. So every creditor must be deemed to be affected with a notice of the trust. Where a cestui que trust with notice of the said trust receives more money than he is entitled to, he must hold the said money subject to the trust impressed in favour of the other creditors. He is bound as much to discharge the said

8. (1897) 1 Q B 55, Minna Craig Steamship Co. and James Laing v. Chartered Mercantile Bank of India London and China.
9. (1814) 2 Rose 55, Ex parte Burn; In the matter of Moulson.
10. (1789-1817) 15 Ves 479: 33 E R 836, Ex parte Dwedney.
11. (1862-66) 46 E R 1019, Ex parte Lubbock.

trust as the Official Receiver. When an insolvency Court makes an order calling upon him to refund, it was only to compel him to perform the trust which he was bound to perform.

The question therefore is, is not the same principle applicable where a property is vested in an appointee under S. 37, Provincial Insolvency Act? As already stated, the order is specific. The property was vested in the Official Receiver in the interest of the general body of creditors. The moment an order of adjudication takes place the insolvent is divested of his ownership and his property vests in the Official Receiver and the moment an annulment takes place the property which was vested in the Official Receiver is vested in the appointee under S. 37. It can, in no sense, be called the property of the insolvent though that property is available for distribution among his creditors. Viewed in this way it cannot be denied that by reason of the vesting order under S. 37 every creditor was affected with notice of the trust in regard to the property vested in the Official Receiver. The fact therefore that the Official Receiver as the appointee under S. 37 was compelled to pay the money in execution of a decree of a civil Court not being a Court exercising jurisdiction in insolvency can, in no way, affect the application of this principle. Therefore, from the date of the vesting order under S. 37, the fund was completely under the disposal of the insolvency Court to be administered according to the provisions of the insolvency law, and it is competent to that Court to direct a refund of any sum of money taken away by a creditor who is amenable to its jurisdiction in excess of what he is justly entitled to. Respondent 1 himself submitted to the jurisdiction of the insolvency Court and in O. P. No. 121 of 1931 wanted a dividend to be given to him even in respect of the debt in question. Strictly speaking, he can be directed to refund all the sums he has received including the sum of Rs. 7415 but in respect of that sum, as already pointed out by me, there has been an order of the Insolvency Court which entitles him to retain that sum of money and it has become final as between all parties. In regard to the sum which he has received since, he has no right to retain it. I am therefore of the opinion that the decision in 59 Mad 62[2] does not debar the appellants in this case from seeking the relief which they seek in this case, that is, to request the Court to call upon respondent 1 to refund the moneys which he has received in pursuance of the order of the District Court dated 21st September 1937 and drawn by him on the cheque issued in his favour dated 22nd September 1937. I therefore direct him to pay the said sum of money, namely Rs. 3928.5.10 into Court to the credit of E. P. No. 42 of 1929 with interest at 6 per cent. per annum from the date of receipt which sum when paid will be distributed among all the creditors. In the result, the appeal in so far as the relief sought in respect of the sum of Rs. 7415 is concerned is dismissed but in so far as the relief sought in respect of E. P. No. 42 of 1929 is concerned is allowed. I direct each party to bear his own costs both here and in the Court below. Leave to appeal refused.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 761

LAKSHMANA RAO J.

In re Muthuswami Udayan —

Petitioner.

Criminal Revn. Case No. 1111 and Petn. No. 1055 of 1940, Decided on 13th March 1941, to revise order of Sess. Judge, North Arcot Division at Vellore, D/- 12th November 1940.

Penal Code (1860), S. 409 — Village Munsif collecting certain sums on 15th March and 17th April 1937 and remitting same to treasury on 21st May and 24th April 1937 respectively before any complaint was made against him—Retention of amounts in interval held did not by itself justify conviction under S. 409.

The village Munsif collected certain amounts on 15th March 1937 and 17th April 1937 and remitted the same to the treasury on 21st May and 24th April 1937 respectively before any complaint was made against him :

Held that the retention of the amounts in the interval did not by itself justify the conviction under S. 409. [P 761 C 2]

V. T. Rangawami Ayyangar — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The petitioner was the Village Munsif of Chetput and he collected Rs. 2-7-0 from P. W. 2 on 15th March 1937 and one rupee from P. W. 3 on 17th April 1937. The amounts were remitted to the treasury on 21st May and 24th April 1937 respectively before any complaint was received and retention of the amount in the interval would not by itself justify the conviction under S. 409, Penal Code. The conviction of the petitioner under S. 409, Penal Code, is therefore set aside and the fine if levied will be refunded.

C.R.K./G.N. *Conviction set aside.*

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(28) A. I. R. 1941 Madras 762 (1)

GENTLE J.

Thimmappa Chettiar — *Appellant*

v.

Thangavelu Chetty and another — *Respondents.*

Second Appeal No. 693 of 1938, Decided on 15th April 1941, against decree of Dist. Court, South Arcot, in A. S. No. 221 of 1936.

Costs—Assignee and assignor of decree both contesting appeal against decree by defendant—Appeal allowed—Assignee is liable for costs not only of appeal but also of trial Court.

Where an appeal by the defendant against the decree passed against him is contested both by the assignor and the assignee of the decree, the assignee is liable to pay to the successful defendant not only the costs of the appeal but also of the trial Court : 20 Bom 167, *Rel. on.* [P 762 C 2]

K. V. Ramachandra Iyer and S. Thayagaraja Ayyar — for Appellant.

S. Venkataraman — for Respondents.

Judgment. — The plaintiff in the suit obtained a decree against the defendant and which he assigned to the appellant to whom he was indebted in some sums of money. The appellant was to execute the decree and give credit to the plaintiff in respect of any fruits he obtained from execution. After the assignment the defendant appealed against the decree which had been passed against him. The appellant as the assignee-decree-holder was made a party to the appeal and appeared together with the plaintiff by learned counsel. The defendant's appeal succeeded and in his judgment the learned District Judge directed that the appellant should pay the costs of the appeal and also the costs of the trial Court.

It is against the order for costs against the appellant that he files this appeal. It is contended that as the appellant appeared together with the plaintiff, no order for costs should be passed against him and further as he was not interested in the suit until after the decree, he should not be ordered to pay the costs of the trial. It is conceded that the counsel on behalf of the appellant as well as on behalf of the plaintiff argued the appeal and contended that the decree should stand and should not be vacated. The appellant did everything that he could to obtain the dismissal of the appeal by the defendant and to assert the correctness of the decree which at the time of the hearing of the appeal had been assigned in his favour. In my view, the order of the District Judge was correct and that the appellant should be directed to pay the costs both of the appeal before the learned District Judge and of the trial Court. In 20 Bom 167[1] in the course of the judgment at page 171, the view is expressed that, an assignee of a claim in the suit who in view of his assignment is made a party to the suit should be made liable for costs. I respectfully agree with the observation in that case. The result is that this appeal is dismissed with costs of respondent 1. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

1. ('96) 20 Bom 167, Ranji Morarji v. J. E. Ellis and the Standard Oil Co. of New York.

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(28) A. I. R. 1941 Madras 762 (2)

LAKSHMANA RAO J.

Valliammai Ammal — *Petitioner*

v.

Dharmalinga Muthirian— *Respondent.*

Criminal Revn. Case No. 59 and Petn. No. 58 of 1941, Decided on 9th April 1941, to revise judgment of Joint Magistrate, Karur, in M. C. No. 50 of 1940.

Criminal P. C. (1898), S. 488 — Petition by wife for maintenance—Husband's indebtedness is no ground for dismissing it.

The husband's indebtedness is no ground for dismissing the wife's application for maintenance under S. 488. [P 762 C 2]

T. R. Srinvasa — for Petitioner.

K. Aravamudha Ayyangar — for Respondent.

K. Venkataraghavachariar for Public Prosecutor — for the Crown.

Order.—The petitioner and the counter-petitioner were living together till 1930 and the recitals in Ex. 2 the compromise of 1927 are irrelevant. Further, the plea of adultery was belated and as observed by the Joint Magistrate the evidence is worthless. The petitioner was not even questioned and the notice issued by the petitioner in 1937 for her maintenance was refused. No reply was sent to the notice issued in 1939 and the claim for maintenance is irresistible. The indebtedness of the counter-petitioner is no ground for dismissing the petition and the order of the Joint Magistrate cannot be sustained. It is, therefore, set aside and the petition is remanded to him for awarding the appropriate maintenance after taking further evidence on the point if desired.

C.R.K./G.N. *Order set aside.*

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(28) A. I. R. 1941 Madras 763

BURN AND HAPPELL JJ.

In re Chitravelu Thevar and others — *Accused.*

Reference No. 18 of 1940, Decided on 18th February 1941; reference by Asst. Sess. Judge, Ramnad Division at Devakottai, in C. C. No. 130 of 1940.

(a) Criminal P. C. (1898), Ss. 289 (2) and 297 — Eight persons tried by jury for offence under S. 395, Penal Code — Accused 1 and 3 pattadars holding ryoti lands under zamindar — Estate authorities distraining cattle of accused 1 and 3 for recovering arrears of rent—Accused 1 and 3 along with others forcibly rescuing cattle and inflicting injuries on estate servant in that process — No proof of exchange of muchilika between zamindar and accused 1 and 3 or of continuance of valid patta — Arrears of more than one fasli attempted to be recovered by single distraint — Distraint being wholly illegal no offence of theft or dacoity held committed — On facts Judge held ought to have directed jury under S. 289 (2), Criminal P. C., to return verdict of not guilty — It was for Judge and not jury to find whether distraint was valid or not, whether cattle were illegally taken away and whether accused acted dishonestly.

Eight persons were put up for trial by jury for an offence under S. 395, Penal Code, in the Sessions Court. Two of them, accused 1 and 3, were pattadars holding ryoti lands in the zamindari. It was alleged that they were in arrears with their rent, that when the estate authorities went and distrained their cattle, they and the other six accused came and forcibly rescued the cattle inflicting injuries upon the estate servants for that end. There was no proof of the exchange of patta and muchilika between the zamindar and accused 1 and 3, or of the continuance in existence of a valid patta: and the estate officials had attempted to recover arrears of more than one fasli by means of a single distraint :

Held (1) that the distraint was wholly illegal, and accused 1 and 3 could not be said to be acting dishonestly when they went to recover their cattle from the possession of the estate officials, who were taking them away. Nor could the other accused who were helping them to recover their own property illegally distrained be considered to be acting dishonestly. The essential elements of the offence of theft were wanting and without theft there could be no robbery and of course no dacoity. [P 764 C 1]

(2) It was the duty of the Judge and not of the jury to find whether there had been a valid distraint or not, whether the cattle had been illegally taken away and whether the accused acted dishonestly. [P 764 C 1]

(3) The Judge ought to have directed the jury under S. 289 (2), Criminal P. C., to return a verdict of not guilty even if they believed every word that the prosecution witnesses said and should not have referred the case under S. 307, Criminal P. C. [P 764 C 1]

(b) Criminal P. C. (1898), S. 307 — Jury trial — Judge finding jury's verdict of guilty to be perverse and unjust making reference under S. 307 for setting it aside—Judge held ought to have released accused after verdict on bail.

The Judge being of opinion that the jury's verdict of guilty was perverse and unjust and that the accused ought not to have been convicted made a reference under S. 307 for setting aside the verdict :

Held that the Judge ought to have released the accused on bail after the verdict. [P 764 C 1]

Public Prosecutor—for the Crown.

Burn J. — This is a reference by the learned Assistant Sessions Judge of Devakottai against the verdict of the jury in Sessions Case No. 130 of 1940. The charge against the accused was for an offence of dacoity under S. 395, Penal Code, but the dacoity was one in a very technical sense. There were eight persons put up for trial before the learned Assistant Sessions Judge. Two of them, accused 1 and 3, were alleged to be pattadars holding ryoti lands in the zamindari of Ramnad. It was alleged that they were in arrears with their rent, that when the estate authorities went and distrained their cattle, they and the other six accused came and forcibly rescued the cattle inflicting injuries upon the estate servants for that end. The accused were therefore supposed to have stolen their own cattle. The theft became an offence of robbery because they were said to have caused hurt to some of the prosecution witnesses in order to the commission of the theft, and since there were more than five jointly concerned the offence became one of dacoity. The learned Assistant Sessions Judge recorded all the evidence at great length and then charged the jury. He endeavoured to persuade the jury to acquit all the accused persons, but the jury returned a unanimous verdict of guilty. The learned Assistant Sessions Judge disagrees with that verdict and considers that it is grossly unjust and perverse and he has therefore made this reference under S. 307, Criminal P. C.

Although the reference must be accepted, it is quite clear that it need never have been made. On the evidence recorded and the facts stated by the learned Assistant Sessions Judge, he ought to have directed the jury under S. 289 (2), Criminal P. C., to return a verdict of not guilty. As the learned Assistant Sessions Judge states, the distraint of the cattle of accused 1 and 3 would be illegal if it were made by a person unauthorized to make it, if it were made without the prior exchange of patta and muchilika, or if it were made to recover the arrears of more than twelve months. In this case the Inspector, P. W. 1, who wrote out the distraint notices was not proved to have had any authority to make the distraint. There

was also no proof of the exchange of patta and muchilika between the zamindar and accused 1 and 3, or of the continuance in existence of a valid patta; and it was also clear that the estate officials were attempting to recover arrears of more than one fasli by means of a single distraint. In these circumstances it is clear that the distraint was wholly illegal, and accused 1 and 3 could not be said to be acting dishonestly when they went to recover their cattle from the possession of the estate officials, who were taking them away. Nor could the other accused who were helping them to recover their own property illegally distrained be considered to be acting dishonestly. It is clear therefore that the essential elements of the offence of theft were wanting in this case. Without theft there can be no robbery and of course no dacoity. The learned Assistant Sessions Judge ought to have told the jury that, even if they believed every word that the prosecution witnesses said, the accused were not guilty of any offence and therefore they must return a verdict of not guilty. Instead of doing that, he charged them at great length discussing before them all the legal elements of a lawful distraint. This must have been extremely confusing to the jury, and it was very unfair on the part of the learned Assistant Sessions Judge. It was his duty, not that of the jury, to find whether there had been a valid distraint or not, whether the cattle had been illegally taken away and whether the accused acted dishonestly.

The verdict of the jury clearly cannot be allowed to stand. We set it aside and direct that the accused in this case be acquitted. They must also be set at liberty forthwith. The learned Assistant Sessions Judge in this matter also has not apparently had the courage to set up to his own convictions. He has said that the verdict of the jury was perverse and unjust and his opinion clearly is that the accused ought not to have been convicted; nevertheless he has kept them in custody ever since the date of the trial, 14th December 1940. They had also been in jail for a considerable period before the trial took place. The learned Assistant Sessions Judge ought to have released them on bail immediately.

C.R.K./G.N. *Accused acquitted.*

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(28) A. I. R. 1941 Madras 764

LAKSHMANA RAO J.

Oyyappa Kone — Accused

v.

Chidambaram Chettiar, President, Vallalappatti Panchayat Court, Melur Taluk — Complainant.

Criminal Revn. Case No. 1118 and Case Referred No. 48 of 1940, Decided on 25th March 1941, referred by Sess. Judge, Madura Division, D/- 9th December 1940.

Criminal P. C. (1898), S. 195 (1) (a)—*K*, party to suit before President of Panchayat Court filing petition before District Munsif for transfer of case alleging partiality on part of President—President filing complaint under S. 182, Penal Code — Public servant concerned within S. 195 (1) (a) competent to file complaint under S. 182, Penal Code, held was District Munsif and not President of Panchayat Board—Complaint of District Munsif held necessary for offence under S. 193, Penal Code.

K, a party in a suit before the President of a Panchayat Court, filed a petition before the District Munsif for the transfer of the case from that Court to another Court alleging partiality against the President who filed a complaint against *K* in the Court of the Sub-Magistrate under S. 182, Penal Code, in respect of the allegations made in the petition for transfer:

Held : (1) the public servant concerned within the meaning of S. 195 (1) (a), Criminal P. C., competent to file the complaint under S. 182, Penal Code, was the District Munsif and not the President of the Panchayat Board : [P 765 C 1]

(2) A complaint of the District Munsif was necessary for a prosecution for an offence under S. 193, Penal Code. [P 765 C 1]

Public Prosecutor — for the Crown.

FACTS. — One K was a party in a suit before one C, President of the Panchayat Court at Vellalapatti in the Melur Taluk, Madura District. K filed a petition before the District Munsif for the transfer of the case from that Court to another Court alleging partiality against the President. C filed a complaint against K in the Court of the Sub-Magistrate, Melur, under S. 182, Penal Code, in respect of the allegations made in the petition for transfer. K applied to the Sub-Magistrate for dismissing the complaint as being unsustainable on the ground that the allegations did not constitute an offence and that he could not file the complaint. The Magistrate refused. K filed a revision petition against that order before the Sessions Judge, Madura, praying the Sessions Judge to recommend to the High Court to quash the proceedings. The Sessions Judge, Madura, referred the case to the High Court and recommended that the proceedings be quashed.

Order.—The information was not given to the complainant or any public servant subordinate to him and an offence under S. 182, Penal Code, cannot be taken cognizance of except on the complaint in writing of the public servant concerned or some other public servant to whom he is subordinate. A complaint of the District Munsif would be necessary for a prosecution for an offence under S. 193, Penal Code, and the proceedings cannot be sustained. The reference is therefore accepted and the proceedings are quashed.

C.R.K./G.N. *Reference accepted.*

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(28) A. I. R. 1941 Madras 765

WADSWORTH AND SOMAYYA JJ.

In re Peria Guruswami Gounder and another — Accused.

Referred Trial No. 55 and Criminal Appeal No. 324 of 1941, Decided on 2nd June 1941, referred by Court of Session, Tinnevelly Division, D/- 8th March 1941.

(a) Criminal trial — Evidence — Hostile witness—Prosecution witness treated as hostile by prosecution with permission of committing Magistrate — Witness whether should be examined in Sessions Court — No general rule can be laid down — Proper course is to examine such witness if really important as court witness and allow both sides to cross-examine him.

No rule of universal application can be laid down as to the examination in the Sessions Court of a prosecution witness who was treated as hostile by the prosecution with the permission of the committing Magistrate. No doubt the Public Prosecutor should not be compelled to put forward as his own witness a man who has in the opinion of the Public Prosecutor committed perjury by giving evidence hostile to the prosecution in the lower Court. At the same time it is the duty of the Court when there is an important eyewitness whom the Public Prosecutor does not wish to examine because he has been treated as hostile in the committal inquiry, to record the evidence of that witness, and the accused should not be forced to examine him as a defence witness. The proper course to take in such circumstances for the Public Prosecutor is to see that the witness is present in Court and for the Court, if the witness is really important, to examine that witness as a court witness and allow both sides to cross examine the witness. [P 766 C 1]

(b) Evidence Act (1872), S. 27—Confessional statement made to police before deponent came into police custody — S. 27 does not apply — Such statements can only be used by police officer to refresh his memory and for no other purpose.

Section 27 has no application to a confessional statement made to a police officer before the deponent has come into the custody of that police officer. Such a statement can be used by the police officer only to refresh his memory as to the date and time when the accused appeared before him and cannot be used for any other purpose, such as for throwing light on the motive for the crime. [P 766 C 1,2]

(c) Evidence Act (1872), S. 27—Summary of joint statement made by two persons — It is improper to treat it as individual statements by two persons.

It is improper to treat as the individual statements of two different persons a composite statement made up of information gathered from the two persons, it being impossible to say how much of the statement was made by one of them and how much was made by the other. [P 766 C 1, 2]

K. S. Jayaram — for Accused.

Public Prosecutor — for the Crown.

Wadsworth J. — The accused in this case have been convicted by the learned Sessions Judge of Tinnevelly of an offence under S. 302, Penal Code. It is alleged that they on 23rd March 1940 at Ottudanpatti, a village in the Koilpatti taluk, murdered one Sangili Thevar. The prosecution evidence is that the deceased was attacked in the street at about 3 P. M. by the two accused, accused 1 holding him while accused 2 cut him, and that this was done in the presence of three eyewitnesses, P. W. 3 a man of the village, one Sanga Reddiar, who has not been examined by the Sessions Judge and is also a man of the village, and P. W. 4, a man who lives some four miles away and happened to be present. The deceased received a large number of injuries and died before the arrival of the Village Munsif. The Village Munsif heard of the occurrence when in a hamlet a mile and a half away and he is said to have been there by 4 P.M. and hearing that P. W. 3 was a witness he sent for him and took a complaint from him which is alleged to have been despatched at 6 P. M., and to have reached the police station, which we are told is 8 miles away, at 9-30 P.M. The two accused are alleged to have appeared before a constable at a police out-post a mile away at 4-30 P. M. and to have handed over two weapons, an aruval and a knife, neither of which were found by the chemical examiner to be stained with blood. As we think it desirable to send this case back for retrial we do not propose to say anything which will affect the merits of the case. We will deal only with the two main criticisms of the trial by the learned Sessions Judge.

Firstly there is the fact that Sanga Reddiar, who was undoubtedly one of the three eye-witnesses, was not examined in the Sessions Court on the ground that he was treated as hostile by the prosecution with the permission of the committing

Magistrate. It is undoubtedly difficult to lay down any rule of universal application in such cases. It may be said that the Public Prosecutor should not be compelled to put forward as his own witness a man who has in the opinion of the Public Prosecutor committed perjury by giving evidence hostile to the prosecution in the lower Court. At the same time it does seem to us to be the duty of the Court, when there is an important eye-witness whom the Public Prosecutor does not wish to examine because he has been treated as hostile in the committal inquiry, to record the evidence of this witness and that the accused should not be forced to examine him as a defence witness. The proper course to take in such circumstances seems to us to be for the Public Prosecutor to see that the witness is present in Court and for the Court, if the witness is really important, to examine that witness as a court witness and allow both sides to cross-examine the witness. We do feel in the present case, which depends on the evidence of the three eye-witnesses, that those three eye-witnesses should have been examined in the Sessions Court and, if the Public Prosecutor is reluctant in the circumstances of the case to put forward Sanga Reddiar as a witness on behalf of the prosecution, there seems to be no reason why he should not have been examined as a court witness.

The other criticism relates to EX. E. Ex. E purports to be a report by the constable on duty at the out-post at which the accused are alleged to have presented themselves shortly after the occurrence and handed over two weapons. This report contains what is alleged to be a summary of a joint statement made by both the accused to some extent implicating them in the crime. A portion of this statement has been treated as admissible by the Sub-Magistrate apparently under the impression that it falls under S. 27, Evidence Act. So far as one can gather, the Sessions Judge has marked the whole of the report including this joint statement. It appears to us that S. 27, Evidence Act, has no application to a confessional statement made to a police officer before the deponent has come into the custody of that police officer. Moreover, it seems to us improper to treat as the individual statements of two different persons a composite statement of this kind, which appears to have been made up of information gathered from the two persons it being impossible to say how much of the statement was made by one of them and how much was made by the other. No doubt EX. E could properly have been used by the constable to refresh his memory as to the date and time when the two accused appeared before him and handed over the two weapons. We do not consider that it should have been used for any other purpose. In fact it has been mainly used by the learned Sessions Judge to throw light on the motive for this crime. In our opinion, it should have been excluded from evidence. In view of these two defects in the trial, namely the failure to examine Sanga Reddiar and the inclusion of this inadmissible document, EX. E, we think it desirable to order a fresh trial. The convictions and sentences are therefore set aside and the case will be remanded for retrial by the Additional Sessions Judge of Tinnevelly.

C.R.K./G.N. *Case remanded.*

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(28) A. I. R. 1941 Madras 766

LAKSHMANA RAO J.

In re Agasthyalinga Goundan — *Petitioner.*

Criminal Revn. Case No. 344 and Petn. No. 333 of 1940, Decided on 27th September 1940, to quash charge framed by Court of Sub-Divisional Magistrate, Erode, D/- 9th April 1940.

Penal Code (1860), S. 304-A—Accused keeping bottle of "Atlas tree killer" in his farm shed —His farm servant drinking stuff thinking it to be arrack and dying—Prosecution under S. 304-A held unwarranted.

The accused had kept a bottle of the "Atlas tree killer" in his farm shed and two of his farm servants drank the stuff thinking it to be arrack and died in consequence :

Held that the prosecution under S. 304-A was unwarranted. [P 766 C 2]

K. Desikachari — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The accused had kept a bottle of the "Atlas tree killer" in his farmshed and two of his farm servants drank the stuff thinking it to be arrack and died in consequence. This can hardly warrant a prosecution under S. 304-A, I. P. C., and the charge framed against the accused is quashed.

C.R.K./G.N. *Charge quashed.*

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(28) A. I. R. 1941 Madras 767 (1)

LAKSHMANA RAO J.

Crown Prosecutor, Madras — Appellant

v.

Abdul Wahab and another — Respondents.

Criminal Appeal No. 96 of 1941, Decided on 2nd April 1941, against order of the Special Honorary Presidency Magistrate, Egmore, Madras, D/- 8th November 1940.

Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), S. 37 (3)—First accused suspected of receiving bets on horse races — On being given slip containing names of horses and four annas by *A*, first accused, retained cash and passed slip to his clerk, second accused, who wrote something over slip and gave it to first accused who returned one slip to *A*—On search ten betting slips, acceptance form and some cash found on first accused while second accused had pencil on him — First accused held guilty under S. 37 (3) but not second accused who could not be said to be gaming within meaning of Act.

Accused 1 who was suspected of receiving bets on horse races on being given a slip containing names of horses and four annas by *A*, retained the cash and passed the slip to his clerk, accused 2, who wrote something over the slip and gave the slip to accused 1 who returned one slip to *A*. On a search being made, ten betting slips, an acceptance form and some cash were found on accused 1. Accused 2 had a pencil on him :

Held that accused 1 was guilty under S. 37 (3) but accused 2 was not, inasmuch as he could not be said to have been gaming as defined in the Act. [P 767 C 2]

Appellant in person.

C. K. Venkatanarasimham — for Respondents.

Judgment. — This is an appeal by the Provincial Government against the acquittal of the respondents of an offence under S. 37, cl. (3), Madras City Police Act. Respondent 2 is the clerk of respondent 1 and the prosecution case is that on information that respondent 1 was receiving bets on horse races in the Suparikunta in Badai Sahib Street, P. W. 1, the Sub-Inspector sent P. W. 2 with a slip, Ex. B-2, containing the names of horses and four annas. P. W. 2 handed over the slip and cash to respondent 1 and respondent 1 retained the cash and passed the slip to respondent 2. Respondent 2 wrote something over the slips and gave them to respondent 1 and respondent 1 returned one slip, Ex. A, to P. W. 2. The Sub-Inspector rushed to the place and ten betting slips, Ex. B series, an acceptance form Ex. C and fifteen annas in cash were found on respondent 1. Respondent 2 had M. O. 2, the pencil, on him and Ex. A, the betting slip, was with P. W. 2. These facts are spoken to by P. Ws. 1 and 2 who were not seriously cross-examined, and the search witnesses could have been examined by the Magistrate if necessary. The evidence of D. Ws. 1 and 2 is not entitled to any weight and on the evidence respondent 1 would be guilty under S. 37, cl. (3), Madras City Police Act. Respondent 2 was not found gaming as defined in the Act and he would not be guilty of the offence. The acquittal of respondent 1 is therefore set aside and he is convicted under S. 37, cl. (3), Madras City Police Act, and sentenced to pay a fine of Rs. 5 with simple imprisonment for one week in default. The acquittal of respondent 2 is correct and the appeal is dismissed as against him.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 767 (2)

LEACH C. J. AND SOMAYYA J.

Devarajulu Naidu and another — Appellants

v.

Jayalakshmi Ammal and another — Respondents.

City Civil Court Appeal No. 79 of 1939, Decided on 18th March 1941, against decree of City Civil Court, Madras, in O. S. No. 1066 of 1937.

(a) Limitation Act (1908), Arts. 120 and 62— *K* executing pronote in favour of *A* benami for *B* — *A* assigning pronote to *C* who accepted it with knowledge of benami character and without consideration — *C* recovering amount due under pronote from *K*—*B* suing *A* and *C* for recovering amount recovered by *C* from *K*—Claim against *C* held equitable claim governed by Art. 120 and not by Art. 62.

K executed in favour of *A* benami for *B* a promissory note for Rs. 1650. *A* assigned it to *C* who had knowledge of the benami character and paid no consideration. *C* recovered from *K* the amounts due under the said promissory note. Subsequently *B* instituted a suit against *A* and *C* to recover from them the amount recovered from *K* :

Held : (1) The relationship between a benamidar and the real owner being a relationship of trust, *A* was a trustee for *B* : ('18) 5 A I R 1918 P C 140, *Rel. on.* [P 769 C 2]

(2) *A* having converted the trust property *B* was entitled to trace the proceeds of the property in the hands of *K*. [P 769 C 2]

(3) The claim against *K* was an equitable claim and was governed by Art. 120 and not by Art. 62 : 21 Mad 373; 30 Mad 298 and 30 Mad 459, *Disting.*; S. A. No. 1469 of 1901, *Ref.*; ('31) 18 A I R 1931 P C 9 and 10 Cal 860 (P C), *Rel. on.* [P 769 C 1]

(b) Limitation Act (1908), S. 10, Arts. 120 and 62 — Relationship between benamidar and real owner is one of trust—Such trust is not express trust within meaning of S. 10—Person receiving property with knowledge of benami character takes it subject to trust.

The relationship between a benamidar and the real owner is a relationship of trust, and although

he has no beneficial interest in the property or business standing in his name, the benamidar represents the real owner and is in the position of a trustee : ('18) 5 A I R 1918 P C 140, *Rel. on.* [P 768 C 2]

A trust of this nature is not an express trust within the meaning of S. 10 : ('31) 18 A I R 1931 P C 9, *Rel. on.* [P 768 C 2]

Although there is no express trust in a benami transaction there is a trust and a person receiving the property with the knowledge of the true position will take it subject to the trust. [P 768 C 2]

V. T. Rangaswami Ayyangar and P. Krishnamachari — for Appellants.

Srinivasaraghavan — for Respondents.

Judgment.—This appeal arises out of a suit filed by the appellants in the City Civil Court to recover a sum of Rs. 2200 from respondents 1 and 2. A decree was passed for Rs. 187-12-0 only, the balance of the claim being dismissed on the ground that the suit to that extent was barred by the law of limitation. The question is whether Art. 62 or Art. 120, Lim. Act, applies to the case. On 9th January 1931 the appellants, who are brothers, sold certain immovable properties to one Krishnaswami Naidu for Rs. 3000 and in part discharge of the purchase consideration Krishnaswami Naidu executed a promissory note for Rs. 1560 in favour of respondent 1, who is the wife of appellant 1. The husband and the wife quarrelled and she eventually left him. On 5th November 1931 respondent 1 fraudulently endorsed the promissory note to Doraiswami Naidu, the father of respondent 2, who was said to have been a friend of the family. Doraiswami Naidu sympathised with the wife in her quarrel with the husband, and it has been established that the promissory note was endorsed to him without consideration and with the object of defeating the husband and his brother. In 1932 Doraiswami Naidu filed a suit against Krishnaswami Naidu in the city civil Court to recover the amount due on the promissory note and on the 19th July 1933 he obtained a decree for Rupees 1653-8-0. As the result of an appeal to this Court the decree was set aside and the case remanded to the city civil Court for the taking of evidence. The judgment of this Court remanding the case was delivered on 9th August 1934. As the result of the further hearing a new decree for Rs. 1653-8-0 was passed on 26th November 1934.

The present suit was filed by the appellants on 26th November 1937 to recover from respondent 1 and Doraiswami Naidu with interest the Rs. 1653-8-0 which Doraiswami Naidu had recovered from Krishnaswami Naidu. The decision that the appellants were only entitled to Rs. 187-12-0 was based on a finding that the rest of the money had been paid to Doraiswami Naidu before 26th November 1934. The Principal Judge of the City civil Court who tried the case was of the opinion that this was a suit for money had and received and accordingly held that Article 62 applied. If the suit is to be regarded as a suit for money had and received, as known to the English common law, the Court below was right in limiting the decree to the Rs. 187-12-0 which was paid after 26th November 1934, but we consider that the suit cannot be so regarded. The case is not one which falls within the decisions in 21 Mad 373,[1] 30 Mad 298[2] and 30 Mad 459,[3] where Art. 62, Limitation Act, was applied to claims against benamidars and therefore it is not necessary to consider whether those cases were rightly decided, but in passing, it may be mentioned that in the unreported case in S. A. No. 1469 of 1901,[4] Benson and Bhashyam Ayyangar JJ. held that a suit against a benamidar was governed by Art. 120 and not by Article 62.

The relationship between a benamidar and the real owner is a relationship of trust. In 46 Cal 566[5] the Privy Council held that although he has no beneficial interest in the property or business standing in his name the benamidar represents the real owner and is in the position of a trustee. A trust of this nature is not an express trust within the meaning of S. 10, Limitation Act, as the Privy Council pointed out in 8 Rang 645.[6] It cannot be, as S. 2 (11) expressly states, that the word "trustee" as used in the Act does not include a benamidar. Although there is no express trust in a benami transaction there is a trust and a person receiving the property with the knowledge of the true position will take it subject to the trust. The appeal in 8 Rang 645[6] arose out of a suit for an account against the representative of a benamidar and the appellants contended that Art. 62 applied to the case, but in deli-

1. ('98) 21 Mad 373, Mahabala Bhatta v. Kunhanna Bhatta.
2. ('07) 30 Mad 298 : 17 M L J 224 : 2 M L T 332, Subbanna Bhatta v. Kunhanna Bhatta.
3. ('07) 30 Mad 459 : 17 M L J 452, Shanmugha Pillai v. Minor Govindasami.
4. Second Appeal No. 1469 of 1901, Narayana Bhatta v. Mahabala Bhatta.
5. ('18) 5 AIR 1918 P C 140 : 49 I C 1 : 46 Cal 566 : 46 I A 1 (P C), Gur Narayan v. Sheolal Singh.
6. ('31) 18 AIR 1931 P C 9 : 130 I C 609 : 8 Rang 645 : 58 I A 1 (PC), Annamalai Chettiar v. Muthukaruppan Chettiar.

vering the judgment of the Judicial Committee Lord Thankerton said that Art. 62 did not apply to an equitable claim against a trustee, liable to account, for an account and ascertainment of what might be due. The Board held that the proper article was Art. 120 and referred to an earlier decision, that in 10 Cal 860.[7]

We consider that the judgment in 10 Cal 860[7] really governs the present case. There, certain timber had been entrusted by the plaintiffs to one Modhoosoodan who wrongly converted it to his own use. As the result the plaintiffs brought an action against him and obtained a decree for Rs. 25,200. Madhoosoodan died without satisfying the decree and the plaintiffs instituted against the agent of his widow the suit out of which the appeal to the Privy Council arose. The widow had sold through the defendant certain timber which Madhoosoodan had not disposed of and the proceeds of this sale were in the hands of the defendant. It was contended that the suit was barred by the law of limitation because it was a suit for money had and received and had been instituted more than three years after the defendant had obtained the money. The Limitation Act of 1871 was then in force, but the only difference, so far as this case is concerned, is in the numbering of the articles. Article 62 of the present Act corresponds to Art. 60 of the old Act and Art. 120 to Art. 118. The Privy Council rejected the contention and the reason is to be gathered from the following passage in the judgment:

> The suit is to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the defendant, to make him responsible for the amount. That does not fall either within Art. 60 or Art. 48, but comes within Art. 118, as 'a suit for which no period of limitation is provided elsewhere in the schedule,' and for suits of that nature a period of six years is the limitation.

In the present case the real claim is against respondent 2 in whose hands are the moneys paid by Krishnaswami Naidu in discharge of the promissory note. In endorsing the promissory note over to Doraiswami Naidu respondent 1 wrongly converted it and as Doraiswami Naidu took it with full knowledge of the facts he acquired no title to it. Therefore he had no right to the moneys paid by Krishnaswami Naidu in respect of it. As the legal title to the promissory note was in respondent 1, Doraiswami Naidu must, if legal fiction is to be recognized, be deemed to have received the moneys for her use, not for the use of the appellants. The position is analogous to the position in 10 Cal 860.[7] There is here, as there was in that case, an equitable claim and the Privy Council has held that equitable claims do not come within Art. 62 but within Art. 120. Respondent 1 is a trustee for the appellants and she has converted the trust property. Therefore, the appellants are entitled to trace the proceeds of the property in the hands of respondent 2. Respondent 2 represents Doraiswami Naidu who realized the promissory note with full knowledge of the facts. As the suit falls within Art. 120 it is in time. Consequently the appeal succeeds and the suit will be decreed with costs here and below. The appeal was filed in forma pauperis and respondent 2 will be directed to pay the court-fee to Government.

C.R.K./G.N. *Appeal allowed.*

7. ('84) 10 Cal 860 : 11 I A 59 : 4 Sar 548 (P C), Gurudoss Pyne v. Ram Narayan Sahu.

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(28) A. I. R. 1941 Madras 769

WADSWORTH J.

C. Kuppiah Chetty — Petitioner

v.

P. Saraswathi Ammal and others — Respondents.

Civil Revn. Petns. Nos. 1255 of 1937 and 540 of 1938, Decided on 10th December 1940, to revise order of Full Bench of Court of Small Causes, Madras, D/- 24th August 1937.

(a) Presidency Small Cause Courts Act (1882), S. 38 — Application under S. 38 heard and decided by two Judges of Madras Small Cause Court Bench, third Judge being absent — Judgment signed by aforesaid Judges also signed subsequently by third Judge — Superfluous signature of third Judge who had nothing to do with trial of case held did not render judgment invalid.

An application under S. 38 was heard and decided by the Chief Judge and another Judge of the Madras Small Cause Court Bench, the third Judge being absent. The judgment was signed by the two Judges who had heard the case. Subsequently the aforesaid judgment was signed also by the third Judge who knew nothing about it and was not concerned with it in any way :

Held that the error in adding the superfluous signature of the third Judge to the judgment could not be taken to detract from the validity of the judgment. [P 770 C 2]

(b) Presidency Small Cause Courts Act (1882), S. 38 —Full Bench of Small Cause Court under S. 38 has no appellate powers—It cannot decide questions of fact — Bench finding findings of fact by trial Court unsupported by evidence—Bench should not give fresh findings of fact but should order retrial.

A Full Bench of the Small Cause Court under S. 38 does not exercise appellate powers and has no jurisdiction to decide questions of fact. If it comes to the conclusion that the findings of fact by the trial Court are unsupported by evidence and are such as to justify interference in revision the proper procedure is not to give fresh findings of fact but to order a retrial at which the facts may be gone into afresh : ('17) 4 A I R 1917 Mad 135 (FB), *Rel. on.* [P 771 C 2]

(c) Sale of Goods Act (1930), Ss. 20 and 23 — Mere agreement to transfer shares in company accompanied with instrument of transfer not completed so far as transferor could complete it does not pass title — Transferor signing both agreement to transfer shares and transfer endorsement on share certificate and communicating same to transferee who also countersigning agreement to transfer in token of acceptance of transfer — Title to shares passes to transferee—Transferee must cancel pronote given to him by transferor for amount paid by transferee for transfer of shares and get formalities of transfer completed—Failure on his part to do so does not entitle him to sue on pronote.

An agreement to transfer shares in a company accompanied with the actual instrument of transfer which has not been completed so far as the transferor could complete it does not amount to a transfer deed sufficient to cause title to pass. By itself it would be nothing more than an enforceable agreement to convey and until the transfer endorsement is signed the shares would be unascertained goods and would not be in a deliverable state. But where the transferor signs both the agreement to transfer shares and the transfer endorsement on the share certificate and communicates the fact to the transferee who countersigns the agreement of transfer in token of acceptance of the transfer there is nothing more for the transferor to do and the title in the shares would pass to the transferee. It is then for the transferee to get the formalities of the transfer completed by cancelling the promissory note given to him by the transferor for the amount paid by the transferee for the transfer of shares, handing it over to the transferor and by getting the transfer registered in the company's books. Failure on the part of the transferee to do so does not entitle him to sue on the promissory note : ('26) 13 A I R 1926 P C 38, *Rel. on.* [P 771 C 2; P 772 C 1]

K. S. Sankara Iyer and A. K. Sreeraman — for Petitioner.

K. Kuttikrishna Menon and C. Vasudeva Mannadiar — for Respondents.

Order. — These revision petitions both arise out of an order of a Bench of the Madras Small Cause Court directing a new trial under Sec. 38, Presidency Small Cause Courts Act. A preliminary point has been raised in the following rather unusual circumstances. The application for a fresh trial was heard by the Chief Judge and the second Judge, the third Judge Mr. Padmanabha Iyengar being then absent. The judgment as signed and issued purports to be a judgment of all the three Judges of the Court. A report submitted by the learned Chief Judge makes it clear that the case was actually heard only by the Chief Judge and the second Judge and that these two Judges alone were concerned with the preparation of the judgment and they signed it without reference to the third Judge. By some regrettable error, the judgment thus completed seems to have been placed before the third Judge for signature and he also signed it though he had nothing whatever to do with the trial of the case. It is no doubt regrettable that a Judge should sign a judgment about which he knows nothing and with which he has no concern; but, in the circumstances, I am not satisfied that this error can be taken to detract from the validity of the judgment. The case was tried by two Judges, the judgment was prepared by those two Judges and was signed by those two Judges. The superfluous initials of the third Judge cannot be said to make the judgment a judgment of that Judge also who initialled it in error. Turning to the merits of these two revision petitions, the facts of the case are that the plaintiff desired to acquire certain shares in a company which were owned by Mr. Ratna Mudaliar who was the father-in-law of defendant 1. The plaintiff therefore paid a sum of money to the defendants and took from them a promissory note which is the basis of the present suit. At the same time he gave them a letter (Ex. 1) in which he promises to return the promissory notes duly cancelled as soon as the defendants get Mr. Ratna Mudaliar's 20 shares transferred to the plaintiff or his nominee. This was on 17th February 1934. On 26th February 1934 Mr. Ratna Mudaliar executed an agreement which is Ex. 2 in which he undertakes to transfer to the plaintiff the shares in question and the agreement goes on: "I herewith hand over to you duly endorsed the share certificates," and there are further recitals as to the liabilities under the transfer. This agreement purports to be signed by Mr. Ratna Mudaliar on 26th February and to be countersigned by the plaintiff on the same date. The actual share certificate is Ex. 3 and this certificate contains an endorsement of transfer signed by Mr. Ratna Mudaliar and dated 26th February transferring the shares to the plaintiff ; but the spaces for the signature of the transferee and of the company's officials are not filled. A few days after this transaction Mr. Ratna Mudaliar resigned his position in the management of the company and the plaintiff became its chairman. Nothing more was

done in the matter of the transfer of the shares until the company got into difficulties and went into liquidation in November. Then we have Ex. 4 dated 20th November 1934 which is a lawyer's notice to the two defendants claiming payment of the amount due under the promissory note.

The suit on the promissory note was tried by the learned Second Judge of the Small Cause Court who came to the conclusion that the transfer endorsement on the share certificate Ex. 3 was not signed by Mr. Ratna Mudaliar on 26th February that the agreement Ex. 2 was taken back by defendant 1 from the plaintiff after countersignature and was never afterwards delivered to the plaintiff, that Ex. 3 was not delivered or even tendered to the plaintiff and that the plaintiff did not as alleged request defendant 1 to keep in his custody Exs. 2 and 3 until the return of the promissory note. On these findings the learned Judge came to the conclusion that the ownership of the shares remained with Mr. Ratna Mudaliar, that the defendants had not done that which was obligatory upon them if they wanted the promissory note to be cancelled and that they could not require the plaintiff to take a transfer of the shares after such unreasonable delay when the company had gone into liquidation and that the defendants were therefore obliged to pay the amount due under the promissory note. There was an application for a fresh trial which, as I have stated, was heard by the Chief Judge along with the trial Judge. This Bench gives a finding that the share certificate standing in the name of Mr. Ratna Mudaliar was duly endorsed to the plaintiff on 26th February 1934 which finding is of course in direct conflict with the conclusion of the trial Judge. They also come to the conclusion that Exs. 2 and 3 show that the shares were transferred on 26th February 1934 and somehow they seem to think that the crucial question in the case is whether there was a valid agreement to transfer the shares and that this would depend upon whether Mr. Ratna Mudaliar's acceptance of the plaintiff's offer was communicated to the plaintiff. It was for a decision of these questions that a new trial was ordered. It is conceded on both sides before me that the questions formulated for decision at the fresh trial are not the real questions which arise in the case and it is also not seriously disputed that the Bench has given findings of facts which are in conflict with those of the trial Judge and that it is on the basis of these findings of fact that the fresh points for determination have been formulated. It has been held by this Court, 40 Mad 355,[1] that a Full Bench of the Small Cause Court under S. 38 does not exercise appellate powers and has no jurisdiction to decide questions of fact. If it comes to the conclusion that the findings of fact by the trial Court are unsupported by evidence and are such as to justify interference in revision the proper procedure is not to give fresh findings of fact but to order a retrial at which the facts may be gone into afresh. Moreover, there is no serious dispute between the parties, so far as I have been able to gather, as to the validity of the agreement to transfer these shares or as to the fact of the communication of Mr. Ratna Mudaliar's agreement to transfer to the plaintiff.

The real question in issue between the parties is whether Mr. Ratna Mudaliar at the time when this agreement was communicated to the plaintiff completed the endorsement of transfer so far as he was able to do so and thereby appropriate the particular shares for the performance of his contract with the plaintiff and converted those shares into specific goods in a deliverable state so as to satisfy Ss. 20 and 23, Sale of Goods Act. If on that date Mr. Ratna Mudaliar not only signed Ex. 2 but also signed the transfer endorsement and communicated to the plaintiff the fact that the shares were in a deliverable state so that the plaintiff could complete the formalities by handing over the cancelled promissory note and getting the transfer registered in the company's books there was nothing more for Mr. Ratna Mudaliar to do and title in the shares would pass to the transferee : *vide* 50 Bom 360.[2] I am not prepared to take the view that Ex. 2 by itself would amount to a transfer deed sufficient to cause title to pass. It purports to be an agreement of transfer accompanying the actual instrument of transfer and if the instrument of transfer has not been completed, so far as the transferor could complete it, Ex. 2 by itself would be nothing more than an enforceable agreement to convey and until the transfer endorsement was signed the shares would be unascertained goods and they would not be in a deliverable state. But if

1. ('17) 4 A I R 1917 Mad 135 : 38 I C 346 : 40 Mad 355 : 32 M L J 213 (F B), Sikandar Rowther v. Ghouse Mohideen Marakayar.
2. ('26) 13 AIR 1926 P C 38 : 94 I C 824 : 50 Bom 360 : 53 I A 92 (P C), Maneckji Pestonji v. Wadilal Sarabhai & Co.

on 26th February Mr. Ratna Mudaliar signed both the agreement Ex. 2 and the transfer endorsement on the share certificate and communicated the fact to the plaintiff who countersigned Ex. 2 in token of acceptance of the transfer, then it was the plaintiff's fault that he did not cancel the promissory note and get the formalities of the transfer completed. In such circumstances the result would be that title in the shares would pass to the transferee and the plaintiff would be disenabled from suing on the promissory note. It seems to me therefore that in view of the contention that the trial Court's finding of fact regarding the execution of the endorsement on Ex. 3 is not supported by evidence and having regard to the fact that the trial Judge himself sitting with the Chief Judge has arrived at a conclusion on the same materials which is diametrically opposed to the findings of fact in the actual trial it is desirable that there should be a fresh trial in the course of which the essential facts may be found afresh.

The order of the Bench is therefore set aside. There will be a fresh trial in the course of which the trial Judge will decide whether title in these shares passed to the plaintiff on 26th February 1934, which question will depend on the further question whether at the time of the execution of Ex. 2 by Mr. Ratna Mudaliar he also executed the transfer endorsement on Ex. 3 and communicated to the plaintiff the fact that he had executed the transfer endorsement. The costs throughout will abide the result and the parties will be free to adduce fresh evidence. The Chief Judge will consider the desirability of posting this case before a Judge who has not hitherto been concerned with it.

C.R.K./G.N. *Order accordingly.*

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* (28) A. I. R. 1941 Madras 772

FULL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Thadi Murali Mohana Reddi, minor, by guardian Sabbella Rami Reddi and another — Appellants

v.

Medapati Gangaraju and others — Respondents.

Appeals Nos. 76 and 77 of 1938, Decided on 30th April 1941, against decrees of Sub-Judge, Coconada, in O. S. Nos. 2 and 3 of 1935.

(a) Limitation Act (1908), S. 19—Purpose for which acknowledgment is made is immaterial. (Per *Venkataramana Rao J.*, in order of reference.)

The purpose for which the acknowledgment was made is immaterial. S. 19 is concerned with whether there was an acknowledgment and not why an acknowledgment was made. [P 775 C 1]

(b) Hindu law—Debts—Father— Pronote by father alone—Suit on—Sons cannot be made parties—Suit can also be laid on debt impleading sons so as to make their share liable — Question in each case depends on whether allegations in plaint cover claim on debt as well as on pronote—In considering aforesaid question distinction must be drawn between father and manager — In case of manager allegation of necessity is necessary if other members are sought to be made liable—But in father's case allegation of necessity is immaterial—Allegation that debt was incurred by father and sons are sued as their shares are to be rendered liable for debt evidenced by pronote is sufficient—Suit against sons after father's death on pronote executed by father before partition—Plaint referring to borrowing and to execution of pronote—Sons stated to be heirs under Hindu law —Reason of their being made liable referred to by alleging that debt due to plaintiff was prepartition debt of father—Plaint held laid not only on pronote but on debt as well—Even assuming suit to be on pronote suit held maintainable against sons as legal representatives. (Per *Venkataramana Rao and Abdur Rahman JJ.*, in second order of reference.)

If during the lifetime of a Hindu father a suit is laid on a promissory note executed by him alone, his sons cannot be made parties to it: ('18) 5 A I R 1918 P C 146, *Rel. on.* [P 777 C 2]

But a suit can also be laid on the debt impleading the sons as parties thereto so as to render their shares in the joint family property liable : ('38) 25 A I R 1938 Mad 377 (F B), *Rel. on.* [P 777 C 2]

Therefore the question in each case would be whether the allegations in the plaint are sufficiently wide to cover a claim on the debt as well as on the promissory note. In considering this question a distinction must be drawn between the case of a father and the case of a manager. In the case of a manager, there should be an allegation that the debt was incurred for a necessary purpose if the other members of the family are sought to be made liable, and from the recitals as to necessity the Court could infer that the suit could be treated as one having been brought on the debt as well. In the case of a father, however, the allegation as to necessity is immaterial and all that one need allege is that the debt was incurred by the father and the sons are sued as their shares in the joint family property are to be rendered liable for the debt evidenced by the promissory note.

[P 777 C 2; P 778 C 1]

The plaint in a suit against the sons after the father's death on a pronote executed by the father before partition referred first to the borrowing and then to the execution of the pronote. The sons were stated to be the heirs under the Hindu law. The reason why they were sought to be made liable was referred to by alleging that the debt referred to as debt due to the plaintiffs was pre-partition debt of the father.

Held that the plaint should be considered to have been laid not merely on the promissory note but on the debt as well. [P 778 C 1]

Held further that even assuming the suit to have been laid only on the pronote, the suit having been filed after the death of the father against the sons who were his legal representatives under the Hindu law, it was maintainable : ('38) 25 A I R 1938 P C 7, *Rel. on.* [P 778 C 2]

(c) Contract Act (1872), S. 62—Pronote executed by insolvent renewed by him after his adjudication and before discharge—Renewal is fraud on insolvency law—Creditor can sue on original pronote. (Per *Venkataramana Rao and Abdur Rahman JJ.*, in second order of reference.)

Where a pronote executed by a person is renewed by him after his adjudication as an insolvent and before he is discharged, the debt due under the pronote being provable in insolvency the renewal of the pronote constitutes a fraud on the insolvency law. Consequently the fact that there were renewals cannot prevent a creditor from suing on the original pronote : ('25) 12 A I R 1925 Bom 346, *Rel. on.* [P 779 C 1]

(d) Limitation Act (1908), S. 19—Insolvency —Signing of schedule by insolvent constitutes acknowledgment within S. 19 — Acknowledgment is purely personal and not on behalf of any other—Hindu insolvent father cannot be treated as agent of his sons in making acknowledgment. (Per *Full Bench.*)

The signing of the schedule in the insolvency proceedings by an insolvent constitutes an acknowledgment within the meaning of S. 19. The acknowledgment is however a purely personal matter and can only be treated as made by the insolvent on behalf of himself and not on behalf of any other person. Consequently a Hindu insolvent father cannot be treated as agent of his sons in making the acknowledgment : ('17) 4 A I R 1917 Mad 518, *Rel. on.* [P 780 C 1]

* (e) Hindu law—Debts—Father — Partition between father and sons—Acknowledgment by father of prepartition debt—If at date of suit debt be enforceable against him or his estate his divided sons are also liable by reason of their pious obligation. (Per *Leach C. J., and Mockett J. ; Krishnaswami Ayyangar J.*, contra.)

(Per *Leach C. J., and Mockett J.*) — Where a Hindu father after partition between him and his sons acknowledges a prepartition debt incurred by him, his divided sons are by reason of the pious obligation rule in Hindu law also liable if at the date of the suit the prepartition debt is still enforceable against him or his estate : ('33) 20 A I R 1933 Mad 708, *held correctly decided*; 27 Mad 243 (FB), *Approved* ; *Case law referred.* [P 781 C 1]

(Per *Krishnaswami Ayyangar J.*)— A Hindu father cannot after partition keep alive a prepartition debt against his divided sons by an acknowledgment of liability made by himself alone, inasmuch as a partition puts an end to both the joint status and the pious obligation of the son, and takes away the power of the father to deal with the son's interest thereafter, the loss of the father's power being the necessary resultant of the cessation of the pious obligation rather than of the joint status. So long as the father is joint with his sons, the pious obligation would subsist enabling him to incur fresh debts and aoknowledge old ones already incurred. But after a severance of status, the power ceases under Hindu law and S. 21, Limitation Act, cannot help to recreate it : ('40) 27 A I R 1940 Mad 470 (FB), *Rel. on.* [P 785 C 2; P 786 C 1]

(f) Hindu law—Debts — Father — Debt incurred by father for personal purpose and by manager for necessity—There is no distinction so far as creditor's remedies are concerned—Family property is equally liable for both. (Per *Krishnaswami Ayyangar J.*)

There is no distinction recognized in Hindu law between a debt incurred by a manager for the necessary purposes of the family and a debt of the father incurred for his personal purposes if they are neither illegal nor immoral, in so far as the creditor's remedies are concerned. In the origin and in the matter of the proof to be adduced, there is undoubtedly a difference but none in the nature or quality of the resulting liability once it is validly incurred. Both classes of debts rank *pari passu* and the family property is equally liable for both. [P 785 C 1]

(g) Hindu law—Debts — Father — Personal debt—There is only one cause of action against both father and son — S. 19, Limitation Act, must govern suit against son as much as against father. (Per *Krishnaswami Ayyangar J.*)

On a personal debt of the Hindu father there is but one cause of action, enforceable both against the father and the son to the extent of their interests in the joint family property but within the time fixed by the Limitation Act for the cause of action against the father. Consequently S. 19, Limitation Act, must be held to govern the suit against the son as much as a suit against the father: 27 Mad 243 (FB), *Rel. on.* [P 785 C 2; P 786 C 1]

(h) Hindu law—Construction—Rule peculiar to Hindu law as doctrine of pious obligation—It is safer to gather limits of rule by resort to principles of Hindu law than to analogies from other system. (Per *Krishnaswami Ayyangar J.*)

It is safer to try and gather the limits of a rule so peculiar to Hindu law as the doctrine of pious obligation by resort to the principles of that law than by resort to analogies derivable from another system. [P 786 C 2]

(i) Hindu law—Debts—Father—Son is under pious obligation to pay his father's debt not incurred for illegal or immoral purpose—Obligation does not extend to debt incurred subsequent to partition. (Per *Leach C. J.*)

It is a well established rule of Hindu law that a son is under a pious obligation to pay his father's debts provided that they have not been incurred for any illegal or immoral purpose but the rule does not apply to a debt incurred subsequent to partition : ('28) 15 A I R 1928 Mad 657 (FB) ; ('28) 15 A I R 1928 Mad 735 (FB) and ('36) 23 A I R 1936 P C 277, *Rel. on.* [P 780 C 1]

Ch. Raghava Rao — for Appellants.

K. Rajah Iyer and D. Narasaraju — for Respondents.

ORDER OF REFERENCE.

Venkataramana Rao J. — One of the main questions argued by Mr. Raghava Rao in this appeal was the question of limitation. The suit out of which this appeal arises was instituted to recover certain sums of money due in respect of four promissory

notes dated 10th May 1929, 12th June 1929, 18th August 1929 and 31st May 1930 executed by the father of defendants 2 and 3 in favour of the plaintiffs and defendant 4 for Rs. 2000, 3000, 1800 and 3000 respectively, repayable with compound interest at 12 per cent. per annum. At a partition between the plaintiffs and defendant 4 the promissory notes fell to the share of the plaintiffs. On the date of the promissory note, defendant 3 was not in existence, as he was born subsequently. On a creditor's petition dated 13th March 1931 the father was adjudicated insolvent on 13th November 1931. A few days prior to the date of the order of adjudication, a suit for partition was brought by defendants 2 and 3 against their father and on 16th November 1931 a preliminary decree for partition was passed. On 21st December 1931 the father filed a schedule EX. D before the Official Receiver wherein he acknowledged his indebtedness in respect of the said promissory notes. It is also in evidence that in respect of the three promissory notes dated 10th May 1929, 12th June 1929 and 18th August 1929, the plaintiffs obtained a renewal thereof on 19th April 1932. In spite of the renewals the suit was not based on the renewed promissory notes on the ground of their having been executed by the insolvent who was yet undischarged. The plaintiffs based their cause of action on the original promissory notes and the suit was instituted on 21st December 1934 against defendants 2 and 3, their father having died on 17th January 1934.

Two main contentions were urged in the lower Court : (1) the suit was barred by limitation and (2) the suit on the promissory notes was not maintainable. Both the contentions were overruled by the learned Subordinate Judge. On the question of limitation, the learned Subordinate Judge relied on the acknowledgment in the schedule filed by the insolvent, EX. D, and also on EX. E series being the renewals of the three original promissory notes. Mr. Rajah Ayyar, counsel for the respondents, did not seek to support the finding of the learned Judge based on EX. E series but relied upon the acknowledgment in EX. D. The contention of Mr. Raghava Rao for the appellants is that EX. D would not save limitation as it was furnished by the insolvent in pursuance of his duty enjoined under the Provincial Insolvency Act. He relied on 36 I C 389,[1] where it was decided that an acknowledgment by an insolvent of a debt in the schedule of assets filed by him could only be treated as one made on behalf of himself and not on behalf of any other. In that case the father and his five sons were members of a joint Hindu family. Defendant 1 was the father and defendants 2 to 6 were the sons, defendant 6 being a minor. The father with the aid of the family funds started a business. From the facts as found by the trial Judge it appears that defendants 2 to 4 were taking active part in the father's business and defendant 5, though he did not take any active part in it, seemed to have acquiesced in the carrying on of the business. The learned trial Judge Bakewell J. took the following view of the business :

> It is clear that the business was carried on for the benefit of all these defendants, that they shared the profits as a joint family, that they were all aware of and acquiesced in the carrying on of the business as a joint family concern, and they are therefore partners therein. . . . All the defendants therefore, except the minor defendant 6, are personally liable for the debts of the firm; and since it has not been shown that there is any family property other than the capital employed in the firm, defendant 6 will be liable to the extent of the assets of his family.

It will thus be seen that it was not a case of contractual partnership but a joint family concern. Defendants 2 to 5 were deemed to be partners on the ground of their having taken part or having acquiesced in the carrying on of the business in order to fix personal liability against them. Defendant 6 could in no sense be a partner; he could only be made liable on the ground of his being the son of his father and a member of a joint Hindu family. The question arose in that case whether the inclusion of the debt by defendant 1, who was adjudicated an insolvent, in the schedule to his petition in insolvency, would amount to an acknowledgment so as to be binding also on the sons. The learned trial Judge dealt with the question of liability thus :

> Before an acknowledgment signed by one partner can be held binding on the other members of the firm, there must be evidence that in the course of business that partner had authority to sign the acknowledgment . . . In the present case I think that such evidence is afforded by the fact that defendant 1 was not only a partner, *but also the manager of all the property of the persons constituting the firm, since in that capacity he had full power to make contracts, to settle accounts and make admissions as to the contractual liabilities of the family.*

(The italics are ours).

It will be seen that the learned Judge did not rest his decision merely on the fact that

1. ('17) 4 AIR 1917 Mad 518 : 36 I C 389, Kissendoss v. Khatan Makanjee Spinning & Weaving Mills Ltd.

the adult members were partners but also on the ground that the father was the managing member of the family and the decree against defendant 6 could only be sustained on that basis. On appeal the decision of the learned trial Judge was reversed. Dealing with the question of implied agency of the managing member Wallis, C. J. observed as follows :

> With regard to acknowledgments by the managing member of a joint Hindu family, it is well settled that a managing member has implied authority to make acknowledgments within the statute, and it has been contended before us that the fact that he has been adjudicated an insolvent does not determine his position as managing member, or that at any rate he may still be allowed to go on acting as managing member, as, it is suggested, the evidence shows that he did in two cases and if so the implication of authority continued. Even supposing however that he could retain the position of managing member and the implied authority to make acknowledgments in the ordinary course of the joint family business, I do not think that he can be considered to have been acting or authorised to act under that implied authority in signing his schedule in the insolvency proceedings. Prima facie, as I have said, in so signing he is acting for himself and for himself only under the statutory duty.

The decree was set aside against all the defendants. With great respect to the learned Chief Justice we are unable to agree with the reason that because the schedule was filed under the statute the acknowledgment must be deemed to have been made for the purpose of the statute alone and could not be therefore held to bind the sons. It seems to us that the purpose for which the acknowledgment was made is immaterial, the question is whether there was an acknowledgment and not why an acknowledgment was made. If the manager in spite of the insolvency had not lost his status as a manager and continued to be a member of an undivided Hindu family and if the debt when contracted was one binding on the family, we do not see why his insolvency should prevent him from acknowledging the debt so as to save limitation against the other members of the family. Mr. Rajah Ayyar contended that the principle of the decision in 36 I C 389[1] would not apply to the case of a father and a son with regard to the son's liability for debts contracted by the father. His contention is that the son would be liable for a debt contracted by the father even though not for a family purpose on account of the pious obligation which the Hindu law imposed on him and that even if the father could in such a case be said to have acknowledged the debt on his behalf alone, that would be enough to make the son's share liable. He therefore urged that if the inclusion of the debt in the schedule by the father would amount to an acknowledgment as against him, it must be equally taken to have that effect as against his sons as well. We are inclined to think that the contention of Mr. Rajah Iyer is well founded and the decision in 36 I C 389[1] may be distinguished on the ground that it did not deal with the liability of the son for the father's debt on the basis of the father's acknowledgment.

Mr. Raghava Rao contends that even assuming Mr. Rajah Ayyar to be correct in his contention, the father's acknowledgment would not save limitation against his sons if subsequent to his insolvency he happened to become divided in status from them. Mr. Rajah Ayyar in answer referred us to the decision in 56 Mad 833.[2] Mr. Raghava Rao contends that the decision in 56 Mad 833[2] is not correct. He outlined his contentions thus: The creditor's right to proceed against the son's share is derived from the right of the father to subject and alienate the sons' share for his debts by virtue of the pious obligation on the sons, but the power ceases the moment the sons become divided in status from him and with it his right to acknowledge the debt so as to save limitation against his son ceases. It seems to us that there is considerable force in this contention. The father of an undivided family consisting of himself and his sons has got certain rights by virtue of his position as such. One such right is to alienate his son's share for a personal debt of his. This is derived from the pious liability which the Hindu law imposes on undivided sons. Both the right and liability are dependent on the continuance of the joint family and the consequent undivided status. The mere paternal relation of a father and sons would not entitle a father to incur a personal debt which would have the effect of subjecting his sons' property for that liability. It is undoubted law that a divided son is not liable for debts contracted by the father after partition both in respect of the separate property of the son as well as the property which he got at the partition. In an undivided family the father not only is the head and manager of that family but if the family consists besides his sons also of his brothers, he will be the head of his own

2. ('33) 20 A I R 1933 Mad 708 : 145 I C 404 : 56 Mad 833: 65 M L J 311, Munuswami Goundan v. Kutti Mooppan.

branch if he does not occupy the position of an elder brother. Therefore as such head and manager of his own branch he has got certain rights. In addition to his right as ordinary manager of incurring debts on behalf of the joint family and alienating the family property for purposes connected with the family, the father has got right to incur debts on his own account and alienate his property which his branch is entitled to including the son's shares. Ramesam J. in the Full Bench decision in 51 Mad 417[3] is of the view that the right of a father to sell the joint family property for his personal debts is dependent upon his occupying the position of the manager of his own branch of the family. At p. 430 he explained the power of the father thus :

> It seems to me that the basis of a Hindu father's right to sell his son's share in the joint family property for antecedent debts is twofold : (1) there must be an antecedent debt of the father which is not illegal or immoral involving a pious obligation on the part of the son to pay it ; and (2) the property must be joint family property of which the father was the manager. If either of these conditions is wanting, the father has no right to sell.

The learned Judge elaborates this position at page 436 thus :

> That he is a manager is clear from the fact that he could be sued by creditors for debts whether incurred by himself only, not illegal or immoral, or for the benefit of his branch so as to bind his own branch. He can sue for a division of the share of his branch and he can sell the share of his branch for antecedent debts not illegal or immoral. All these are acts of managership and where he expressly abandons managership he cannot do these things. It is because he is the manager he can represent his son in the various acts just enumerated.

It would seem to follow that in acknowledging a debt contracted when he was undivided he would represent his sons so long as he is undivided with them but when he becomes divided he would not. Apparently this seems to be the view also of Ananthakrishna Ayyar J. in 51 Mad 361[4] where the majority of the learned Judges took the view that for pre-partition debts of the father the sons' shares could be made liable after partition provided the sons were sued along with the father. At p. 415 he observed thus :

> On the question as to what is the proper procedure to be followed by the creditor in such cases, cases have laid down that the effect of partition is to take away from the father the right to represent the sons, whether in Court or outside. Though by reason of his position at the time of incurring the debt he had the right to make the debt binding on the sons' shares also of the family property, he loses the right to represent the sons after partition.

Whether in incurring the debt on his own account and not for the benefit of his family a father is said to represent his sons may be a question ; but the right to acknowledge a debt which would save limitation against his sons while the family continues undivided can be supported on the ground that the father has got a right, so long as the family continues undivided, to impose liability on the son's share for his debt and that would carry with it the right to extend the time for enforcement of such debts and thus the period of liability. But once that right is lost in consequence of a partition, it seems to us that he would not have the right to acknowledge and prolong the period of liability which would have the effect of adversely affecting the sons' shares, the right to dispose of which is no longer in the father. In 56 Mad 833[2] the learned Judges distinguished 41 Mad 136[5] where the son was held not to be liable on a promissory note executed by the father after partition though in renewal of a note executed by the father before partition on the ground that the renewal would amount to an incurring of a fresh obligation, and remarked as follows :

> If, as 51 Mad 361[4] decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position.

With great respect to the learned Judges the latter proposition does not follow from the earlier. It would be seen that even 51 Mad 361[4] decides that if the sons were not sued along with the father, even for a pre-partition debt, the son's share could not be made liable, whereas before partition even though they were not sued their property could be rendered liable. Kumaraswami Sastri J. in 41 Mad 136[5] at p. 143 dealing with the case of a renewal observed as follows :

> I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition .... The pious duty creates no charge on the son's share prior to partition: the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit he can

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3. ('28) 15 A I R 1928 Mad 735 : 112 I C 541 : 51 Mad 417 : 55 M L J 175 (F B), In the matter of Baluswami Iyer.
4. ('28) 15 A I R 1928 Mad 657 : 110 I C 141 : 51 Mad 361 : 54 M L J 726 (F B), Subramania Iyer v. Sabapathi Iyer.
5. ('19) 6 A I R 1919 Mad 1175 : 43 I C 225 : 41 Mad 136 : 33 M L J 519, Venkanna v. Srinivasa Deekshitalu.

have no right if that right is lost owing to a bona fide partition.

The learned Judge uses the language "presumed agency." It may be a matter for argument whether the learned Judge was right in presuming that the father would be acting as the agent of the son when he acknowledges or renews a debt when he continues undivided. We think he was using it in the sense in which Ramesam and Anantha-krishna Ayyar JJ. explained the father's right, i. e., the right of representation. As we have pointed out already, it may be difficult to apply the theory of representation because in contracting a debt on his own account the father could not be said to be acting as the representative of his sons. The view we are inclined to take is that the right to acknowledge is derived from the father's right to impose liability on the sons' shares, which continues to subsist until the family is divided, but when that right ceases with division, the right to acknowledge also ceases. However, as the matter is one of some importance, and as we doubt the correctness of the decision in 56 Mad 833,[2] we think it desirable that both the matters which we have discussed should be referred to a Full Bench. We accordingly refer to the Full Bench the following questions—(1) whether an acknowledgment by a Hindu father who is adjudicated insolvent of a debt made in the schedule of debts filed by him in insolvency would save limitation against his undivided sons; and (2) would it make any difference if the acknowledgment was made after the insolvent had become divided in status from his sons subsequent to the insolvency?

ORDER OF THE HIGH COURT

Leach C. J. — The following questions have been referred to a Full Bench:

(1) Whether an acknowledgment by a Hindu father who is adjudicated insolvent of a debt made in the schedule of debts filed by him in insolvency would save limitation against his undivided sons; and (2) Would it make any difference if the acknowledgment was made after the insolvent had become divided in status from his sons subsequent to the insolvency?

On the admitted facts it is clear that the word "undivided" in the first question should have been "divided," because the appeal has reference to an allegation of liability on the part of sons who were divided from their father before the filing of the schedule and the second question cannot arise in this case. Before the first question, as amended, arises it is for the Division Bench to decide whether the suit is confined to liability on the promissory notes, or whether the claim has been framed in the alternative, namely, whether the sons are also liable on the debts apart from the promissory notes. We have perused a copy of the plaint and it is obvious that this question calls for a decision. If the Division Bench decides that the suit is merely on the promissory notes the sons cannot be made liable because they were not parties to the instruments, and there will be no need for a reference. In these circumstances the present reference will be returned to the learned Judges and will be re-submitted, if in the light of what is said here, they consider that there is need for a reference.

(In pursuance of the directions contained in the above order, the Division Bench made the following):

SECOND ORDER OF REFERENCE TO FULL BENCH.

Venkataramana Rao & Abdur Rahman JJ.—The question now for our decision is whether the suit is maintainable. Mr. Raghava Rao's contention is that the suit is not maintainable and he urges two grounds in support of it. The first is that the suit is laid on the promissory notes and defendants 2 and 3 are not parties to them, and secondly, that the suit cannot be laid on the promissory notes dated 10th May 1929, 12th June 1929 and 18th August 1929 as the plaintiffs obtained renewals of them on 19th April 1932. We shall now deal with the first ground. So far as our High Court is concerned, after the decision of the Privy Council in 46 Cal 663,[6] the prevalent view has been that if during the lifetime of a Hindu father a suit is laid on a promissory note executed by him alone, his sons cannot be made parties to it. It is well settled that a suit can also be laid on the debt impleading the sons as parties thereto so as to render their shares in the joint family property liable. It is enough to refer the decision in I L R (1938) Mad 568[7] in support of the above propositions: *vide* the observations at pp. 573 and 574. Therefore the question in each case would be whether the allegations in the plaint are sufficiently wide to cover a claim on the debt as well as on the promissory note. In considering this question a distinction has to be kept in mind between the case of a father and the case of a manager. In the case of a manager, there should be an allegation that

6. ('18) 5 A I R 1918 P C 146: 50 I C 216: 46 Cal 663: 46 I A 33 (PC), Sadasukh Jankidas v. Kishen Pershad.
7. ('38) 25 A I R 1938 Mad 377: 174 I C 577: ILR (1938) Mad 568: (1938) 1 M L J 378 (FB), Marutha Muthu Naicker v. Kadir Badsha Rowther.

the debt was incurred for a necessary purpose if the other members of the family are sought to be made liable, and from the recitals as to necessity the Courts could infer that the suit could be treated as one having been brought on the debt as well. In the case of a father, however, the allegation as to necessity is immaterial and all that one need allege is that the debt was incurred by the father and the sons are sued as their shares in the joint family property are to be rendered liable for the debt evidenced by the promissory note.

Before considering the allegations in the plaint in the present case, the important fact that has to be remembered is that the suit was instituted after the death of the father. The plaint is in Telugu and we have gone through it. In para. 4 it is alleged that the father of defendants 2 and 3 borrowed several sums of money on several dates referred to therein and that the father executed promissory notes for those amounts on those dates. The incurring of the debts and the execution of the notes are both referred to. Lower down in the same paragraph after referring to the insolvency of the father and to the order of adjudication and to his subsequent death, the following allegation is made :

> Defendant 1 (the Official Receiver) is representing the late Bulli Gangireddi lawfully. Defendants 2 and 3 are his heirs under Hindu law.

It is thus clear that defendants 2 and 3 were impleaded as the father's heirs under the Hindu law, the object being to render their shares in the joint family property liable. This is made clear in the concluding portion of the said paragraph wherein occurs the following :

> At any rate, since debts due to the plaintiffs were all pre-partition debts, they are not in any way concerned with the partition decree, and the plaintiffs are therefore entitled to recover the same from the whole of the family properties of defendants 2 and 3.

It is thus clear from these allegations that the reason why the sons were made parties is that the debts due to the plaintiffs being pre-partition debts, defendants 2 and 3 should be made liable for the debts in spite of the partition by virtue of their being the sons of their father. The debts apart from the promissory notes were referred to separately and were alleged to be debts due to the plaintiffs. It seems to us that the plaint in this case should be considered to have been laid not merely on the promissory notes but on the debts as well. Though the decision on the basis of a plaint to the suit cannot be treated as an authority for construing the plaint in another suit, yet we think it useful to refer to the plaint in 23 Mad 597[8] which was construed by the majority of the learned Judges in that case and by the learned Judges of the Full Bench in I L R (1938) Mad 568,[7] as one covering a claim on the debt as well. There were only two paragraphs therein on which the said construction was adopted. Just as in this case para. 1 was to the effect "for a sum of Rs. 1000 borrowed a promissory note was executed." Paragraph 2 was to the following effect :

> As the plaint debt has been incurred by the defendants for the expenses of their own family and as all defendants are bound to discharge that amount, I instituted this suit against all the defendants who are concerned in it.

These were the only allegations there. This paragraph regarding necessity had to be made because certain persons were sought to be made liable as members of a joint family. Though the debt was simply referred to as the "plaint debt" still it was considered to be a suit on the debt apart from the note by reason of the fact that the members other than the executant were sought to be made liable by virtue of their obligations under the Hindu law. Similarly in this case para. 4 refers first to the borrowing and then to the execution of the notes. Again there are the necessary allegations to show why defendants 2 and 3 were sued. Defendants 2 and 3 are stated to be the heirs under the Hindu law. The reason why they are sought to be made liable is referred to by alleging that the debts referred to as debts due to the plaintiffs are pre-partition debts of the father.

Even assuming that our view is not correct, and the suit can still be said to be laid only on the notes, the suit having been filed after the death of the father against defendants 2 and 3 who are his legal representatives under the Hindu law, it is maintainable. Where a person executes a promissory note, it cannot be denied that his legal representatives can be sued on it and it is not denied in this case that defendants 2 and 3 are the heirs and therefore the legal representatives of the executant of the promissory notes. If a suit is laid on the note against legal representatives, the decree that will be passed will be a decree against the property of the deceased in the hands of the legal representatives. Where a suit was instituted against the sons or grandsons of an executant, their Lordships of the Privy

8. (1900) 23 Mad 597, Krishna Ayyar v. Krishnaswami Ayyar.

Council in 13 Luck 61,[9] pointed out that the proper form of the decree would be a decree against the defendants as representatives of the executant for a sum to be realized out of any property of the executant coming to their hands. Their Lordships stated the effect of such a decree thus:

> Such a decree passed in accordance with S. 52, Civil P. C., would have attracted the operation of S. 53 and the respondents' interests in the joint property would have been liable to attachment under the decree notwithstanding that such interests were not 'property of the deceased' in the strict meaning of those words.

It is well settled that under the Hindu law in the case of a pre-partition debt the entire joint family property is liable whether there was division or non-division. In this case defendant 1 was sued because the share of the deceased vested in him and defendants 2 and 3 were impleaded because they were the heirs under the Hindu law and were also in possession of the property which would be liable in spite of their having become divided from their father, that is, their shares in the joint family property which would be 'property of the deceased' in their hands. We therefore think that the first ground raised by Mr. Raghava Rao is not tenable. In regard to the second ground it will be seen that the renewals were executed after the father was adjudicated insolvent and before he was discharged. The debts due under the promissory notes were provable in insolvency and it was a fraud on the insolvency law for the insolvent to execute fresh promissory notes in respect of those debts : *cf.* 27 Bom L R 419.[10] Therefore the fact that there were renewals would not prevent a creditor from suing on the original promissory notes. We are therefore of opinion that the suit as laid is maintainable. In view of this conclusion of ours, we refer the case to the Full Bench for an answer on the questions already referred as amended by the Full Bench.

OPINION

Leach C. J. — The question which the Court is called upon to answer in this case is whether a Hindu father, who has been adjudicated an insolvent, can by reason of the acknowledgment of indebtedness embodied in the schedule filed by him in the insolvency proceedings extend the period of limitation against his sons who have separated from him since the debts were incurred, the debts not having been incurred for any illegal or immoral purpose. Respondents 1 and 2 filed a suit in the Court of the Subordinate Judge of Coconada to recover a sum of Rs. 17,909-7-9 claimed to be due on four promissory notes executed by the father of the appellants. The promissory notes are dated 10th May, 12th June, 18th August 1929 and 31st May 1930 respectively. When they were executed appellant 1 was joint with his father. Appellant 2 had not then been born. On 2nd November 1931 appellant 1 brought a suit for the partition of the family estate. On 16th November 1931 a preliminary decree for partition was passed, but a final decree did not follow until 6th April 1935. The father had died on 17th January 1934. A copy of the final decree has not been printed, but it is common ground that its effect was to divide the appellants from their father and from one another. On 13th March 1931 a creditor applied to the Court to adjudicate the father an insolvent and on 13th November 1931 an order of adjudication was passed. On 21st December 1931 the father filed his schedule and thereby acknowledged his indebtedness on the promissory notes now in suit. The plaint was filed on 21st December 1934. The appellants pleaded that the suit was barred by the law of limitation, having been filed more than three years after the execution of the promissory notes. The plaintiff respondents, however, relied on the acknowledgment of indebtedness made by the father of the appellants in his schedule. The Subordinate Judge of Coconada in whose Court the suit was instituted held that it was in time and passed a decree for the amount claimed. The appellants appealed to this Court and the appeal was called for hearing before Venkataramana Rao and Abdur Rahman JJ. who have made this reference.

In 56 Mad 833,[2] a Division Bench of this Court (Beasley C. J., and Bardswell J.) held that a Hindu son is liable on a promissory note executed by his father before partition and kept alive by an acknowledgment made by the father after partition. If this decision is to stand the appellants are out of Court. The learned Judges who have made this reference, however, formed the opinion that this decision requires reconsideration and consequently have referred to a Full Bench the question stated at the outset of this judgment. I may mention that the

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9. ('38) 25 A I R 1938 P C 7 : 172 I C 5 : 13 Luck 61 : 32 S L R 221 (P C), Rajaram v. Raja Bakhsh Singh.
10. ('25) 12 A I R 1925 Bom 346 : 87 I C 929 : 27 Bom L R 419, Mohan Lal Moti Lal v. Harilal Bhogilal.

learned Judges have found that the plaintiffs respondents have based their claim on the debts as well as on the actual promissory notes. It is a well established rule of Hindu law that a son is under a pious obligation to pay his father's debts, provided that they have not been incurred for any illegal or immoral purpose, but it has been held that the rule does not apply to a debt incurred subsequent to partition: *see* 51 Mad 361,[4] 51 Mad 417[3] and 17 Lah 644.[11] As already indicated, the debts in the present case were incurred before partition, and at the time of the institution of the suit were lawfully enforceable against the father's estate, because of the acknowledgment made by him when he signed his schedule in the insolvency proceedings. The signing of the schedule constituted an acknowledgment within the meaning of S. 19, Limitation Act. The acknowledgment was, however, a purely personal matter, and the father cannot here be treated as being the agent of his sons: *see* 36 I C 389.[1] In that case the Court (Wallis C. J. and Phillips J.) was not, however, called upon to consider the question under reference. What the Court has now to decide is whether the sons remain liable under the pious obligation rule of their personal law when the father has extended the period of limitation against himself.

It must be borne in mind that by signing the schedule the appellants' father did not create new debts. He merely acknowledged debts which had been incurred by him before partition. I agree with Beasley C. J. who delivered the judgment in 56 Mad 833[2] that the position is not analogous to that created when the father, after partition, executes a fresh promissory note in renewal of a promissory note executed by him before partition. In that event there is a fresh cause of action: the cause of action on the new instrument. It follows that I agree with the learned Chief Justice in the distinction which he made between 56 Mad 833[2] and 41 Mad 136.[5] It is manifest that unless the Court is to impose a new restriction on the application of the pious obligation rule an acknowledgment by a father which extends the period of his own liability must affect his son. As the law stands at present, a debt lawfully incurred by the father before partition must be paid by the son, if the father fails to do so. The son is, of course, only liable to the extent of the family property in his hands. The only restriction which has been placed so far on the application of the rule is that which has been imposed with regard to post-partition debts, but the appellants are asking the Court to place a further restriction on the rule, a restriction by way of limitation. In 51 Mad 361,[4] Coutts-Trotter C. J. expressed the opinion that the doctrine of pious obligation should not be extended beyond the point to which the cases had carried it. He regarded the doctrine as being an illogical relic of antiquity, unsuited to any but a primitive and patriarchal society. It may be unsuited to modern conditions but that is the concern of the Hindu community. The doctrine remains and the Court is bound to apply it until the Legislature steps in and changes the law. I consider that 56 Mad 833[2] was rightly decided. To overrule it the Court must go to the length of adding something to the rule which is foreign to it and this would, in my judgment, amount to the usurpation of power which is vested only in the Legislature. The rule is a simple one and there is no difficulty in its application. All that the Court has to do is to inquire whether the debt was lawfully incurred before partition and whether it is still enforceable against the father. If it was lawfully incurred and is still enforceable against the father the son is liable to the extent of the family property in his hands. I find support for what I have said in the judgment of Bhashyam Ayyangar J. in 27 Mad 243.[12] In that case a Full Bench held that independently of the debt arising from an original transaction, a decree against the father, by its own force creates a debt as against him which his sons, according to the Hindu law, are under an obligation to discharge, unless they show that the debt is illegal or immoral. In the course of his judgment Bhashyam Ayyangar J. said:

> Where the creditor sues the son on the original cause of action the law of limitation—including the article in Sch. 2, Limitation Act—applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself. This is conclusively established by the principle of the decision of the Court of Appeal in (1889) 23 Q B D 316.[13] It was there held that the cause of action in respect of which a husband is liable for his wife's ante-nuptial debts is his wife's contract, not his own, and the statute

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11. ('36) 23 A I R 1936 P C 277 : 164 I C 6 : 17 Lah 644 : 63 I A 384 (P C), Sat Narain v. Sri Kishan Das.

12. ('04) 27 Mad 243: 14 M L J 84 (F B), Periaswami Mudaliar v. Seetharama Chettiar.

13. (1889) 23 Q B D 316: 58 L J Q B 516: 61 L T 448: 38 W R 29: 54 J P 198, Beck v. Pierce.

of limitations had always been regarded as beginning to run in his favour as well as in his wife's from the time when the cause of action accrued against her and any acknowledgment or part payment by her before marriage kept her debt alive both against her and her after-taken husband. In the case of a contract, no doubt, the only person who can under the general law be ordinarily sued on it is the contracting party or his legal representative or in some cases his assign. But if a son is under the Hindu law under an obligation to fulfil the father's contract of debt, as a husband is under the English law to fulfil his wife's ante-nuptial contract of debt, the suit, against the son or the husband is a suit on the contract just asmuch as a suit against the legal representative of a contracting party. It may be that the liability of the contracting party himself is unlimited but that of the son or the husband or the legal representative on the same contract is limited, in the case of the son to the extent of the joint family property in his hands, in the case of the husband to the extent of his wife's property which he may have acquired, and in the case of the legal representative to the extent of the assets of the deceased which may have come to his hands. But in all these cases the cause of action on which the son, husband or legal representative is liable to be sued is that against the father, wife or person represented respectively, and the law of limitation applicable is therefore the same.

Bhashyam Ayyangar J. was, of course, referring to the position in England before the passing of the Married Women's Property Act, 1882. Before then, ordinarily, a married woman had no capacity in law to contract during coverture. The decision in (1889) 23 Q B D 316[13] was that an unmarried woman could by her own acknowledgment of a debt create a fresh period of limitation which would be binding on her spouse when she married. After marriage she could not give any valid acknowledgment because of her inability to contract, but before marriage the position was different and her future husband was affected by her action. Here the father has always the power to give an acknowledgment within the meaning of S. 19, Limitation Act; and if he gives one in respect of a pre-partition debt that debt continues to be enforceable for another three years, which in my judgment means that it can within the further period be enforced against the family property in the hands of his son. I would answer the reference in this way. The acknowledgment by the father in his schedule extends the period of limitation against himself and if at the date of the suit pre-partition debts are still enforceable against him or his estate his divided sons are by reason of the pious obligation rule in Hindu law also liable. I would make the costs of this reference costs in the appeal.

Mockett J.—The point that arises for decision is whether the divided son of a Hindu father can be made liable so far as his own share is concerned, for a pre-partition debt of the father which would have been time-barred had it not been for an acknowledgment made by the father after the partition. The referring Judges, Venkataramana Rao and Abdur Rahman, doubt the correctness of the decision of a Bench of this Court (Beasley C. J., and Bardswell J.) in 56 Mad 833.[2] At the outset it is worthy of note that 56 Mad 833[2] which was decided in 1933 does not appear till now to have been the subject of doubt in any High Court; at least no cases have been cited to us suggesting that. In the 10th Edn. of Mayne on Hindu Law (published in 1938) in para. 328 (p. 421) the position is stated as follows :

> A son is not under Hindu law liable to pay a debt of the father which is time-barred as against the father. But he continues to be liable for a debt of the father kept alive by the latter's acknowledgment whether before or after partition.

Similarly in Mulla's Principles of Hindu Law, 9th Edn. 1940 at p. 336, the same proposition is stated as follows :

> If the debts are saved from limitation by the father's acknowledgment, the son is bound to pay even though the acknowledgment by the father is after a partition between the father and the son.

and as authority, 56 Mad 833[2] is cited, the decision of Beasley C. J., and Bardswell J. Judgment in that case was delivered by Beasley C. J., Bardswell J. expressing agreement, and during the course of that judgment certain authorities which have been cited to us are examined. The first was 41 Mad 136[5] in which it was held that a Hindu son was not liable during his father's lifetime on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. Beasley C. J. points out that that decision is not an authority on the question which we now have to consider. The suit was not based, as is evident from the facts, on the original debt of the father but on a new cause of action created by him after partition by the execution of a second promissory note. In 41 Mad 136[5] Kumaraswami Sastri J. observes :

> In the case of renewal by the father alone after partition of a note executed before partition the case is much stronger as I can see no equity in allowing a Hindu father to renew and keep alive a debt (increased by the addition of interest and principal at each renewal) so as to throw upon the son the duty of paying it out of the properties that fall to his share. The renewed note must in my opinion be treated as a new obligation incurred after partition.

If those observations are examined closely they are referable only to a new obligation and not in any way to an acknowledgment within the statute of a pre-partition debt. In 51 Mad 361[4] the following question was referred to a Full Bench of five Judges :

Whether a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a bona fide partition has taken place between the father and the sons ?

A majority of the Bench (Waller, Jackson and Ananthakrishna Aiyar JJ.) held that the answer was in the affirmative, and the learned Judges approved the decision in 47 Mad 621.[14] Coutts-Trotter C. J., and Srinivasa Ayyangar J., differed. It is evident from a perusal of the learned Chief Justice's judgment that he considered the whole doctrine of the pious obligation to be out of tune with modern requirements. It is described by him as "an illogical relic of antiquity unsuited to any but a premitive and patriarchal society." With great respect I think that we are concerned with administering the Hindu law as we find it leaving it to the Legislature to make such changes as public opinion demands. In 56 Mad 833[2] these decisions were considered and at p. 835 Beasley C. J. emphasises that in both, 41 Mad 136[5] at p. 144 and 51 Mad 361,[4] the Courts were concerned not with a suit based on a renewed promissory note but a suit on the original debt, and observes:

The two positions, in my opinion, are quite distinct. If, as 51 Mad 361[4] decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position. The suit in such a case is on the original debt for which the sons are liable.

The position thus stated seems to me, with respect, to be a correct statement of the law. It has been argued by the appellant that S. 19, Limitation Act, is applicable and that here we have an acknowledgment "by an agent duly authorized in this behalf." This view is, I think, without real foundation. The consideration of managership or agency should, as contended by the learned Advocate-General on behalf of the respondents, find no place in deciding the question before us. The appellant's argument appears to be founded on an observation of Kumaraswami Sastri J. in 41 Mad 136[5] at page 144 :

The pious duty creates no charge on the son's share prior to partition, the presumed agency of the father ceases on partition and as the creditor can only work out the father's rights at the date of the suit he can have no right if that right is lost owing to a bona fide partition.

With respect I cannot suppose that the suit against a son claiming payment of his father's debts is based on the debt in the strict sense that it is alleged that the father and the son are jointly liable or that the father contracted the debt on behalf of his son, which logically eliminates the father's own liability. In my view, the learned Judge was using a convenient phrase and no more. His observations on p. 143 suggest to me that in any case it was only referable to the acts of a father manager of a joint family. The son's liability is based on a doctrine peculiar to Hindu law by which there is an obligation on him to pay another's debts, namely his father's, provided that the debt is not immoral and incurred before partition. This appears to be the present position as held in modern decisions, e. g., 51 Mad 361,[4] 51 Mad 417[3] and 17 Lah 644.[11] There is therefore in my opinion no question of agency as between the father and the son. To emphasize the position, let us take a case of a debt incurred by the father for his own, not family, purposes, not being illegal or immoral. In such a case it could not be suggested that the father was the son's agent. Equally, if the father acknowledges it, no question of agency could arise. Limitation finds no place in Hindu law. It is true that the Legislature has made irrecoverable certain debts for which a suit is not brought within a certain time; but no statute has attempted to touch the realms of piety. It seems to me that unless piety, as certain observations in 51 Mad 361[4] suggest, is to be regarded as an anachronism today, which I have no doubt would offend Hindu opinion as a whole, the pious obligation to pay still exists, whether the debt is legally recoverable or not. A consideration of these matters makes the decision in 56 Mad 833[2] readily acceptable not only as representing good law but as representing the spirit of the Hindu law as well. The acid test is : Is there a debt owed by and recoverable from the father? The fact that the father has, instead of sheltering himself behind the machinery of a modern statute, acknowledged the debt seems to me irrelevant. The relationship of a Hindu father and son is dealt with by Curgenven and Sundaram Chetty JJ. in 57 Mad 190[15] and

14. ('24) 11 A I R 1924 Mad 682 : 80 I C 228 : 47 Mad 621 : 46 M L J 590, Jagganatha Rao v. Viswesam.

15. ('33) 20 AIR 1933 Mad 690 : 149 I C 188 : 57 Mad 190:65 M L J 417, Virayya v. Parthasarathi Appa Rao.

the learned Judges emphasize the comprehensive nature of the pious obligation, and that it exists

irrespective of the fact whether the father is or is not the manager of the joint family or whether the joint family is or is not composed of persons other than the father and the sons.

This is a quotation from the remarks of Iqbal Ahmad J. in 55 ALL 283,[16] with which the learned Judges express their assent. In 27 Mad 243,[12] Bashyam Ayyangar J. remarks at page 252 :

Where the creditor sues the son on the original cause of action the law of limitation — including the article in Sch. 2, Limitation Act—applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself.

Bashyam Ayyangar J. considers that that position is conclusively established by the principle of the decision in (1889) 23 Q B D 316,[13] where it was held that the cause of action in respect of which a husband is liable for his wife's ante-nuptial debts is his wife's contract, not his own, and that the statute of limitations has always regarded as beginning to run in the husband's favour as well as in his wife's; and the time when the cause of action accrued against her and any acknowledgment or part payment by her before marriage kept her debt alive both against her and her after-taken husband. This decision is instructive, but I consider that the position of a Hindu father and son is far simpler than was that of an English wife and husband although the principle may be of assistance. I would answer the reference in the manner proposed by my Lord the Chief Justice, whose judgment I have had the advantage of reading and with which I respectfully agree. I also concur with the order as to costs.

Krishnaswami Ayyangar J. — The substantial question which arises for decision in this reference is whether a Hindu father can after partition keep alive a pre-partition debt against his divided sons by an acknowledgment of liability made by himself alone. In 56 Mad 833[2] a Division Bench of this Court consisting of Beasley C. J. and Bardswell J. have answered the question in the affirmative. The learned Judges who heard the appeal from which the present reference has arisen have doubted the correctness of this decision, and hence it was that they felt obliged to refer the question to a Full Bench. The judgment in that case was pronounced after a consideration of the effect in 41 Mad 136[5] and 51 Mad 361.[4] In the first of these cases it was held that the father had no authority to bind his divided sons by a promissory note executed after partition in renewal of one executed before. The grounds of the decision are found more fully expressed in the judgment of Kumaraswami Sastri J. than in that of Wallis C. J. They are two in number. The first is that if a bona fide partition had been arrived at between the father and the sons the creditor must seek his remedy against the father alone as, in the absence of a term to the contrary expressly agreed to, the share received by the sons at the partition would be wholly exempt from the liability. The learned Judge observed :

So far as the creditor of the father is concerned, all that he can do is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and if the father has lost his power of dealing with the son's interest owing to a bona fide partition between them, the creditor can be in no better position. The effect of a bona fide partition is prima facie to secure to each of the parties absolute control over the properties that fall to his share unfettered by any liabilities which at the date are not charged upon them .... There is nothing in Hindu law to prevent a father from taking certain properties absolutely or receiving certain benefits and releasing the son from the duty cast upon him by Hindu law to pay his debts and so long as the transaction is bona fide, a simple creditor can have no right to object to a transaction which both the father and son were competent to enter into.

The second ground is contained in the following sentence occurring in the judgment :

In the case of renewal by the father alone after partition of a note executed before partition, the case is much stronger as I can see no equity in allowing a Hindu father *to renew* and *keep alive* a debt (increased by the addition of interest and principal at each renewal), so as to throw upon the son the duty of paying it out of properties that fall to his share. The renewed note must, in my opinion, be treated as a new obligation incurred after partition. (The italics are mine.)

So far as the first of these two grounds is concerned, it had definitely been rejected by the Full Bench in 51 Mad 361[4] the decision in which case has finally established the proposition that notwithstanding a bona fide partition the sons continue to be liable for a pre-partition debt in so far as the creditor's remedies are concerned. It is the second ground which may be said to approach the question on hand, but it does not in fact touch it. The learned Judge was dealing with the case of a renewed, and not a merely acknowledged promissory note, and he was content to rest his judgment on the

16. ('33) 20 A I R 1933 All 235 : 149 I C 181 : 55 All 283 : 1933 A L J 550, Lalta Prasad v. Gajadhar Shukul.

fact that the renewal gave rise to a fresh cause of action which of course stands on a different footing, from an acknowledgment which only operates to keep the old cause of action alive. But it is to be observed that the learned Judge did not, and was not called upon to decide whether the father had the right after partition, to make an acknowledgment so as to bind the son. This case was, if I may say so with respect, rightly distinguished by the learned Chief Justice in 56 Mad 833[2] on the ground that it only dealt with a case of a renewed promissory note giving rise to a fresh cause of action. The Full Bench decision in the second of the cases referred to above did not go beyond establishing the liability of a divided son for a pre-partition debt. The question therefore fell to be decided as a matter which was res integra, and was apparently decided on that footing. The ground of the decision is to be found from the following passage in the judgment of Beasley C. J. concurred in by Bardswell J. :

> If, as 51 Mad 361[4] decides, sons are liable after partition for the original debt of the father incurred before partition, then the fact that the debt has been acknowledged by the father, in my view, does not alter the position. The suit in such a case is on the original debt for which the sons are liable. But in the case of a renewed promissory note the suit is not upon the original debt at all but upon the renewed promissory note and I can see nothing which can take away from a father his authority from his sons to make a payment during the period of limitation in respect of a debt incurred by him. It is another matter altogether to wipe out the original debt and substitute therefor another debt.

If I may say so with the utmost respect, this statement of the law involves the proposition that a father continues to possess even after partition an authority from the sons to make a part payment or acknowledgment, so as to keep alive against them a pre-partition debt. It is with this proposition that the referring Judges in the present case are in disagreement and it therefore becomes necessary to examine the Hindu law, in order to find out which is the correct view to be taken. The general principles governing the liability of the son under Hindu law to pay the debt of the father, and the limitation to which his interest in the ancestral estate is subject are now so well settled that it is unnecessary at this time of day to enter upon a detailed examination of the case law, much less to trace its development. In origin, the obligation was legal as well as personal; it was capable of being enforced in a Court of law, and prevailed both against the person and property of the son, irrespective of whether that property was ancestral or self-acquired. Since the advent of the British Courts, the liability has become circumscribed and is now limited to the ancestral estate received by the son. In other words, the obligation has ceased to be personal, as it can no longer be enforced by arrest of the person, or by attachment of the son's separate or self-acquired property.

The decisions of the Privy Council in 1 I A 321[17] and 6 I A 88,[18] tended to introduce a remarkable change in the law as theretofore understood. Under the law of the Smrithi writers, the son's liability arose not during the lifetime of the father, but only after his death, natural or civil. The effect of the change was to sustain the liability of the son even during the lifetime of the father, as an incident of the heritage from the very inception of the son's interest, on the apparent ground that if it is the pious duty of the son to save the father from sin after his death, it must be equally meritorious to him to permit the father to anticipate it by an alienation made by him during his own life. It stands to reason that the son could not validly object to a sale of the family property by the father to save himself from the very sin from which after his death the son is himself legally bound to purge him. The next step is easy: if the father has the power to alienate the family property inclusive of the son's interest in order to discharge his own debt, it is a necessary corollary that the interest of the son, along with that of the father in the ancestral estate, may be attached and sold the Court merely stepping in to execute the father's power by doing what the father can himself do for the benefit of a creditor whose debt is neither immoral nor illegal. The son's equal ownership with the father in the heritage thus came to be burdened with a liability which may result in its partial or total destruction owing to the pious duty of the son to provide for the discharge of the debt of the father. The Privy Council have made it clear that the liability is one that is annexed to the estate though it does not amount to a hypothecation or charge. The overriding power of the father is thus founded entirely on the pious obligation of the son and is inseparable from it in the sense that

17. ('73) 1 I A 321 : 22 W R 56 : 14 Beng L R 187 : 3 Sar 380 (P C), Girdhari Lal v. Kantoo Lal.
18. ('80) 5 Cal 148 : 6 I A 88 : 4 C L R 226 : 4 Sar 1 : 3 Suther 539 (P C), Suraj Bansi Koer v. Sheo Pershad Singh.

it begins when the obligation begins and ceases when it ceases. The pious obligation is, so to say, the touchstone of the father's power over the son's share.

But the situation materially changes once a partition takes place between the father and the son. The obligations so far incurred, even those arising out of the individual acts of the father done for his personal benefit, still bind the son's interests in the joint estate. But his pious obligation in respect of all future acts of the father is extinguished for ever and with it the power of the father to affect the share of the divided son. After partition the community of interest entirely ceases; the father and the son thenceforth hold their respective shares as if they are independent owners; they become in fact strangers so far as property rights are concerned. But this, of course, is without prejudice to the rights of the creditor which remain unaffected notwithstanding the partition, in respect of the prepartition debts of the father. In respect of such debts, their rights had already become crystallized. It is the power of the father to affect the son's interest in future, which is eliminated simultaneously with the disappearance of the pious obligation on a disruption of the joint status in consequence of a partition. It is important in this connection to remember that there is no distinction recognized in Hindu law between a debt incurred by a manager for the necessary purposes of the family and a debt of the father incurred for his personal purposes if they are neither illegal nor immoral, in so far as the creditor's remedies are concerned. In the origin and in the matter of the proof to be adduced there is undoubtedly a difference but none in the nature or quality of the resulting liability once it is validly incurred. Both classes of debts rank *pari passu* and the family property is equally liable for both.

The pious obligation is then the only source of the son's liability and its subsistence is the very foundation on which the superior power of the father as such is based. In its absence, the position of the father is indistinguishable from that of a mere manager. After a severance in status is established, the father, no less than the manager, sinks to the level of any other divided parcener of the family. If a manager cannot after the cessation of his managership acknowledge a debt so as to extend the period of limitation as against his divided kinsmen, it is difficult to see how the father can, after the extinction of the pious obligation, as against his divided son. The decisions of this Court in 41 Mad 136[5] and 51 Mad 417[3] should, in my opinion, be regarded as being merely illustrative of a wider principle, which is that the father after partition is as incompetent to affect or extend an existing liability of the son as he is to impose on him a fresh one. To acknowledge a debt is certainly to affect the liability of the son to his possible prejudice, by giving it a new term of life, and holding his share bound for a longer period. If the father has the power, it would lead to the startling result that he could by successive acknowledgments prolong the period of limitation for an indefinite length of time, without the consent and against the will of the son. It would be illogical to recognize the existence of such a power after the destruction of the son's pious obligation from which alone the father's power is derived. In the Full Bench decision of this Court in 51 Mad 417,[3] the learned Judges who formed the majority held that the power of the father to sell though derived from the theory of the pious obligation existed only so long as the family remained joint. In substance and effect, there is no difference between the two theories as a partition puts an end to both the joint status and the pious obligation, and takes away the power of the father to deal with the son's interest thereafter. But existing obligations in favour of the creditor are saved, though the father has lost his right of disposal over the son's share. It would be more in consonance with principle, to hold that the loss of the father's power is the necessary resultant of the cessation of the pious obligation rather than of the joint status.

One other aspect of the question also deserves notice. The Hindu law as such contains no rules of limitation such as are known to modern jurisprudence. There were perhaps rules of prescription affecting property rights, but the sanctity of the obligation to pay a debt properly incurred knew no limit of time. The idea of keeping a debt alive by an acknowledgment or part payment is foreign to the ancient law and it is purely the creation of statute in this country. It would therefore be an anachronism to speak of a power to acknowledge as based on a rule of Hindu law. It is the Limitation Act which has fixed periods of limitation for all kinds of suits without exception and it has been held that on a personal debt of the father there is but one cause of action, enforceable both against the father and the

son to the extent of their interests in the joint family property but within the time fixed by the article appropriate for the cause of action against the father: 27 Mad 243.[12] Prima facie, it would seem then if the Limitation Act applies, as it undoubtedly does, S. 19 must be held to govern the suit against the son as much as a suit against the father. An acknowledgment of liability to come within the section must be in writing signed by the party against whom the property or the right in suit is claimed or by some person through whom he derives his liability to be sued. The signature may be that of the defendant or of his agent duly authorized in that behalf. The explanation contained in S. 21 (3) (b), while recognizing in the manager a right to make an acknowledgment binding on the other members, confers no similar power on the father. So long as he is joint with his sons, the pious obligation would subsist enabling him to incur fresh debts, and acknowledge old ones already incurred. But after a severance of status, the power ceased under Hindu law, and S. 21 does not help to recreate it. The principle involved is not very different from that laid down by the Full Bench decision of this Court in I L R (1940) Mad 872,[19] where a mortgagor who had lost all interest in the mortgaged property was held not entitled to bind by his acknowledgment the person on whom his interest had devolved. That principle in the words of Lord Westbury, quoted in extenso in the above decision, is that an acknowledgment by one person cannot bind another on the ground that the latter derived his liability from the former unless the derivation of title or liability takes place after the acknowledgment has been given. I find it difficult to hold that an acknowledgment by a person who has ceased to have any interest in the property or right claimed, could still be efficacious to bind the party against whom such property or right is claimed in the absence of a writing signed by him. This appears to be a condition of the acknowledgment operating against him, expressly so enacted by S. 19, Limitation Act.

I regret therefore that I feel obliged with great respect to differ from my Lord the Chief Justice and my learned brother Mockett J. I may add that I have refrained from considering the applicability of the decision in (1889) 23 Q B D 316[13] to the question before us in view of the fact the two systems of law differ materially, though there may be analogies here and there. With respect, it seems to me that it is safer to try and gather the limits of a rule so peculiar to Hindu law as the doctrine of pious obligation by resort to the principles of that law than by resort to analogies derivable from another system. My answer to the question referred is in the negative.

C.R.K./G.N. *Reference answered.*

19. ('40) 27 AIR 1940 Mad 470 : 188 I C 603 : I L R (1940) Mad 872 : (1940) 1 M L J 766 (FB), Pavayi v. Palanivela Goundan.

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(28) A. I. R. 1941 Madras 786

MOCKETT J.

Gonuguntla Maha Latchayya — *Petitioner*

v.

Tadepalli Adi Seshayya and others — *Respondents.*

Civil Revn. Petns. Nos. 17 and 566 of 1939, Decided on 4th February 1941, to revise decree of Sub-Judge, Bezwada, in S. C. S. Nos. 180 and 370 of 1936, respectively.

(a) Civil P. C. (1908), O. 2, R. 3—Limitation —Different claims in one suit — More than one period of limitation can be applied.

In considering limitation more than one period of limitation can be applied to different claims in one suit : ('22) 9 A I R 1922 Lah 198 (F B), *Rel. on.* [P 787 C 2]

(b) Civil P. C. (1908), O. 2, R. 3 — Plaintiff uniting several causes of action against same defendant before Court competent to try suit as whole — Question of limitation under Ss. 3 and 4, Limitation Act, must be regarded with special reference to that Court's jurisdiction to try suit and not to jurisdiction of other Courts which might have been able to try those causes of action when split up had they been brought before them.

Where the plaintiff has united several causes of action against the same defendant before a Court competent to try not necessarily those causes of action separately but the suit as a whole, the question of limitation under Ss. 3 and 4, Limitation Act, should be regarded with special reference to the jurisdiction of that Court to try the suit and not to the jurisdiction of the other Courts which might have been able to try those causes of action when split up had they been brought before them. [P 788 C 1]

The plaintiff's cause of action in respect of his first contract with the defendant involving a claim of Rs. 240 arose on 31st May 1933 while the cause of action in respect of the second contract with the same defendant involving a claim of Rs. 609 arose on 30th July 1933. At the place where the parties entered into the contracts two Courts had small cause jurisdiction—the District Munsif's Court up to Rs. 300 and the Sub-Judge's Court up to Rs. 1000. On 31st May 1936, when the three years for a suit on the first contract expired both the Courts were closed for the vacation. The District Munsif's Court was to re-open on 12th June 1936 and that of the Sub-Judge on 2nd July 1936. Instead of filing his suit on the first contract on

12th June 1936 in the District Munsif's Court under S. 4, Limitation Act, the plaintiff under O. 2, R. 3, Civil P. C., united his causes of action on the first and second contract in one suit which he filed in the Sub-Judge's Court on 2nd July 1936, the day on which that Court re-opened. It was contended that the claim in respect of the first contract was barred :

Held that the suit instituted in the Sub-Judge's Court including the claim on the first contract was in time. [P 788 C 1]

V. Govindarajachari and N. Vasudeva Rao — for Petitioner.

P. Satyanarayana Rao and P. Sivaramakrishnayya — for Respondents.

Order. — *C. R. P. No. 17 of 1939* — This is a petition under S. 25 of Act 9 of 1887 to revise the decree of the Subordinate Judge of Bezwada in S. C. S. No. 180 of 1936. The main point on which I have listened to the interesting arguments of Mr. V. Govindarajachari and Mr. P. Satyanarayana Rao concerns limitation. It is a point on which I should have expected to find a wealth of authority but on which I find in fact there is no authority directly in point. The defendant is alleged to have sold to the respondent (plaintiff) large quantities of oil and the suit was concerned with two contracts— a contract dated 17th March 1933 in respect of 1000 tins which were to be delivered before 31st May 1933 and another contract dated 25th May 1933 for 1000 tins, delivery in this case to be before 30th July 1933. I am concerned only with the first contract so far as limitation is concerned. The relevant facts are as follows : The breach alleged in respect of the first contract was on 31st May 1933 and on that day the cause of action may be said to have arisen. Three years from that day would be 31st May 1936. In Bezwada there is a District Munsif's Court and a Subordinate Judge's Court both having small cause jurisdiction. The District Munsif's Court's jurisdiction is limited to Rs. 300 and the Sub-Court's jurisdiction is limited to Rs. 1000. The Sub-Court was closed for the summer vacation from 1st May 1936 to 1st July 1936. The District Munsif's Court was closed from 1st May 1936 to 11th June 1936. Under S. 4, Limitation Act, it will be seen, therefore, that in the case of these two Courts, where the period of limitation prescribed for any suit expired during their respective vacations, the suit should be instituted in the case of the Sub-Court on 2nd July and in the case of the District Munsif's Court on 12th June 1936. Actually in this case the alleged breach being on 31st May 1933, three years expired on 31st May 1936 when both the Courts were in vacation. A suit with regard to the first contract which amounted to a claim for Rs. 240 could have been filed in the Munsif's Court on 12th June, but that is not what happened. The plaintiff preferred to avail himself of the option given to him under O. 2, R. 3, Civil P. C., and he united in one suit the causes of action which he alleged he had against the defendant in respect of the breach of the first contract and also in respect of the breach of the second contract. The amount of the second contract was Rs. 609 and that suit could not have been filed in the District Munsif's Court. The suit was in fact filed on 2nd July 1936, the day the Court of the Subordinate Judge re-opened. It was objected in the lower Court that the suit was barred by limitation. The objection was overruled and Mr. Govindarajachari has argued that the lower Court was wrong and that in fact the claim so far as the first suit was concerned should have been dismissed as time-barred.

The argument put before me is as follows: Section 15, Civil P. C., says that every suit shall be instituted in the Court of the lowest grade competent to try it. The suit for Rs. 240 could have been filed under S. 4, Limitation Act, in the Court of the District Munsif, although by actual process of time it was barred by limitation. But owing to the provisions of Sec. 4, the period of the vacation being excluded, the suit should have been filed on 12th June. If it was not filed on 12th June, it became barred and no other Court could take cognizance of it. It has been strongly urged that in S. 4 the word "Court" must mean "the proper Court." It has further been urged that when in that section mention is made of the period of limitation prescribed for any suit it cannot be one period of limitation especially in view of O. 2, R. 3 but that limitation must be examined in each particular case with regard to each particular cause of action. Now, I do not understand that either of these positions is contrary to the argument of Mr. P. Satyanarayana Rao. If authority is required for the position that in considering limitation more than one period of limitation may be applied to different claims in one suit, it is to be found in a Full Bench decision of the Lahore High Court reported in 2 Lah 376[1] (*see* the observations of Shadilal C. J. at p. 378). The respondent's argument is put in this way. Order 2, R. 3 is a provision

1. ('22) 9 A I R 1922 Lah 198: 66 I C 490 : 2 Lah 376 (F B), Mahomed Ghasita v. Sirajuddin.

which gives facilities to the plaintiff to unite in one suit several causes of action and it has to be applied to any suit in which the provisions of that order have been called in aid to consider whether such uniting has been properly done and no question of limitation is relevant to a consideration of the rule by itself. It is Ss. 3 and 4, Limitation Act, which deal with limitation and it is with regard to one suit —it is conceded that the suit may be divided into various causes of action—that those sections begin to operate.

Now, in the absence of any direct authority to assist me, I take the view that if the plaintiff has united several causes of action against the same defendant before a Court competent to try not necessarily these causes of action separately but the suit as a whole when those causes of action are combined — when that has been done, the question of limitation under Ss. 3 and 4 is to be regarded with special reference to the jurisdiction of that Court to try the suit and not to the jurisdiction of the other Courts which might have been able to try those suits when split up had they been brought before them. That in my view is the test. I cannot see why I should imply any restriction on the facilities given by O. 2, R. 3 to a plaintiff to join several causes of action because it happens that another Court might have tried one of those causes of action sued on. I think that in arriving at this conclusion there is at least behind it the general spirit which should influence these matters—the desire of the Legislature to avoid multiplicity of suits — moreover I do not consider that the law of limitation should be unduly strained to bar a suit any more than it should be strained to allow it to be tried. It seems to me that the result that this suit should proceed is a reasonable one and is in accordance with the spirit of the Code and of the Act. So far as the order of the Subordinate Judge is concerned, I think it was right. I do not think that there is any substance in the contention as regards interest which does not appear to have been seriously advanced in the lower Court. The civil revision petition is dismissed with costs.

C. R. P. No. 566 of 1939—I see no reason to interfere with the decision of the lower Court. The revision petition is dismissed with costs.

C.R.K./G.N. *Petitions dismissed.*

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(28) A. I. R. 1941 Madras 788

PANDRANG ROW AND ABDUR RAHMAN JJ.

Chilakamarri Lakshminarasimhacharyulu — Plaintiff — Appellant

v.

McLaurin High School, Coconada by Manager, Rev. Eric. L. Quirk — Defendant — Respondent.

Appeal No. 209 of 1938, Decided on 11th October 1940, against decree of Sub-Judge, Coconada, in O. S. No. 22 of 1935.

(a) Master and servant—Permanent appointment not ordinarily to be terminated for reasons other than conduct or unsatisfactory work as unfits servant for post — Drastic reduction in salary or dispensing with services on ground of financial stringency — Master should prove grave character of financial stringency to justify such action.

The material portion of a contract of employment of a teacher ran as follows : "This is a permanent appointment and will not ordinarily be terminated by the manager for reasons other than that of such conduct or unsatisfactory work as, in his opinion, unfits the teacher for his post." Subsequently, the salary of the teacher was sought to be drastically reduced (by about 28 per cent.) on ground of financial stringency, and on his not agreeing to do so his services were dispensed with :

Held that it was not every financial stringency that would come under the definition of "ordinary," but it must be of a sufficiently grave character, and what has to be considered was whether the financial stringency was of such grave character as to necessitate directly a revision of the scales of pay and indirectly the termination of the contract with the servant who was a member of the permanent staff. [P 792 C 1; P 793 C 1]

(b) Master and servant — Teacher—Contract of employment — Usage prevailing in educational world regarding age of retirement should be deemed to be part of contract — Use of word 'permanent' in contract does not make it one for life *(Obiter)*.

In construing a contract of employment of a teacher the usage prevailing in the educational world regarding the age till which the teachers are allowed to continue in service must be deemed to be part of the contract and merely because the word 'permanent' is used in the contract, the contract cannot be regarded as being one for life. [P 793 C 1]

V. Govindarajachari and D. Suryaprakasa Rao — for Appellant.

Advocate-General and D. Narasaraju — for Respondent.

Pandrang Row J. — This is an appeal from the decree dated 9th September 1937 of the Subordinate Judge of Coconada in O. S. No. 22 of 1935 on his file. The suit was for damages estimated at Rs. 10,000 for wrongful dismissal of the plaintiff from his appointment as first assistant in the defendant school, namely, the McLaurin High School, Coconada, which is represented in

the litigation by its manager. The suit was dismissed with costs by the Court below and the plaintiff is the appellant before us. Two questions arise for determination in this appeal, namely, whether there was a breach of contract by the defendant, or, in other words, whether the dismissal of the plaintiff by the manager of the school was wrongful and if so, what is the amount of damages to which the plaintiff is entitled.

So far as the first question is concerned, a similar question arises in a connected appeal, Appeal No. 30 of 1939, in which the contract of service or employment is couched in similar language. In the present case, as observed already, the suit was dismissed, but in the connected case, the suit was decreed, the Court which passed that decree being the District Judge of East Godawari. In other words, in these two cases, two Courts have taken different views as to the interpretation to be placed on the contract and also as regards the actual financial position at the time when the services of the teachers were dispensed with. It seems desirable that we should deal with the appeals separately though in some respects the questions are the same in both the appeals. The plaintiff is a trained graduate who was employed in 1912 when the defendant school was started. He was then on a temporary basis. On 1st July 1927 the position was changed to his advantage, a contract being signed between him and the manager on that day giving him the status of a permanent employee. The important portion of the contract is as follows :

> This is a permanent appointment and will not ordinarily be terminated by the manager for reasons other than that of such conduct or unsatisfactory work as, in his opinion, unfits the teacher for his post; or by the teacher except for reasons which, in his opinion, make it impossible for him to continue in the school. In either case three months notice shall be given to the other party by the party that terminates the agreement.

The order of communication which terminated the services of the plaintiff is dated 24th January 1934 (Ex. F). It runs as follows :

> Due to the stress of extraordinary financial circumstances, I hereby give you three months notice that the agreement made between you and the manager of the McLaurin High School, Coconada, on 1st July, (year nil), is terminated from today and that your appointment to the staff of this school ends on 30th April 1934.

This letter was sent by the manager, Mr. Quirk, D. W. 3, and it purports to have been sent under the authority of the C. B. Mission Conference, 3rd January 1934. Before this final notice terminating the plaintiff's services, there was some previous correspondence which may be briefly referred to. On 18th October 1933, the then manager, Mr. Wilton, wrote a letter (Ex. C) which runs as follows :

> Owing to financial stringency a reduced scale of salaries throughout the Mission will come into force from 1st January 1934. According to that scale we can offer you Rs. 90 per month without further increments. If you desire to enter into a contract with the Mission on this basis and to continue in your present capacity, please intimate the same below.

It must be mentioned in this connexion that the pay that the plaintiff was entitled to get under his contract even in 1927 was Rs. 125 a month. Subsequent to Ex. C there was a reminder and a request for more time to make a decision by the plaintiff and finally a reply was sent by the plaintiff on 15th December 1933. The material part of it runs as follows :

> I beg to state that during the period of financial stringency, I agree to a reduction of my salary in the maximum cut of 12½ per cent. which is usual in all institutions public or private. Kindly consider the possibility of a contract on that basis, in the absence of which, the original contract stands.

The final notice was in answer to this letter from the plaintiff, terminating the services of the plaintiff with effect from 30th April 1934. Later on, on 23rd April 1934, the plaintiff wrote again to the manager protesting against the termination of his services and again expressing his willingness to submit to a cut of 12½ per cent. during the period of financial depression and threatening a suit in case his offer was not accepted. The final reply sent to the plaintiff by the manager is Ex. H which stated that there was no breach of contract committed by the management and that on account of extraordinary financial conditions the management was constrained to make the changes and terminate his services: *vide* Ex. H, dated 30th June 1934. The suit was instituted on 29th March 1935. The defendant's main defence, as disclosed in the correspondence, is that the termination of the services of the plaintiff was necessitated by the plaintiff's refusal to accept the reduced salary of Rs. 90 a month, which reduction in its turn was necessitated by the extraordinary financial stringency that prevailed at the time. Apart from their income in the shape of fees and Government grant, the maintenance of the school was possible only with the addition of a grant from the Mission whose head office is at Toronto, Canada. It is the case of the defendant that the first intimation they

had of this extraordinary financial stringency was a cablegram sent unofficially by the chairman of the Mission, Dr. MacNeill, on 14th March 1933, which was to the following effect :

Foreign Board facing unprecedented financial crisis: severe reductions likely near future: earnestly suggest missionary leaders consult immediately and submit to Board recommendations of voluntary reduction in salaries and work effective at earliest possible date. This message purely personal and unofficial.

It would seem that immediately on the receipt of this cable, a few missionaries met at Coconada on 27th March 1933 and they seem to have straightway decided to propose at the regular conference in July that there should be a "downward revision of salary schedules of the more highly paid Indian workers." It would appear from the evidence, that this description would take in every Indian worker paid more than Rs. 21 a month. It will at once be seen that this proposal which was ultimately carried into effect after approval by the conference in July and subsequent approval by the Home Board on 25th October 1933 went very much further than the information before the meeting justified, because, what the cablegram had stated was that recommendations in respect of voluntary reductions of salaries and work should be made as soon as possible and there was no suggestion as to the extent of the reduction that would be necessary and no hint of any lowering of salaries even in the case of existing and permanent employees. In any case, this proposal seems to have met with the approval of the conference in July 1933. At the same time, so far as the missionaries themselves are concerned, their proposal was that there should be a cut in salaries. Between these two dates, there was a meeting of the Home Board early in May 1933 at which a statement of the financial position of the Mission was read and a copy of the statement was forwarded to the missionaries in India.

It is however unnecessary to go into the question of the financial condition of the Mission in Canada because it was admitted by both the parties in the Court below that what the Court had to consider was, not the financial condition of the Home Board but the financial condition of the Indian branch of the Mission in 1933 and the early part of 1934. It is obvious that so far as any reduction in the salaries or expenditure of any other kind in India was concerned, there could be a necessity to effect it only if there was an anticipated reduction in the income of the Indian branch. In short, unless there had been or there was going to be a serious reduction in the contribution made by the Home Board to the Indian branch of the Mission, there would not have been any necessity to effect any economies or make any reductions in salary. Unfortunately, so far as this aspect of the case is concerned, there is very little evidence as to the information that was before the school authorities (including in this phrase not merely the manager but also the conference which appears to have exercised some power of supervision over the school finances) when they decided to put into force the reduced scale of salaries even in the case of existing permanent employees and authorized the giving of a notice like Ex. F to the plaintiff. So far as Ex. C dated 18th October 1933 is concerned, it would appear that it was sent even before the Home Board had approved the scheme of reduced salaries being applied even to existing employees, for the communication sent by the Home Board after their meeting in May 1933 was substantially to the effect that alternative budgets should be sent for the year 1934 on the basis of a reduction in the grant from the Home Board of 12½ per cent., and 16⅔ per cent. respectively and a note was added to the effect that at that moment the best that could be done was to limit the reduction to 12½ per cent. but that it might be necessary to make the larger reduction of 16⅔ per cent.

In short, the information which the conference had before it in July 1933 was that in all probability there would be a reduction in the grant from the Home Board to the extent of 12½ per cent. and that the reduction might be even as much as 16⅔ per cent.; in other words, that the reduction was likely to be one-eighth and must even have to be one-sixth. The actual reduction made in the salaries by the scheme approved by the conference in July was however much more drastic, because, in some cases the reduction was as much as 38 per cent. and the average was 22 per cent. It is clear therefore that the scheme went very much beyond what the situation required. There is, moreover, no clear evidence as to whether the threatened reduction by 12½ per cent., of 16⅔ per cent. was actually made in the budget of 1934. It is extraordinary, but the fact remains, that there is no clear evidence to show what was the actual reduction made by the Home Board in their contribution for the year 1934. No communication or paper has been put before us from which it

can be seen at a glance what the contribution by the Home Board was in 1933 and what it was in 1934. No doubt, in respect of the High School, with which we are concerned in this case, there is the evidence of the manager given in cross-examination to the effect that the monthly contribution on 1933 was Rs. 548 and the contribution in 1934 was Rs. 439-11-1. This, however, is not sufficient, because, it is admitted that the High School is only one of the several institutions which have, so to say, a common finance. The manager himself admits that though separate accounts were kept, the finance of all the institutions is treated as one unit. In his own words, "the accounts of the two schools the High School and the Training School are kept separate but are grouped together for institutional finances." Again, he stated in his examination-in-chief that the Mission makes a grant in the name of the defendant school but it is divided into four heads, the defendant School, the Training school, the Manual Training School and the Hostel.

These figures, namely, the grants made by the Mission in Canada for all these four institutions for the year 1933 and for the year 1934 are not before us, because the figures given by the manager in his cross-examination relate only to the grant actually allocated to the High School proper by the local authorities here. It is therefore not inaccurate to say that there is no evidence before us to show what was the actual reduction in the grant made by the Board in Canada in its contribution to the Indian branch for the year 1934. Assuming however that the threatened cut in the grant which was foreshadowed in the cable and in the proceedings of the Board in Canada, was sufficient to justify the need for a reduction of salaries, it would have justified the imposition of a cut of 12½ per cent. or so. The manager himself, in his letter to the Director of Public Instruction (Ex. 20) admitted that to meet the 12½ per cent. mission cut, a 12½ per cent. cut on the Mission institutions would have been sufficient to meet the expected deficit for 1934. He also admitted in that letter that for 1934 only a 12½ per cent. cut was made on the Indian work but nevertheless a more drastic reduction was made in the salaries because the conference "decided to make a permanent new scale which should meet the situation with which the mission was faced." In his evidence also, the manager, as D. W. 3, admits that during 1934 the cut on the institutions was only 12½ per cent. This discussion of the evidence is sufficient to show that while a case could be made out for reduction in salaries to the extent of 12½ per cent. either in the shape of compulsory reduction or of voluntary cuts, there was no need to make a more drastic reduction of salary even in the case of existing employees and in particular of employees who enjoyed the privilege of being permanent employees with contracts in their favour. This leads us to the question of the interpretation of the contract in this case. The two words in the contract which are relied upon are the words, "permanent" and "ordinarily", which are found in the following sentence:

> This is a permanent employment and will not ordinarily be terminated by the manager for reasons other than that of such conduct or unsatisfactory work. . . . .

It is not necessary to consider the exception of bad conduct or work, because it is not the case of the defendant that the dismissal or termination of services in this case was on account of unsatisfactory work or conduct. Throughout, the reason for the act complained of by the plaintiff has been the extraordinary financial circumstances which faced the Mission in India. Mr. Govindarajachari for the plaintiff-appellant relies on a comparatively recent ruling of the Court of Appeal in England in (1936) 3 ALL E R 322.[1] The agreement in that case contained the following relevant words:

> In the absence of such notice, the engagement to remain in force as a permanent one, subject to your continuing to perform your duties to the satisfaction of the directors.

It was argued in that case on behalf of the company that the word "permanent" was used in the same sense as a permanent civil servant as opposed to a temporary civil servant and that the use of the word was compatible with the employment being from year to year. This argument was repelled by the Court of Appeal which observed that actually this argument amounted to saying that permanent does not mean permanent but means an engagement which can be determined at any time by notice expiring on 31st December or at any other time in the year; and it was held that the words mean that the plaintiff in the suit was to have a permanent employment, i. e., employment for life, subject to the proviso contained in the agreement, namely, his continuing to perform his duties to the satisfaction of the directors. In the present case, there is not only the use of the word "permanent", but also the additional words

1. (1936) 3 All E R 322, Salt v. Power Plant Co. Ltd.

which have been quoted above which provide, so to say, against termination of the employment. In substance, omitting the cases of dismissal for bad conduct or work, the words are: 'this is a permanent appointment and will not ordinarily be terminated by the manager'. Unless the word 'ordinarily' is given such a meaning as to nullify the effect of the word 'not' preceding it, it is impossible to interpret the contract in the way pressed before us by the learned Advocate-General namely, that in spite of the appointment being declared to be permanent and in spite of the words which provide that the appointment will not ordinarily be terminated by the manager, nevertheless, if the management at any time in its opinion thought that the circumstances were other than ordinary, it would validly terminate the appointment and the Court would have no right to canvass the reasons which led the management to form the opinion that the circumstances were other than ordinary or required the termination of the services.

We are unable to accept such an interpretation of the contract in the present case. "Ordinarily" no doubt, must be given its full force but the meaning of this word as well as of all words in ordinary use must be their ordinary meaning. It means, in our opinion, that in other than ordinary circumstances, or, to put it differently, in exceptional or special or unusual or extraordinary circumstances, the management shall not be prevented by the contract in doing what these extraordinary or unusual circumstances required; and the management's right to terminate the services must be a right which can be made the subject of examination by a Court. It is more or less on this basis that the case proceeded in the Court below, that the reason given for the act complained of, namely, the extraordinary financial stringency, must be established by the defendant and must be shown to have necessitated the termination of the services. As the lower Court put it, it is not every financial stringency that would come under the definition of "ordinary" but it must be of a sufficiently grave character and what has to be considered in the present case is, whether the financial stringency was of such grave character as to necessitate directly a revision of the scales of pay and indirectly the termination of the contract with the plaintiff. This appears to us to interpret the contract in a reasonable and correct way. The "extreme' contentions on both sides appear to be extreme in reality. They were put forward before us as extreme contentions and they do not deserve to be regarded in any better light. On the one side, it was argued that it was for the management to decide whether the circumstances had changed and thus to terminate the services at their discretion and that their act could not be questioned in a Court of law. On the other side, it was contended that the word 'ordinarily' practically meant nothing and that actually the management had no right to terminate the services except on grounds of bad conduct or work. We dismiss both these contentions as not being supported by the language found in the contract.

It would follow from what has been already stated regarding the facts of the case, that even the existence of an extraordinary financial stringency has not been clearly established. Even assuming that there was a financial stringency, which was brought to the notice of the Indian branch by the Home Board in March 1933, the stringency was not sufficiently stringent to necessitate a permanent and unduly drastic reduction in the salaries of the existing permanent staff. There was in particular no reason why the remedy that was found to be sufficient and proper in the case of the missionaries themselves should not have been considered sufficient to meet the needs of the situation in the case of what are described as the more highly paid Indian workers, who are not more highly paid than the missionaries themselves. It is contended before us that the local authorities preferred to make a greater reduction in the salary of the Indian employees than the needs of the situation demanded with the idea that the economies thereby effected would make their own sacrifice a little less than what it might otherwise have to be. We are not prepared to go to the length of saying that this was done with this object, though it is impossible to reject the contention entirely that some such impression might have had its effect on the final decision of the conference. It is also possible as argued, though there is no evidence on the subject, that with the reduced salaries it was thought possible to get sufficiently qualified persons for the work owing to the increase in the number of unemployed qualified men. Whatever the other motives might have been, we are prepared to assume that the motives of those who effected the reduction complained of in this case were not other than honest. We are unable to say that the defendant

has satisfied us that there was such an extraordinary financial stringency as made it necessary to make a drastic reduction of the kind that the plaintiff complained of. In other words, there was no justification or need for reducing the salary of the plaintiff by as much as 28 per cent. especially when he had offered, even before the final notice was given to him, to submit to a cut of 12½ per cent. We are therefore satisfied that in this case the termination of the plaintiff's services was wrongful because it amounted to a breach of the contract, EX. A.

The only other question relates to the quantum of damages. The plaintiff's exact date of birth is not given in the evidence but it is clear, and the fact is admitted, that he was 53 years old when he was given notice of termination of his services. Though the contract merely says, 'permanent' and though the word 'permanent' may in a proper case be taken to mean for life, nevertheless in the matter of appointment of teachers in schools, it is the general usage, so to say, for the educational institutions not to continue to employ teachers who have passed the age of 60, the ordinary age of super-annuation being 55, those who are over 55 being kept on till 60 in case the management is of opinion that they are fit to perform their duties efficiently. This usage prevailing in the educational world must be deemed to be part of the contract and it is impossible in our opinion to regard the contract as being one for life having regard to the conditions and usages known to both the parties at the time of the contract. It is not necessary to elaborate this aspect of the case because the plaintiff himself has not made the claim that the contract gives him an appointment for life. He has claimed only on the basis that he would have been entitled under the contract to continue in service till 60 and he does not contend that even during this period he cannot be sent away if found to be not fit for work. The lower Court has found that the plaintiff would have been entitled under the contract to continue till he was 60 years old. There is a qualification introduced by the Court below to this finding. In para. 44 of the judgment which contains the finding, the lower Court observes as follows :

> I hold that plaintiff is physically fit to continue in service till he completed 60 years of age. I hold that but for the plaintiff's growing incapacity to teach, he could have continued in service till he completed 60 years.

It must be remembered in this connexion that the first finding is to some extent an attempt to forecast the future, because the plaintiff had not attained the age of 60 when the lower Court pronounced its judgment and it was certainly impossible for the lower Court to hold that he is physically fit to continue till he completed 60 years of age. In fact, no one can be so positive about anyone's health and even continued existence. It would seem that even the lower Court was thus of opinion that there was a growing incapacity to teach though the lower Court appears to have also thought that but for that growing incapacity he could have continued till he completed 60. It is obvious that under the contract if the growing incapacity for service really made the plaintiff unfit to perform his duties efficiently, his services could have been terminated by the management. There is also the statement of the manager as D. W. 3 to the effect that the plaintiff was never a good teacher in his subject and it would appear that the inspection reports by the Government educational authorities were not quite favourable to him. The inspection reports show that from 1928 adverse remarks were being made about the teaching in history. Having regard to the facts in this case, it is extremely unlikely that the plaintiff would have been retained in service by the manager after he attained 55 years. The chances of his retention upto 60 were so remote that it is not possible in our opinion to allow him damages on the basis that he would have continued in service till he completed 60 years. Under the circumstances, damages have to be calculated on the basis that he was likely to have continued in service only till he completed 55 years. Having regard to this important consideration and having in mind the other circumstances as well, which bear on the question of damages, we are of opinion that damages to the extent of Rs. 3000 would be a reasonable compensation for the breach of contract established in this case. There would be a decree accordingly for this amount against the properties of the institution, the appeal being allowed to this extent. The plaintiff-appellant will have his proportionate costs on this amount in this Court and in the Court below to be paid by the defendant. The decree amount will bear interest at 6 per cent. per annum from this date until the date of realization.

C.R.K./K.S. *Order accordingly.*

(28) A. I. R. 1941 Madras 794

PANDRANG ROW AND KING JJ.

Mittinti Narasimhamurthi and another *Decree-holders — Appellants*

v.

Pandiri Satyanandam, Judgment-debtor and others — Respondents.

Appeal No. 547 of 1938, Decided on 14th March 1941, against order of Dist. Court, East Godawari at Rajahmundry, D/- 3rd March 1938.

Charge — Decree creating charge over all moveable and immovable property of judgment-debtor — Charge is not void for uncertainty or because property charged is not specific.

A charge created by a decree over "all the property of the judgment-debtor both moveable and immovable" cannot be said to be void for uncertainty. Nor can the property to which the charge relates be said to be not specific inasmuch as the words 'all the property of the judgment-debtor both moveable and immovable" used in the decree are sufficiently specific in the sense that the property charged by the decree can be ascertained at any moment. There is nothing ambiguous or uncertain in the words used though they are general and wide : 1 All 275 and 34 Mad 47, *Approved*; 3 Mad 35, *Expl.* [P 794 C 2]

T. Satyanarayana Rao —for Appellants.

P. Panini Rao, B. V. Ramanarasu and M. S. Ramachandra Rao — for Respondents.

Pandrang Row J. — The appellants are the decree-holders in O. S. No. 12 of 1934 on the file of the District Court, East Godawari. That was a suit instituted under section 92, Civil P. C., and S. 6 of Act 14 of 1920. After removing the judgment-debtor from his office of trustee, the Court directed him to pay a certain amount with interest and also directed that all his property both moveable and immovable should be charged for the amount due. In execution of that decree, the appellants want to enforce the charge given by the decree in respect of some money lying in Court to the credit of the judgment-debtor in another suit. The claim is opposed by some rival decree-holders who, it appears, were instrumental in getting this money into Court in execution of the decrees obtained by them. The main ground of objection has been that the charge was not enforceable in execution because the property charged was not specific. It is on this ground that the lower Court, although it held that so far as the claim to recover the amount from the judgment-debtor was concerned the decree was executable, decided that the decree was inexecutable so far as the charge was concerned because the property on which the charge was fixed was not specific. The decision of the lower Court on this particular point cannot in our opinion be sustained for the simple reason that the words used in the decree "all the property of the judgment-debtor both moveable and immovable" are in our opinion sufficiently specific in the sense that the property charged by the decree could be ascertained at any moment. There was nothing ambiguous or uncertain in the words used, though the words were general and wide. Some decisions have been brought to our notice by the advocate for the respondents but none of them except perhaps 3 Mad 35[1] says anything in his favour. The decision 3 Mad 35[1] itself does not in terms say that the words "all my property" are not specific enough. What it decides is that the words found in the bond and in the decree which the learned Judges had to deal with and to which the case related were indefinite and could not create a charge because the properties were not specific. The correctness of that decision has been doubted subsequently: *vide* in particular 34 Mad 47.[2]

The authority quoted in support of the view arrived at in 3 Mad 35[1] namely 1 ALL 275[3] throws some light on the considerations to be borne in mind in a case of this kind. In 1 ALL 275[3] stress is laid on S. 29, Contract Act, according to which an agreement is void if its meaning is not certain or capable of being made certain and on S. 93, Evidence Act, to the effect that where the language of a deed is on its face ambiguous or defective, no evidence can be given to make it certain. Applying the principles embodied in these provisions of law, we have no doubt that the words found in the decree with which we are concerned are neither ambiguous nor uncertain. There is no reason why description of property by survey numbers, extent, boundaries, etc., should be insisted upon on pain of the charge being held to be void for uncertainty. It cannot be contended that if a man creates a charge on his own house and all that it contains, it would be void for uncertainty or that any charge created on a person's property in a particular village would be void for uncertainty. Again, if a man says that his properties in all the villages should be charged with any particular liability, there is no reason why the charge should be declared to be void for uncertainty. Indeed we are

1. ('81) 3 Mad 35, Bheri Dorayya v. Ramayya.
2. ('11) 34 Mad 47 : 5 I C 917 : 20 M L J 407 : 1910 M W N 568, Manickam Pillai v. Audinarayana Pillai.
3. ('76) 1 All 275, Deojit v. Pitamber.

not able to find any good reason for regarding cases of this kind as being open to the objection of uncertainty or indefiniteness. As pointed out in 34 Mad 47[2] at p. 50 there is a good deal of difference between wideness of language and vagueness or indefiniteness of language. We are of opinion that in this case there is no real force in the objection that the charge created by the decree is void for uncertainty or that the property to which the charge relates is not specific. That being the case, it follows that the charge given by the decree was executable and the petition ought not to have been dismissed by the Court below on the ground that the charge was not executable. No other objection appears to have been pressed in the Court below to the prayer of the appellants being granted. The appeal is therefore allowed with costs in both the Courts.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 795

PATANJALI SASTRI J.

Kunchaparti Venkatachellam — *Petitioner*

v.

Vemuri Subrahmanyam and another — *Respondents.*

Civil Revn. Petn. No. 820 of 1937, Decided on 31st July 1940.

Civil P. C. (1908), S. 73 — Construction—S. 73 is wide enough to include transferees of decrees — Adjudication of validity of transfer and recognition of same by Court before receipt of assets is not condition precedent for entitling transferee to apply for rateable distribution.

The definition of "decree-holder" in S. 2 (3), Civil P. C., is not relevant in interpreting the scope of S. 73. Nor can the use of the expression "decree-holder" in the marginal note to the section be regarded as controlling and restricting the plain language of the provision itself. The language of S. 73 is wide enough to include transferees of decrees. A transfer of a decree by an instrument in writing takes effect from the date of such transfer and the transferee is entitled to apply for executing the decree under O. 21, R. 16, Civil P. C. The Court, before ordering execution has, no doubt, to issue notice of such application to the transferor and the judgment-debtor and hear their objections if any but S. 73 does not require that the objections of the transferor should also have been enquired into and overruled before the receipt of assets by the executing Court. Consequently, the adjudication of the validity of transfer and the recognition of the same by the Court before receipt of assets is not a condition precedent for entitling the transferee to apply for rateable distribution under S. 73 : 33 Mad 62, *Ref.* [P 795 C 2; P 796 C 1]

V. Govindarajachari — for Petitioner.

K. Kuttikrishna Menon and Ch. Raghava Rao — for Respondents.

Order.—This revision petition arises out of the refusal of the Court below to allow the petitioner a share of the realised assets of his judgment-debtor in a rateable distribution thereof under S. 73, Civil P. C. The petitioner obtained a transfer of the decree in O. S. No. 216 of 1929 on the file of the lower Court passed against one Nageswaram, and the respondent obtained a decree against the same person and his brothers in O. S. No. 38 of 1930 in the same Court. In execution of the latter decree, properties of the brothers were sold on 20th July 1936 and the petitioner who is said to have applied on 14th July 1936 to execute his decree claimed a rateable share of the proceeds of such sale. The Court below rejected the claim on the ground that the transfer of the decree in favour of the petitioner had not been recognized by the Court before the date of the realization of the assets, and the correctness of this view is challenged by the petitioner before me.

I am of opinion that the decision of the lower Court is not warranted by the terms of S. 73. All that the section requires is that the person who claims rateable distribution should have applied before the receipt of assets by the Court, for execution of a decree for payment of monies passed against the same judgment-debtor whose assets have been realized. The section says nothing about the Court recognizing the transfer when the transferee of a decree applies for rateable distribution and there can be no justification for reading into the provision a condition which is not to be found there. A transfer of a decree by an instrument in writing takes effect from the date of such transfer, *see* 33 Mad 62,[1] and the transferee is entitled to apply for executing the decree under O. 21, R. 16 of the Code. The Court, before ordering execution has, no doubt, to issue notice of such application to the transferor and the judgment-debtor and hear their objections, if any, but it is plain that S. 73 does not require that the objections of the transferor should also have been enquired into and overruled before the receipt of such assets by the executing Court. As a matter of fact it is said that the Court has since recognized the transfer of the decree to the petitioner.

The respondent's learned counsel has argued that a transferee of a decree is not a "decree-holder" within the meaning of that expression as defined in S. 2 (3), Civil

1. ('10) 33 Mad 62 : 3 I C 938, Sadagopachariar v. Raghunatha Chariar.

P. C., 1908, and that therefore he is not entitled to apply for a rateable distribution under S. 73 until the Court has adjudged the validity of his transfer. He drew attention to the fact that the definition of decree-holder in the old Code included the transferee of a decree and that those words have been omitted from the definition in the present Code. I am unable to appreciate the relevancy of this argument. Section 73 which regulates rateable distribution of a judgment debtor's assets received by the executing Court does not use the expression "decree-holder" but refers only to persons who have applied for the execution of decrees for the payment of money passed against the same judgment-debtor before the receipt of assets by the Court and directs the rateable distribution of such assets among all such persons. Its language is certainly wide enough to cover transferees of decrees and it is difficult to see how the definition of "decree-holder" is relevant in interpreting the scope of this section. The respondents' counsel pointed out that cl. (c) of S. 73 (1) uses the expression "holders of decrees for the payment of money" but it is an obvious fallacy to apply the definition to these words though they may be but an amplification of the expression defined in the statute. These words in their natural sense are of sufficient amplitude to include transferees of such decrees and their ordinary meaning cannot be cut down with reference to the definition of decree-holder. Nor can the use of this expression in the marginal note to the section be regarded as controlling and restricting the plain language of the provision itself. I have therefore no hesitation in rejecting this argument, and holding that the petitioner is entitled to receive a rateable share of the assets held by the lower Court so far as they represent Nageswaram's share of the properties brought to sale.

The respondent's learned counsel has however pointed out that it does not clearly appear from the record that the petitioner did in fact apply on 14th July 1936, to execute his decree as alleged by him in his affidavit filed in this Court, and suggested that the matter should be enquired into. I order accordingly. In the result, the civil revision petition is allowed and the case will be remitted to the lower Court for disposal according to law in the light of this judgment. Costs will abide and follow the result.

C.R.K./G.N. *Petition allowed.*

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(28) A. I. R. 1941 Madras 796

PATANJALI SASTRI J.

Vempati Venkayya — Petitioner

v.

Official Receiver, Guntur — Respondent.

Civil Revn. Petn. No. 980 of 1937, Decided on 15th August 1940, to revise order of Dist. Court, Guntur, D/- 23rd February 1937.

Provincial Insolvency Act (1920), S. 54—Onus to prove that transaction impugned amounts to fraudulent preference is on Official Receiver and never shifts — Still Court can infer intent to prefer when that is only way of explaining transaction—Residence of transferee creditor in insolvent's village is no ground for inferring intention to prefer when practically all creditors reside in same village — Nor can execution and registration of sale deed at place where both parties resided instead of where it ordinarily should have been registered by itself be evidence of intent to prefer — Insolvent's financial condition hopeless—Any threat or pressure of creditors could have had no influence — Creditors aware of such condition and demanding payment—Insolvent selling most of his property to one of creditors in partial discharge of his debt — Sale having effect of giving transferee preference over other creditors — Transaction held fraudulent preference under S. 54.

The burden of proving that the transaction impugned amounts to a fraudulent preference lies on the Official Assignee or Receiver, and though the onus of proving the intent to prefer lies on the Receiver and never shifts, it is open to the Court to infer such intention when that is the only way of explaining the transaction and no other explanation is possible : (1934) A C 252 and (1935) 152 L T 201, *Rel. on*; (1926) 134 L T 765 and (1924) 2 Ch 515, *Ref.* [P 797 C 2; P 799 C 1]

The residence of the transferee creditor in the village of the insolvent can be no ground for inferring an intention to prefer when practically all the creditors of the insolvent also lived in the same village, nor can the execution and registration of the sale deed in favour of the transferee creditor at the place where both the parties resided instead of at the place where it should ordinarily have been registered be evidence by itself of such intent. [P 797 C 1,2]

The insolvent's financial condition was so hopeless that any threat or pressure of the creditors could have had no influence on him. The creditors knew of such condition and were demanding payment. For some reason which had not been affirmatively established, the insolvent sold most of his properties to one of the creditors in partial discharge of the debt due to him and the sale had the effect of giving him a preference over his other creditors :

Held that an intention to prefer the transferee creditor over other creditors could properly be inferred in the circumstances of the case in the absence of any reason why the insolvent sold practically all his properties to the transferee when his insolvency was imminent. [P 799 C 1]

V. Subramaniam — for Petitioner.

V. Rangachari — for Respondent.

Order.—This revision petition is directed against an order of the District Court of

Guntur setting aside a sale in favour of the petitioner as a fraudulent preference under S. 54, Provincial Insolvency Act. One Ramachandrayya and another were adjudicated insolvents on 7th August 1930. The sale deed in question (EX. III) was executed by them in favour of the petitioner on 11th July 1930. The total liabilities of the insolvents amounted to about Rs. 4000 of which about Rs. 3000 was due to the petitioner. Sale deed comprised all the insolvents' properties except their residential house in the village which according to P. W. 4 was worth from Rs. 300 to Rs. 400 at the time of the sale. The sale was executed for Rs. 1400 in pro tanto discharge of the debt due to the petitioner, a promissory note being given for the balance. The deed was registered in Guntur though the lands comprised therein are within the jurisdiction of the Sub-Registrar of Gurazala where it should ordinarily have been registered. The petitioner's case which was accepted by the trial Court was that he had been pressing the insolvent for payment of the debt due to him and had gone to Guntur with a view to file a suit against them when having come to know of his intention, they came there and executed the sale deed and got it registered in order to avert such suit. In those circumstances the sale was upheld as not being a fraudulent preference. On appeal, the learned District Judge disbelieved the petitioner's case and found that the finances of the insolvents were in a hopeless state at the time of the sale, that all their creditors were pressing them for payment, and that it was impossible to believe that the insolvents could have thought of protecting themselves from any threatened suit by a sale of their properties. The learned Judge also considered that the execution and registration of the sale deed at Guntur was suspicious, and that, as the petitioner and the insolvents belonged to the same village, it must have been executed with a view to prefer the petitioner.

Learned counsel for petitioner contended that this decision is unsustainable as there is no evidence to show that the dominant intention of the insolvents in effecting the sale was to prefer the petitioner. It was pointed out that all the creditors of the insolvents except P. W. 4 to whom a trifling sum was due were residents of the same village and that the learned Judge was wrong in inferring a motive to prefer from the petitioner's residence in the same village. It must be admitted that residence in the village of the insolvents can be no ground for inferring an intention to prefer when practically all the creditors of the insolvents also lived in the same village, nor can the execution and registration of the sale deed at Guntur instead of Gurzala be evidence by itself of such intent. Apart from these facts, there is no affirmative evidence to show that the sale was effected with a view to prefer the petitioner over other creditors. The position therefore reduces itself to this: the insolvents' financial condition was so hopeless that any threat or pressure of the creditors could have had no influence on them. The petitioner as well as the other creditors knew of such condition and were demanding payment. For some reason which has not been affirmatively established, the insolvents sold most of their properties to the petitioner in partial discharge of the debt due to him and this sale had the effect of giving him a preference over their other creditors. The question is whether in these circumstances the sale can be set aside as a fraudulent preference under S. 54 of the Act.

It is well settled that the burden of proving that the transaction impugned amounts to a fraudulent preference is on the Official Assignee or receiver. Learned counsel for respondent, however, broadly contends that in seeking to establish the insolvent's intent to prefer, all that is necessary for the Official Receiver to show is that the transaction was voluntary in the sense that it was not induced by real or genuine pressure exerted upon the insolvent and that it resulted in the preference of one creditor over other creditors. If the creditor who is in fact preferred fails to give any other explanation for the transaction, it must be presumed to have been done with the view or intent of preferring that creditor. Several decisions were cited in support of this proposition but most of them are not helpful as they were concerned with their own peculiar facts. It must however be admitted that the decision of the English Court of appeal in (1924) 2 Ch 515[1] and of the Division Court in (1926) 134 L T 765[2] on which counsel particularly relied lend support for the proposition contended for. The relevant part of the headnote of the former case runs thus :

Held further (Pollock M. R., dissenting), that where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor

1. (1924) 2 Ch 515 : (1924) P & C R 143 : 69 S J 35, In re Cohen; Ex parte Trustee.
2. (1926) 134 L T 765, Re John Drage and Sons ; Palmer and Roberts v. Knight.

with the result of giving him a preference in fact, and the reason for such payment is unexplained, a prima facie case of fraudulent preference is established.

This was apparently based upon what Sargant L. J., observed at pp. 543 and 544 :

And amongst all the cases referred to in the text books we have not been referred to one in which an actual preference in view of imminent bankruptcy has been supported, except by showing affirmatively that the actual preference was caused by some other reason — such as pressure, threats, fear or the like, which the Court considered as constituting the dominant motive, and as showing an intention displacing the prima facie intention to be gathered from the mere fact of preference. No case has been cited to us nor do I think any case can be found where a debtor in imminent expectation of bankruptcy has given a preference in fact to a particular creditor, which is apparently voluntary and is wholly unexplained, and where that preference in fact has been held good.

To the same effect more or less are the observations to be found in the other decision referred to above. A decade later however, the House of Lords had to consider this question in (1934) A C 252.[3] A director of an insolvent company caused the withdrawal of opposition to a judicial proceeding instituted by a creditor company to perfect their title to the security given by the former company for their debt. The said director was also the managing director of the creditor company. The liquidator of the debtor company claimed that the withdrawal of the opposition was the suffering by it of a judicial proceeding with a view of giving the creditor company a preference. Apart from the dual position of the director referred to above, there was nothing to show that there was any intention to prefer. In upholding the transaction as not being fraudulent preference, Lord Tomlin observed :

In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the Court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is no direct evidence and there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred. In my opinion there is nothing in the decision in (1924) 2 Ch 515[1] to justify the doctrine for which the appellant contends, and I do not think that such a doctrine could be reconciled with the opinion expressed in your Lordships' house in (1899) A C 419[4] and in particular with the views indicated by Lord Halsbury at pp. 421 and 422 of the report. I may add that I do not think that the headnote in (1924) 2 Ch 515[1] accurately expresses the result of the decision in the Court of appeal. The majority of the Court held that upon the evidence the intent to prefer was made out, but it is only in the judgment of Sargant L. J. that any support can be found for the headnote as expressed.

Later on, he observed :

It is improper to speculate what the reasons for his actions were, and in my opinion upon the material available the inference that the intent was to prefer cannot in law properly be drawn.

It will be observed that Lord Warrington who was one of the majority Judges in the Court of appeal in (1924) 2 Ch 515[1] concurred in these observations. This decision appears to lay down that mere proof of a voluntary payment and a preference in fact of a particular creditor does not shift the onus from the Official Receiver to the creditor preferred. The onus still lies on the former to prove that the dominant or the real intention of the insolvent was to prefer and the Court must be satisfied upon the evidence before it that such intention was present. Inference of such intention cannot be justified by the mere unexplained fact of preference and ought not to be drawn as a matter of speculation where it is possible to attribute the payment by the insolvent to other reasons or motives than an intention to prefer. The Court is not bound to infer such intent if the creditor preferred fails to establish such reasons or motives. This decision was applied by the Court of appeal in (1935) 152 L T 201.[5] The father of the insolvent in that case had guaranteed to the insolvent's bankers the payment of the overdraft, and the insolvent, after he was aware of his insolvency, paid in cheques and thereby reduced the overdraft. The trustee in bankruptcy claimed that the payments thus made amounted to a fraudulent preference of the bank and its guarantor. Apart from the kinship of the insolvent with the guarantor of the bank, there was nothing to show that the insolvent paid in the cheques with intent to prefer the bank over his other creditors and thereby relieve his father's liability to the bank. Clauson J. inferred the insolvent's intention to prefer from his relationship to the surety, but the Court of appeal reversed the decision and upheld the payment as not amounting to a fraudulent preference. It is no doubt true that notwithstanding the dual position of

3. (1934) 1934 A C 252, Sir William Henry Peat v. Gresham Trust Ltd.
4. (1899) 1899 A C 419 : 68 L J Q B 866 : 80 L T 841 : 6 Manson 264 : 15 T L R 418, Sharp v. Jackson.
5. (1935) 152 L T 201 : B & C R 174: 78 S J 754: 51 T L R 24, In re Lyons; Barclays Bank Ltd. v. The trustee.

the director in the former case, and the insolvent's kinship with the surety in the latter, the Court refused to infer an intention to prefer and upheld the transaction impugned. But it is worthy of note that in each case the Court laid stress on the possibility of the transaction being otherwise explained on the facts and circumstances of the case, though it was held that it was not incumbent on the preferee to show that that was the real explanation. In other words, according to these decisions though the onus of proving the intent to prefer lies on the receiver and never shifts, it is open to the Court to infer such intention when that is the only way of explaining the transaction and no other explanation is possible.

If this, as I conceive, is the law as explained and laid down by these decisions of great authority under the English Bankruptcy Acts and it is not suggested that the law under the Indian statutes in this respect is different, I consider that an intention to prefer the petitioner over other creditors can properly be inferred in the circumstances of this case. The only explanation which was put forward by the petitioner namely, that the sale was effected in order to avert the suit which the petitioner had gone to Guntur to file was, as already stated, rejected by the Court below as untrue, and learned counsel for petitioner was unable to suggest any other reason why the insolvents sold practically all their properties to the petitioner when their insolvency was imminent. On the whole, I am of opinion that the order of the Court below setting aside the sale should be sustained though on different grounds and this revision petition dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 799 (1)

LAKSHMANA RAO J.

Sheku Sahib — Petitioner

v.

Venkataramanayya — Respondent.

Criminal Revn. Case No. 910 and Petn. No. 863 of 1940, Decided on 20th December 1940, to revise judgment of Joint Magistrate, Hosur, D/- 6th July 1940.

Penal Code (1860), S. 379—Scope.

Where a property is attached by the amin in execution of a decree at the instance of *A* the fact that the claim petition of *B* to the property is allowed does not warrant the conviction of *A* under S. 379 read with S. 114. [P 799 C 2]

C. K. Venkatanarasimham — for Petitioner.

N. Somasundaram —for Respondent.

Public Prosecutor—for the Crown.

Order.—The property was attached by the amin in execution of a decree at the instance of the petitioner and the fact that the claim petition of the complainant was allowed does not warrant the conviction of the petitioner under S. 379 read with S. 114, Penal Code. The conviction is therefore set aside and the fine if levied will be refunded.

C.R.K./K.S. *Conviction set aside.*

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* (28) A. I. R. 1941 Madras 799 (2)

WADSWORTH AND PATANJALI SASTRI JJ.

Thiruvengadatha Ayyangar—Petitioner

v.

Sannappan Servai — Respondent.

Civil Revn. Petn. No. 1513 of 1940, Decided on 2nd May 1941, to revise decree of Dist. Munsif, Devakottai, in S. C. S. No. 721 of 1939.

***Madras Agriculturists Relief Act (4 of 1938), Ss. 9 and 13 — Debts incurred after Act in discharge of prior debts before Act—S. 9 does not apply.**

Section 9 does not apply to a debt incurred by an agriculturist after the commencement of the Act in discharge of an anterior debt incurred before the commencement of the Act. All debts incurred after the commencement of the Act, whether they be in discharge of prior debts or not, will fall only under Section 13. [P 799 C 2; P 800 C 1]

A. V. Narayanaswamy Iyer — for Petitioner.

G. N. Chari — for Respondent.

Wadsworth J. — This civil revision petition raises the question whether S. 9, Madras Act, 4 of 1938, applies to a debt incurred by an agriculturist after the commencement of the Act in discharge of an anterior debt incurred before the commencement of the Act. The debt in question is due on a promissory note dated 2nd October 1938 which discharged a prior promissory note dated 1st October 1935. The learned District Munsif has applied the proviso to S. 9, clause (1), and has treated the debt as a renewal of an earlier debt upon which interest upto 22nd March 1938 is to be reduced to five per cent.

Section 9 in terms applies to debts incurred on or after 1st October 1932, and it does not say that the section shall not apply to debts incurred after the commencement of the Act, namely 22nd March 1938. But the scaling down machinery under this section has the effect only of reducing interest upto the date of the commencement of the Act, and from this it may reasonably be inferred that the Legislature did not intend the section to apply to those debts which had no existence before the last point of time upto which the scaling down under this section could be effected. A debt

scaled down under S. 9 suffers reductions of interest under that section only upto the commencement of the Act, and for future interest rates the Court has to look to the provisions of S. 12. Section 9 therefore could have no application to a debt incurred for the first time after 22nd March 1938; for S. 9 would not provide for any scaling down at all of such a debt and S. 12 would have no application, for it only relates to interest on debts, after the date upto which they have been scaled down under some other provision. On the other hand, S. 13 seems to provide a complete machinery for dealing with debts incurred after the commencement of the Act, and it appears to have been designed as part of a regular scheme whereby debts of agriculturists are divided into three categories; firstly, those incurred before 1st October 1932, which fall under S. 8; secondly, those incurred from 1st October 1932 to 22nd March 1938 which fall under S. 9; and thirdly, those incurred after 22nd March 1938. The only point in seeking to apply S. 9 to the last class of debts is to get the advantage of the proviso to S. 9 (1). It seems to us that having regard to the scheme of the Act, if it had been the intention of the Legislature to introduce the theory of renewals into the scaling down operations in respect of debts incurred after the commencement of the Act, some specific provisions would have been made in this behalf. We are of opinion that all debts incurred after the commencement of the Act, whether they be in discharge of prior debts or not, will fall only under S. 13.

In the result therefore we allow the revision petition with costs and grant the plaintiff a decree for the principal amount of the suit promissory note with interest at $6\frac{1}{4}$ per cent. less the amount of the three payments which will be credited in the first instance to interest at $6\frac{1}{4}$ per cent. as on the dates on which they were made. The plaintiff will be entitled to costs in the trial Court.

C.R.K./K.S. *Petition allowed.*

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(28) A. I. R. 1941 Madras 800 (1)

LAKSHMANA RAO J.

In re S. Yegnanarayanaih—Accused — Petitioner.

Criminal Revn. Case No. 504 and Petn. No. 479 of 1940, Decided on 22nd November 1940, to revise order of Magistrate, First Class Bench, Ambasamudram, D/. 27th May 1940.

Madras Local Boards Act (14 of 1920), Sch. 4, R. 24—R. 24 does not require notice before tax is enhanced.

Rule 24 does not require any notice to the person interested before the tax is enhanced. [P 800 C 2]

K. R. Rama Iyer — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The tax was enhanced by the special officer under R. 24 of Sch. 4, Madras Local Boards Act, and the rule does not require any notice before the tax is enhanced. The notice of demand was duly served and the evidence shows that the son of the petitioner prevented the distraint of his properties. There is therefore no ground for interference with the conviction and the revision petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 800 (2)

WADSWORTH J.

Pothula Sattiraju — Plaintiff — Petitioner

v.

Polisetti Venkataratnam and others — Defendants — Respondents.

Civil Revn. Petn. No. 339 of 1937, Decided on 24th July 1940, to revise decree of the Sub-Judge, Coconada, in C. M. A. No. 1 of 1936.

Madras Estates Land Act (1 of 1908), Ss. 213 and 189 — S. 213 gives right of suit to any person deeming himself aggrieved by any proceedings taken under colour of Act — Words "any person aggrieved" in S. 213 are wide enough to give remedy under S. 213 to any person interested in land on which arrear was claimed—Plaintiff holding mortgage decree against tenants — Tenants conspiring with landlord and allowing ex parte decree for non-payment of cess to be passed against them—Plaintiff to save his land paying amount due under decree for cess and suing landlord and tenants for recovery of amount paid on ground of fraudulent conspiracy between them—As to relief against landlord and tenants on ground of fraud under colour of Act civil Court held had no jurisdiction by reason of Ss. 213 and 189 — Proper remedy was before Collector — But plaintiff held entitled to relief against tenants under S. 69, Contract Act, in civil Court — Suit as against landlord held one for damages and not one for refund of illegal exaction.

Section 213 in terms gives a right of suit before the Collector to any person deeming himself aggrieved by any proceedings taken under colour of the Act and such a suit would lie at the instance not merely of the registered pattadar or other person actually impleaded as the defaulter in the original proceedings but would lie at the instance of any other person coming within the category of those who under S. 131 of the Act, have a right to set aside the sale on deposit of the amount due. The words "any person aggrieved" in S. 213 are wide enough to give the remedy under S. 213 to

any person who had any interest in the land on which the arrear was claimed : ('17) 4 A I R 1917 Mad 149, *Contrary view not approved.* [P 801 C 2; P 802 C 1]

The plaintiff had a decree under a mortgage binding lands in an estate. Defendants 3, 4 and 5 represented the mortgagors owning the kudivaram in the land. Defendant 1 was the zamindar. In 1929 defendant 1 obtained an ex parte decree against defendants 3 to 5 for water cess alleged to be due on their land which was an inam. Under the decree a sale was held and a portion of the land was purchased in revenue sale by defendant 2. The plaintiff came to know of the sale and deposited the amount due thereunder and got the sale set aside and subsequently filed a suit in the civil Court alleging a fraudulent conspiracy between defendant 1 and defendants 3 to 5 whereby a decree was obtained for an amount not due and the land was sold to defendant 2, a friend of the parties. Plaintiff therefore claimed the right to get back from defendant 1 and from defendants 3 to 5 the amount which he was obliged to pay to get the sale set aside and in the alternative based his claim under S. 69, Contract Act, for the recovery of the amount paid by him from defendants 3 to 5 :

Held that (1) in so far as the suit was one for damages or compensation flowing from the tortious act of the defendants in conspiring to bring about an improper sale under colour of the Estates Land Act, S. 213 applied and the civil Court had no jurisdiction having regard to the provisions of Ss. 213 and 189. The proper forum was the revenue Court; [P 801 C 2; P 802 C 2]

(2) but the alternative claim, based on S. 69, Contract Act, as against defendants 3 to 5, was one which the civil Court could entertain and which the revenue Court could not; [P 802 C 2]

(3) the suit as against defendant 1 was a suit for damages or compensation and not a suit for a refund of an illegal exaction : ('16) 3 A I R 1916 Mad 80 (F B); ('31) 18 A I R 1931 Mad 609 and ('31) 18 A I R 1931 Mad 743, *Rel. on.* [P 802 C 2]

G. Balaparameswari Rao—for Petitioner.

D. Narasaraju—for Respondents.

Order. — This revision petition is preferred against a judgment in appeal dismissing a suit as one of which the civil Courts have no jurisdiction with reference to the terms of Ss. 189 and 213, Madras Estates Land Act. The petitioner (plaintiff) had a decree under a mortgage binding lands in an estate. Defendants 3, 4 and 5 represented the mortgagors owning the kudivaram in the land. Defendant 1 was the zamindar. In 1929 defendant 1 obtained an ex parte decree against defendants 3 to 5 for water cess alleged to be due on their land which was an inam. Under the decree a sale was held and a portion of the land was purchased in revenue sale by defendant 2. The plaintiff came to know of the sale and deposited the amount due thereunder which was a little over Rs. 1300 and got the sale set aside. This was on 17th January 1930. On 17th January 1933 he filed the present suit in the District Munsif's Court in which he alleged a fraudulent conspiracy between defendant 1 (the landholder) and defendants 3 to 5 (the tenants) whereby a decree was obtained for an amount not due and the land was sold to defendant 2, a friend of the parties. Plaintiff therefore claimed the right to get back from defendant 1 and from defendants 3 to 5 the amount which he was obliged to pay to get the sale set aside. Paragraph 12 of the plaint after setting out this claim based on fraud also says that if the amount for which the decree was passed was really due, it was due from defendants 3 to 5 and that as they defaulted with the result that part of the plaintiff's hypotheca was sold, the plaintiff was obliged to deposit the amount due and defendants 3 to 5 are bound in law to make good the said sum with interest. The trial Court treated the suit as one purely for damages for a fraudulent conspiracy carried out under colour of a proceeding under the Estates Land Act and applying S. 213 held that the suit was one cognizable only by a revenue Court. The lower appellate Court did point out that there was an alternative claim against defendants 3 to 5 under S. 69, Contract Act. Nevertheless it dismissed the appeal and confirmed the dismissal of the suit.

Now in so far as the suit was one for damages or compensation flowing from the tortious act of the defendants in conspiring to bring about an improper sale under colour of the Estates Land Act, it seems to me quite clear that S. 213 applies. It is true that in the case reported in 3 M L W 517,[1] there was a difference of opinion between the two learned Judges on the question whether S. 213, Estates Land Act, has any application to a suit for damages brought by a person who is not a tenant suing his landlord. With all respect to the learned Judge who held otherwise, it seems to me clear that S. 213 in terms gives a right of suit before the Collector to any person deeming himself aggrieved by any proceedings taken under colour of this Act and that such a suit would lie at the instance not merely of the registered pattadar or other person actually impleaded as the defaulter in the original proceedings but would lie at the instance of any other person coming within the category of those who under S. 131 have a right

1. ('17) 4 A I R 1917 Mad 149 : 34 I C 480 : 3 M L W 517, Rajah of Vizianagaram v. Narasimharaju.

to set aside the sale on deposit of the amount due. The Act contemplates proceedings against the registered pattadar but gives to other persons having an interest in the land a right to intervene and pay any amount which may be due and in a very large number of cases under this Act the registered pattadar is not in fact the person who pays the rent. It must have been the intention of the Legislature in using the wide term " any person aggrieved " to give the remedy under S. 213 to any person who had any interest in the land on which the arrear was claimed.

It has also been contended that the suit as against defendant 1 is not really a suit for damages or compensation but is a suit for a refund of an illegal exaction. The contention is supported by the citation of the case in 56 M L J 525.[2] I do not think this case has any bearing on the present facts. The learned Judges were dealing with an illegal recovery by a public body from a person alleged to be liable to tax and they held that in a suit by the person who paid the tax once the illegality was established, there was an equitable right to demand a refund of the excess and that such a refund was not damages. The present suit is not a suit of the nature. The decree stands and there is no question of a demand for recovery of a tax paid under protest. What the plaint alleges is a fraudulent conspiracy to secure an improper decree as a result of which a sale has been held and the plaintiff has been obliged to pay money to avert the consequences of that conspiracy. This claim sounds purely in tort and the measure of the plaintiff's damages will be the amount which he has been obliged to pay to save the land in which he is interested from the consequences of the conspiracy. It has been pointed out in the Full Bench decision in 39 Mad 239,[3] that the word "damage" in S. 213 is used in a general way to specify pecuniary compensation in contrast to reliefs such as an injunction or a decree for which a more elaborate form of suit lies in the civil Courts. There is also the authority of Pandalai J. for the view that a suit for the refund of any excessive collection under colour of the Act from a tenant would itself be a suit for damages under S. 213: *vide* A I R 1931 Mad 609[4] and A I R 1931 Mad 743.[5] But as I have said this is not a suit for a refund of an illegal collection, but it is a suit for compensation for a payment which the plaintiff was obliged to make owing to the tortious act of the defendants under colour of the procedure laid down in the Madras Estates Land Act. In so far as the plaint seeks relief against defendant 1 and in so far as it seeks relief against defendants 3 to 5 on the ground of fraud under the colour of the Act, the civil Courts clearly have no jurisdiction having regard to the terms of Ss. 213 and 189, Madras Estates Land Act.

But the alternative prayer, based presumably on S. 69, Contract Act, as against defendants 3 to 5, was one which the civil Court could entertain and which the revenue Court could not entertain. It is not clear why the learned Subordinate Judge did not remand the suit for the trial of this alternative claim. There was no point in returning the plaint for amendment for the suit so far as it should have been filed in a revenue Court was barred by limitation. The proper course therefore was to dismiss the suit so far as it claimed damages from defendant 1 and defendants 3 to 5 on the ground of fraud and proceed with the trial of the suit as against defendants 3 to 5 only on the alternative relief under S. 69, Contract Act. Unfortunately, defendants 3 to 5 are not represented before me, but I can see no reason why the suit as against them under the alternative relief should have been dismissed. The revision petition is therefore dismissed as against defendant 1 with costs. As against defendants 3 to 5 the petition is allowed in part and the trial Court will be directed to proceed with the trial of the suit against them in so far as the alternative prayer under S. 69, Contract Act, is concerned. The costs as against defendants 3 to 5 will abide the result.

C.R.K./G.N. *Case remanded.*

2. ('29) 16 AIR 1929 Mad 409 : 120 I C 867 : 52 Mad 207 : 56 M L J 525, Municipal Council, Dindigul v. Bombay Co., Ltd., Madras.

3. ('16) 3 AIR 1916 Mad 80 : 31 I C 326 : 39 Mad 289 : 29 M L J 607 (FB), Narayanaswami v. Venkataramana Aiyar.

4. ('31) 18 AIR 1931 Mad 609 : 134 I C 55, Rajah of Ramnad v. Ramanatha Pillai.

5. ('31) 18 AIR 1931 Mad 743 : 134 I C 984 : 61 M L J 395, Ramji Das Iyer v. Nayinar Rowthen.

(28) A. I. R. 1941 Madras 802

LAKSHMANA RAO J.

Nilakanta Ayyar — Petitioner

v.

Thatha Pichaikaran and others — Respondents.

Criminal Revn. Case No. 207 and Petn. No. 199 of 1940, Decided on 29th October 1940, to revise judgment of Joint Magistrate, Karur, D/- 29th November 1939.

Criminal trial — Hearing — Appeal closed on same day on which it is presented without giving adjournment to pleader for argument and accused acquitted — Order held should be set aside.

The Magistrate after admitting the appeal insisted on the advocate to argue the appeal without any further adjournment. The advocate pleaded inability to advance the argument and the case was adjourned to another date on which day the Magistrate passed orders acquitting the accused :

Held that the order of the Joint Magistrate could not be sustained. [P 803 C 1]

K. S. Jayarama Ayyar and S. V. Venkatasubramania Ayyar — for Petitioner.

A. V. Narayanaswami Ayyar — for Respondents.

Public Prosecutor — for the Crown.

FACTS. — The accused were charged on 6th October 1939 on a charge of rioting. Accused 1 and 2 appealed before the Joint Magistrate on 9th October 1939 and the Magistrate issued notice and posted the appeal for hearing on 1st November 1939. On that date accused 3 to 7 also presented an appeal and the Magistrate after admitting the appeal and clubbing it along with the other papers filed by accused 1 and 2 insisted on the advocate to argue the appeal without any further adjournment. The advocate pleaded inability to advance the argument and the case was adjourned to 29th November 1939. On 29th November 1939 the Magistrate passed orders acquitting the accused and against this order of acquittal the present revision petition is filed.

Order.—The appeals were closed without any hearing on 1st November 1939 though one of the appeals was presented only that day and the order of the Joint Magistrate cannot for that reason be sustained. It is therefore set aside and the appeals are remanded to the District Magistrate of Trichinopoly for disposal by him or such other Magistrate as he may direct.

C.R.K./K.S. *Appeals remanded.*

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(28) A. I. R. 1941 Madras 803 (1)

LAKSHMANA RAO J.

Ponnambala Thevar — Petitioner

v.

Ramaswamy Iyer — Respondent.

Criminal Revn. Case No. 667 and Petn. No. 627 of 1940, Decided on 10th January 1941, to revise judgment of Joint Magistrate, Devakottai, D/- 28th March 1940.

Madras Estates Land Act (1 of 1908), Sec. 212 (d), (e)—Ejectment suit in civil Court decreed and possession obtained through civil Court — Subsequent trespass by tenant into land—He is not guilty under S. 212 (d), (e).

The tenant failed to pay the arrears of rent and the land was purchased in court auction by the estate and the estate took delivery of possession and included it in the estate patta. The tenant continued in occupation of the land. The estate filed a suit for ejectment and after obtaining a decree took possession through the civil Court. In spite of this the tenant trespassed into the land and in the face of objections began to plough the land and transplanted paddy :

Held that his occupation of land was not an offence under S. 212 (d) and his unlawful obstruction to entry by the estate subordinates on the land was not an offence under S. 212 (e). [P 803 C 2]

C. A. Md. Ibrahim and T. S. Santhanam — for Petitioner.

K. P. Sarvothama Rao for S. T. Srinivasagopalachariar — for Respondent.

Public Prosecutor — for the Crown.

FACTS. — The appellant owned Olagu No. 2703 measuring 88 cents in Thennambatti village. He failed to pay the arrears of rent and the land was purchased in court auction by the Sivaganga Estate and took delivery of possession on 25th December 1938 and included it in the estate patta. The appellant continued in occupation of the land. The estate filed a suit for ejectment and after obtaining a decree took possession through the civil Court. In spite of this the appellant trespassed into the land and in the face of objections began to plough the land and transplanted paddy. The lower appellate Court held that his occupation of land was an offence under S. 212 (d), Madras Estates Land Act, and his unlawful obstruction to entry by the estate subordinates on the land was an offence under S. 212 (e) and convicted the accused under S. 447, Penal Code, and S. 212 (d), Madras Estates Land Act. Against this order the appellant has preferred this present revision petition.

Order. — The evidence justifies the conviction under S. 447, Penal Code, but the eviction of the petitioner was not under S. 163A, Madras Estates Land Act, and the conviction under S. 212 (d) and (e) of that Act is unsustainable. The conviction under S. 212 (d) and (e), Madras Estates Land Act, is therefore set aside and otherwise this petition is dismissed.

C.R.K./K.S. *Order accordingly.*

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(28) A. I. R. 1941 Madras 803 (2)

LAKSHMANA RAO J.

Sri Kolanu Sesha Reddi — Petitioner

v.

Sri Kolanu Narasimha Reddi and others — Respondents.

Criminal Revn. Case No. 966 and Petn. No. 919 of 1940, Decided on 31st January 1941, to revise order of Joint Magistrate, Ongole, D/- 7th October 1940.

Criminal P. C. (1898), S. 146 — Dispute as to trusteeship of temple and receiver appointed under S. 146 and properties handed over to him — Decision of Religious Endowment Board as to who is trustee — Such trustee is entitled to possession of properties even though board has not specifically declared it.

Where the trusteeship of a temple is in dispute and on a petition under S. 145 a receiver is appointed and the properties are handed over to him and subsequently the Hindu Religious Endowments Board recognizes and declares a certain person to be the trustee, such person is entitled to the possession of the property and the Magistrate cannot refuse it on the ground that the Board did not also declare that he is entitled to possession of the property. [P 804 C 1]

N. Subramaniam — for Petitioner.

Public Prosecutor — for the Crown.

FACTS. — The trusteeship of Chenna Keswaraswami Temple at village K was in dispute and on a petition filed under S. 145, Criminal P. C., before the Joint Magistrate, Ongole, a receiver was appointed under S. 146, Criminal P. C., and the properties were handed over to the receiver. The Hindu Religious Endowments Board later as a result of the enquiry recognized and declared the petitioner as the hereditary trustee of the temple. The petitioner as trustee applied to the Joint Magistrate for possession of the property of the temple and the income therefrom. The Joint Magistrate rejected the application on the ground that the order of the Hindu Religious Endowments Board did not also declare that the petitioner was entitled to possession of the property. The revision is filed against this order.

Order. — The petitioner has been declared to be the trustee and the order of the Joint Magistrate cannot be sustained. It is accordingly set aside and the lands under attachment will be restored to the petitioner.

C.R.K./K.S. *Order set aside.*

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(28) A. I. R. 1941 Madras 804

LAKSHMANA RAO J.

Pannalall Marwari — Accused

v.

T. M. Krishnaswami Pillai — Complainant.

Criminal Revn. Case No. 439 and Case Referred No. 19 of 1940, Decided on 27th September 1940, referred by District Magistrate, Tanjore, D/- 19th June 1940.

(a) Criminal P. C. (1898), S. 436 — Charge framed by Sub-Magistrate—District Magistrate cannot quash it under S. 436.

A District Magistrate has no jurisdiction under S. 436 to quash a charge framed by a Sub-Magistrate. [P 804 C 2]

(b) Penal Code (1860), S. 409—Accused, agent of firm of moneylenders, alleged to have dishonestly sold jewels pledged with him by complainant as security for loan in violation of contract and also to have dishonestly appropriated interest paid by complainant— Offence does not fall under S. 409.

The complainant alleged that the accused, an agent of a firm of moneylenders, without giving due notice to him dishonestly disposed of the jewels pledged with him by the complainant as security for a loan in violation of the terms of the contract and thereby committed breach of trust and that he also dishonestly misappropriated a sum of Rs. 50 paid by the complainant towards interest without crediting the same to his account:

Held that the offence did not fall under S. 409. [P 804 C 2]

V. Rajagopalachari — for Accused.

V. R. Venugopalan — for Complainant.

The Public Prosecutor — for the Crown.

FACTS.— The accused was the agent of a firm of moneylenders. The complainant alleged that the accused without giving due notice to him dishonestly disposed of the jewels pledged with him as security for a loan in violation of the terms of the contract and thereby committed breach of trust and that he also dishonestly misappropriated a sum of Rs. 50 paid by the complainant towards interest without crediting the same to his account and thereby committed another offence under S. 406, Penal Code. The Stationary Sub Magistrate framed charges on the two counts for an offence under section 406, Penal Code, against the accused. The accused applied to the Additional District Magistrate under S. 435, Criminal P. C., for quashing the charge under S. 406, Penal Code, as being illegal on the ground that the offence would fall under S. 409, I. P. C. The Additional District Magistrate agreeing with the accused quashed the charge and directed a fresh enquiry into the complaint. The District Magistrate also agreed with the Additional District Magistrate that the offences alleged in the complaint would fall under S. 409, Penal Code, but reported case to the High Court under sec. 438, Criminal P. C., for cancelling the order of the Additional District Magistrate as he could not do so under S. 436, Criminal P. C.

Order. — The Additional District Magistrate had no jurisdiction to quash the charges framed by the Stationary Sub-Magistrate and his order under S. 436, Criminal P. C., is set aside. But the offence, if any, does not fall under S. 409, Penal Code, and the case will go back to the Stationary Sub-Magistrate of Kumbakonam for disposal according to law.

C.R.K./G.N. *Case remanded.*

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(28) A. I. R. 1941 Madras 805 (1)

LAKSHMANA RAO J.

K. G. Monappa — Petitioner

v.

A. Venkataswami Naidu and others — Respondents.

Criminal Revn. Case No. 282 and Petn. No. 271 of 1940, Decided on 6th September 1940, to revise order of Addl. Dist. Magistrate, Madura, D/- 15th January 1940.

Penal Code (1860), Ss. 182 and 500 — Memorial to Government Officer containing false and defamatory allegations against Government servant — Complaint by such Government servant in respect of such memorial held under S. 500 and not S. 182.

Accused submitted a memorial to a Government Officer containing deliberately false and highly defamatory allegations against the complainant, a Government servant. The Government servant filed a complaint in which he stated that the allegations were false, made out of ill feeling on account of certain misunderstanding and the intention was of getting the complainant removed from the office and that complainant was lowered in estimation of his friends and public. The Magistrate to whom the complaint was given took it on file under Section 182, Penal Code :

Held that the complaint was under S. 500 and the order of the Magistrate taking it on file under S. 182 was unsustainable. [P 805 C 1]

A. K. Pavithran — for Petitioner.

N. Somasundaram — for Respondents.

Public Prosecutor — for the Crown.

FACTS. — A forest ranger filed a complaint against the accused who were forest lessees on the ground that on 17-9-1938 the accused submitted a memorial to the Conservator of Forests, Coimbatore, signed by themselves and certain others containing deliberately false and highly defamatory allegations against the complainant. The copies of the memorial were sent to the Chief Conservator of Forests, the District Magistrate and Collector of Madura and District Forest Officer, Madura. The complaint also stated that the allegations were false, made out of ill-feeling on account of certain misunderstanding and the intention was of getting the complainant removed from the office and that the complainant was lowered in estimation of his friends and public. The Sub-Divisional Magistrate to whom the complaint was given took it on file under S. 182, Penal Code, and transferred it to the Sub-Divisional Magistrate, Periakulam, for disposal in accordance with law. Against this order the present revision petition is filed.

Order — The complaint was under S. 500, Penal Code, and the order of the Additional District Magistrate taking it on file under S. 182, Penal Code, is unsustainable. It is therefore set aside and the complaint will be enquired into afresh by the District Magistrate or such other Magistrate as he may direct in accordance with law.

C.R.K./K.S. *Order set aside.*

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(28) A. I. R. 1941 Madras 805 (2)

SOMAYYA J.

Avana Mana alias Kanhiyur alias Thekkiniyedath Kirangat Manakkal Vasudevan Nambudripad — Appellant

v.

Mangat Valapil Avathala's daughter Panikka Veetil Abdul Kader's wife Maria Kutti Umma — Respondent.

Second Appeal No. 586 of 1938, Decided on 17th July 1941, against decree of Sub-Judge, Ottapalam, in A. S. No. 103 of 1936.

Transfer of Property Act (1882), Ss. 58 (a) and 59—S. 58 (a) does not apply to moveables —Hence S. 59 also does not apply—Hypothecation bond in respect of moveables need not be attested.

A hypothecation of moveable property is not a mortgage within the meaning of S. 58 (a) and hence S. 59 does not apply to the case of moveables. Consequently a hypothecation bond in respect of moveables need not be attested. [P 805 C 2]

N. R. Sesha Ayyar — for Appellant.

B. Pocker — for Respondent.

Judgment. — Mr. Pocker, the learned advocate for the respondent, reported no instructions and the respondent does not appear. I have therefore to decide the appeal in the absence of the respondent. The sole question that arises in this second appeal is whether EX. A, the registered hypothecation bond executed by defendant 1, the sole respondent in this second appeal, operates as a valid hypothecation of a fund in Court O. S. No. 238 of 1920. The lower appellate Court found that the mortgage was not properly attested and therefore declined to give a mortgage decree. It gave a simple money decree against the defendant. Hence the second appeal. The necessity for attestation is to be found in S. 59, T. P. Act. Chapter 4 in which that section occurs relates to mortgages of immovable properties and charges. Section 58 (a) which defines a mortgage says :

> A mortgage is the transfer of an interest in specific immovable property for the purpose of securing payment of money . . . .

Obviously a hypothecation of moveable property is not a mortgage within the meaning of S. 58 (a). Section 59 provides how a mortgage defined under S. 58 is to be executed. Hence if S. 58 does not apply to a case of moveables S. 59 also will not apply.

Exhibit A is therefore a valid hypothecation of the funds which is in deposit in O. S. No. 238 of 1920 on the file of the Additional District Munsif's Court of Palghat. The decree of the appellate Court is reversed and that of the trial Court restored so far as this item is concerned. The second appeal is confined to the amount of Rs. 286-14-0 in deposit in the above suit. The appellant will have his costs of this second appeal and also in the lower appellate Court calculated on the sum of Rs. 286-14-0 which is the extent of success in that Court.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 806

GENTLE J.

In the matter of Garland Petroleum Co. (Madras) Ltd., in liquidation.

M. F. R. D'Cruz — Petitioner

v.

K. N. Viswanathan, Official Liquidator — Applicant.

Application No. 2332 of 1940 in O. P. No. 77 of 1938, Decided on 15th November 1940.

Companies Act (1913), S. 156 — Uncalled capital upon issued shares forms part of company's assets or capital—Fact of its remaining unpaid and not having been called until liquidator exercised his power under S. 156 cannot exclude it from assets or capital of company — Preference shareholders entitled under articles of company to return of capital in winding up in priority to other shareholders can be repaid their investment out of calls made on ordinary shareholders — Company not making profits — No dividend is payable on preference shares.

The unpaid or uncalled capital upon issued shares forms part of the capital or assets of a company. The fact that it has not been called upon before the winding up but remains unpaid until the liquidator has exercised his powers under S. 156 does not make the unpaid shares capital excluded from the assets or capital of the company : (1894) 70 L T 3 and (1892) 3 Ch D 165, *Rel. on.* [P 807 C 1]

Consequently where under the memorandum of articles of a company the preference shareholders are entitled to return of capital in a winding up in priority to all other shareholders the unpaid portion of the shares held by the ordinary shareholders can be called up to repay to the preference shareholders the amount of their capital after the payment of all the debts of the company. But the preference shareholders are not entitled to dividend when the company has made no profits at all.

[P 807 C 2; P 808 C 1]

William Lobo — for Petitioner.

K. N. Viswanathan, Official Liquidator in person.

Order. — The capital of the company was Rs. 50,00,000 divided into Rs. 1,50,000 7½ per cent. preference shares of Rs. 10 each and Rs. 3,50,000 ordinary shares of Rs. 10 each. Of these, 702 preference shares were issued and held by 46 persons representing in the aggregate issued capital of Rs. 7020 and Rs. 13,245 ordinary shares were issued and held by 105 persons representing issued ordinary share capital of Rs. 1,32,450. 68 of the ordinary shares have been fully paid and the remainder are partly paid. The matters which now require decision are as follows : (1) whether the holders of the preference shares are entitled to be repaid the amount of their capital out of the calls made upon the ordinary shareholders in respect of the unpaid portion of their share money ; and (2) whether, in addition, the preference shareholders are entitled to a cumulative dividend at 7½ per cent. upon each preference share. Clause 5 of the memorandum of association, which deals with capital, is as follows :

> The said preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7½ per cent. per annum on the capital for the time being paid up therein respectively and shall have priority as to such dividend and also as to return of capital in the winding up over all other shares in the capital for the time being of the company, but shall not carry any further right to participate in profits or assets. The rights hereby attached to the said preference shares may be modified in accordance with the company's articles of association.

This clause gives to the preference shareholders a priority over the ordinary shareholders to participate in the company's assets and to return of capital, in the case of winding up, over the other shares in the capital of the company. Article 9 is the only article which has any relevance to the matter now before me, the material portion of which is as follows :

> The cumulative preference shares carry a fixed cumulative dividend at the rate of 7½ per cent. per annum on the capital for the time being paid thereon and shall both as regards dividend and capital rank in priority to the ordinary shares but without any further right to participate in the profits or assets.

I do not find any appreciable modification or alteration in the extent of the provisions of clause 5 of the memorandum of association in art. 9. It is quite clear that, whatever profits the company might have made, the preference shareholders would be entitled only to 7½ per cent. dividend upon the amount of their subscribed capital and before winding up, the annual dividend of 7½ per cent. being cumulative, it would follow that a preference shareholder would be entitled to look to the company for payment of dividend in respect of any year in which it was not paid, out of any future

earnings, the dividend must be paid upon preference shares before the ordinary shares are entitled to receive any benefit. Another matter which is beyond doubt is that if in a liquidation the assets exceed the liabilities and after payment of all the debts and after return of capital invested by the preference shareholders and by the ordinary shareholders a surplus remains, then that surplus will be divisible amongst ordinary shareholders and the preference shareholders will be entitled to no more than the amount of their subscribed capital.

The matter which now requires decision is whether the unpaid portion of the shares held by the ordinary shareholders can be called up to repay to the preference shareholders the amount of their capital. This involves consideration of the question whether the unpaid or uncalled capital upon issued shares forms part of the capital or assets or both of the company. If unpaid share money does form part of the capital and assets, then since under cl. 5 and art. 9 preference shareholders are entitled to return of capital in a winding up in priority to all other shareholders, it must follow that, after payment of all the debts, the preference shareholders are entitled to be repaid the amount of their investment out of calls made upon the ordinary shareholders. Counsel on behalf of some ordinary shareholders have informed me that they are unable to find any authority which has decided that unpaid or uncalled share money does not form part of the assets or capital of the company. In my view it does. Supposing a call had been made by the company which was due and paid on the day before the company went into liquidation, that money would form part of the assets of the company. The fact that it has not been called up before the winding up but remains unpaid until the liquidator has exercised his powers under S. 156, Companies Act, does not make the unpaid share capital excluded from the assets or capital of the company. In (1894) 70 L T 3,[1] observations are made by learned Lords Justices which are relevant to the matter now to be considered. Lindley L. J. at p. 5 in the course of his judgment said :

> I do not think it is possible to read, in this contingency, 'surplus assets' in such a sense as to exclude a call whether or not it is wanted at all.

Davey L. J. referring to the judgment in the Court below at p. 6 said :

> I understand the substance of it, but I do not quite understand the form that the surplus assets do not include uncalled capital. I suppose he means by that and from his judgment, to say, that surplus assets do not include capital which has been called up, or may be called up, for the purpose of adjusting the rights of the contributories inter se because undoubtedly the surplus assets conceivably consist wholly of capital which was uncalled at the commencement of the winding up, and had been called during the winding up.

The above observations of the learned Lords Justices express the view that uncalled capital at the date of the winding up does form part of the assets of the company. In (1892) 3 Ch D 165,[2] Vaughan Williams J., at 172 said :

> It must be remembered that in a winding up the property of the company includes the uncalled capital, and that the rights arising from unequal contributions on shares of equal amounts must be adjusted out of the property, including uncalled capital, not required to satisfy prior claims.

The preference shareholders being entitled in winding up to return of capital in priority to other shareholders, in my view it means that unpaid ordinary share capital can be called up to meet the amount required to repay the preference share capital. In clause 5 it is provided that, except the priority specified, preference shares shall not carry any further right to participate in profits or assets. This makes it clear that in regard to the right specified the preference shares are to participate in the profits and assets of the company. In Art. 9 the words "shall both as regards dividend and capital rank in priority to the ordinary shares but without any further right to participate in the profits or assets" also clearly indicate that to the extent specified preference shares are entitled to priority in the profits and assets. I hold therefore that the preference share capital can be repaid to the preference shareholders out of calls made upon the ordinary shareholders to the extent of the unpaid capital on the issued shares. Such payment of course is subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares.

A further matter is whether these preference shareholders are entitled to payment of a sum equivalent to $7\frac{1}{2}$ per cent. upon the capital of each share from the date of the issue of the preference share. Clause 5 of the memorandum provides that

1. (1894) 70 L T 3: 7 R 337: 1 Manson 325, In re Sheppard's Corn Malting Company : Ex parte Lowenfield.

2. (1892) 3 Ch D 165 : 61 L J Ch 670 ; 67 L T 83 : 40 W R 700, In re Wakefield Rolling Stock Co.

preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 7½ per cent. per annum on the capital for the time being paid up and Art. 9 provides to the same effect. Article 155 is as follows : "No dividend shall be payable except out of the net profits arising from the business of the company." No dividend can be paid unless the company makes profits. This company never made any profits, but always incurred losses. No dividend can therefore be paid. The priority of the preference shares for payment of 7½ per cent. is in regard to dividend. As there were no profits which could justify a dividend, there can be no dividend payable to the preference shareholders. The contention put forward on behalf of the preference shareholders is that each share is entitled to a sum equivalent to 7½ per cent. from the amount of the capital. That would amount to interest being payable each year. Neither the memorandum nor the articles provide for any interest. In my view, as there were no profits no dividends could be declared and were not declared; nothing is payable to the preference shareholders in respect of dividend or interest and they are entitled only to repayment of the actual share capital. There will be an order accordingly.

In this application the Official Liquidator seeks authority to draw cheques in favour of the holders of 68 ordinary fully paid shares to make payments to them. In my view, this application is premature. I make no order in regard to that at present. As regards costs for counsel for preference shareholder No. 121 I allow a sum of Rs. 50. For the two learned counsel who appeared on behalf of two other preference shareholders they have merely adopted the argument of Mr. Lobo, and I allow Rs. 17-8-0 each. For the two learned counsel for ordinary shareholders I allow Rs. 35 each. This will be payable by the Official Liquidator out of the assets. The Official Liquidator will have Rs. 5 (stamp).

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 808

LEACH C. J. AND GENTLE J.

In re S. Subramanya Sarma and others Petitioners.

Criminal Revn. Cases Nos. 442 and 443 and Petns. Nos. 418 and 419 of 1941, Decided on 2nd May 1941, to revise order of Third Presidency Magistrate, Court of Presidency Magistrates, Egmore, Madras, D/- 26th April 1941.

Madras High Court, Criminal Rules of Practice, R. 82—Advocate accused cannot appear as counsel for his co-accused.

An advocate who is accused of a criminal offence or is a party in a civil Court is fully entitled to conduct his own defence or his own case but he cannot appear in the same matter both as counsel and party. Consequently, an advocate who is accused with others of a criminal offence cannot appear at the trial as counsel for his co-accused : (1862) 9 H L C 711 and (1850) 19 L J C P 374, *Rel. on.* [P 809 C 1]

Rule 82 certainly does not authorize a co-accused to appear as counsel in the case. [P 809 C 2]

K. Bhashyam for S. Suryaprakasam, S. Viswanathan and B. Jagannadha Das for P. S. Kailasam — for Petitioners.

Crown Prosecutor — for the Crown.

Leach C. J. — These criminal revision petitions raise the question whether an advocate who is accused with others of a criminal offence can appear at the trial as counsel for his co-accused. The petitioner in Criminal Revision Case No. 443 of 1941 is a member of the English Bar and has been enrolled as an advocate of this Court. He and six others, two of whom are the petitioners in Cri. R. C. No. 442 of 1941, are accused of having been parties to a criminal conspiracy, the object of which was inter alia to commit or abet the commission of certain illegal acts by the public generally or by a class of persons exceeding ten. The illegal acts are specified in the charge sheet. They number six. It will be sufficient to quote the first and the last of these allegations :

(1) Influencing the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India or to the efficient prosecution of the war.

(6) To unite into one organisation the extremist elements in India, revolutionaries, labour and other unions with the object of setting up a state which would be controlled by the workers and peasants.

The proceedings commenced on 14th March of this year before the Third Presidency Magistrate. The Court sat *de die in diem*, from 14th March until 24th April, when accused 2 and 4 (the petitioners in Cr. R. C. No. 442 of 1941) fell ill. On 25th April accused 1 filed a memorandum stating that he had been instructed to appear on behalf of accused 2 and 4 and that he wished to enter an appearance on their behalf. The Magistrate considered that it would be improper to allow him to do so and consequently refused permission. His order has led to the filing of the applications now before the Court. The accused are all in custody and have been in custody throughout. The Court is asked to sanction accused 1 stepping from

the dock to the place reserved for counsel and appearing there as counsel for two of his co-accused. It has been suggested by Mr. Bhashyam Ayyangar, who appears on behalf of accused 1, that there could be no objection to accused 1 being in the dock a part of the time and in counsel's seat for the remainder of the time. This is a startling proposition. I have no hesitation in holding that the Magistrate has passed a correct order. Counsel cannot appear in the same matter both as counsel and party. There is no objection to an advocate who is accused of a criminal offence or is a party in a civil Court conducting his own defence or his own case. He is fully entitled to do so. But he cannot be in Court in the same matter in the two capacities. Mr. Bhashyam Ayyangar has not been able to produce any authority in support of the proposition that accused 1 should be allowed to appear before the Third Presidency Magistrate for his co-accused, and this is not surprising. There is, however, authority that accused 1 cannot be allowed to appear as counsel for his co-accused. In (1862) 9 H L C 711 : 11 E R 907[1] the respondent was a barrister. On the first day of hearing the leading counsel for the respondent suggested that the respondent might appear as his junior in the cause. The Lord Chancellor (Lord Westbury) said:

> Certainly. But not both as party and counsel. The respondent must elect to argue in person or not. There cannot be a mixture of the two characters.

In (1850) 19 L J C P 374[2] the Court of Common Pleas held that a barrister, who was a party in an action, civil or criminal, is in the same position as any other party. Wilde C. J. observed :

> I do not think that a party in a civil or criminal case, who is also counsel, is in a different position from any other party. In a criminal matter, a party would not be entitled to sit in wig and gown among the bar as his own counsel.

It is abundantly clear that accused 1 cannot be allowed to appear as counsel in the proceedings before the Magistrate. It has been said, and I do not doubt it, that these petitions have been filed because it would facilitate an early disposal of the case, if accused 1 were allowed to appear on behalf of the two accused who have fallen ill. The question, however, is not one of expediency; it is one of principle. Rule 82 of the Criminal Rules of Practice states that criminal Courts should, as a rule in cases where there are more accused than one, permit one of them to be authorized by another to appear, plead or act for him in the proceeding, provided that the authority is in writing and signed or contains the thumb impression of the party giving it and is filed in Court. The application to the Magistrate was not made under this rule. In fact the Court has been informed that it was expressly stated to the Magistrate that the application made by accused 1 to be allowed to appear as counsel for accused 2 and 4 was not intended to be made under this rule. If and when any such application is made it will be heard; but this rule certainly does not authorise a co-accused to appear as counsel in the case. For these reasons I consider that these petitions should be dismissed.

Gentle J.—I agree and have nothing to add.

C.R.K./G.N. *Petitions dismissed.*

1. (1862) 9 H L C 711 : 31 L J Ch 297 : 8 Jur (NS) 575 : 6 L T (NS) 109 : 10 W R 305 : 131 R R 415 : 11 E R 907, New Brunswick & Canada Railway Co. v. Conybeare.
2. (1850) 19 L J C P 374, Nuton v. Chaplin.

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(28) A. I. R. 1941 Madras 809

LAKSHMANA RAO J.

In re Nachi Naicker and others Petitioners.

Criminal Revn. Case No. 846 and Petn. No. 799 of 1940, Decided on 30th January 1941, to revise judgment of joint Magistrate, Palni, D/- 24th July 1940.

Madras Forest Act (5 of 1882), S. 35—Timber Transit Rules (1939), R. 1 (d) — Exemption under rule does not apply to fuel in bandy loads.

The wood "in headloads of small quantities" in R. 1 (d) applies to both small wood for fuel and bamboos; but the exemption does not apply to fuel in bandy loads. [P 810 C 1]

A. Narasimha Ayyar — for Petitioners.

Public Prosecutor — for the Crown.

FACTS. — The accused were charged of an offence under Timber Transport Rules for transporting timber from one place to another without the permit bearing the seal of the District Forest Officer. The defence taken in the lower Court was that the timber cut was from a forest in the zamin village for which no permit was necessary, that the wood came into the exemption given in rule 1 (d) of the rules and that in any view of the matter the accused could be convicted of only one offence that of moving the timber without valid permit punishable under rule 2 (a) of the rules and that they could not also be punished under rule 4 (c). As regards the second contention that the wood came under the exemption given in rule 1(d) of the rules, namely timber includes all

class of timber as defined in the . . . . . except . . . . (d) small wood for fuel (excluding sandal wood, etc.) and bamboos in headloads of smaller quantities. The lower Court while holding that the wood removed was actually "small wood for fuel" also held that the wood "in headloads of small quantities" applied to both small wood for fuel and bamboos; and that as in the present case the timber was in cart loads the exemption did not apply to fuel in bandy loads and that the second contention failed. He therefore confirmed the conviction and sentence for an offence under rule 2 (c). Against this conviction the present revision petition is filed.

Order. — The interpretation of rule 1 (d) of the Timber Transit Rules of 1939 by the Courts below is correct and there is no ground for interference. The revision petition is therefore dismissed.

C.R.K./K.S. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 810

WADSWORTH AND PATANJALI SASTRI JJ.

Santhappa — Appellant

v.

Eswarappa Holiappa Bulla by L. R. Siddalingappa Bulla — Respondent.

Appeals Nos. 424 and 425 of 1940, Decided on 25th March 1941, against orders of District Court, Bellary, D/- 23rd July 1940.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 19 — "Decree" means decree passed by Courts of Madras Province.

The term decree in S. 19 refers to a decree passed by the Courts of Madras Province and S. 19 is not applicable to decrees made by Courts in other Provinces : ('40) 27 A I R 1940 Mad 910, *Applied.* [P 811 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), Ss. 19, 8 — Partial reduction of amount payable under decree by wiping out of interest amounts to amendment of decree and does not fall under S. 47, Civil P. C.

A partial reduction of the amount payable under a decree by the wiping out of the interest amounts to an amendment of the decree and cannot be said to fall under S. 47, Civil P. C., as it is not a matter relating to execution of the decree : ('41) 28 A I R 1941 Mad 235 (FB), *Applied.* [P 811 C 1, 2]

B. Sitarama Rao and K. Seshagiri Rao — for Appellant.

V. S. Narasimhachar — for Respondent.

Patanjali Sastri J. — The question that falls to be decided in these appeals is whether interest payable under a decree passed by a Court in the Bombay Presidency but transferred for execution to a Court in this Province is liable to be scaled down under S. 8, Madras Agriculturists' Relief Act, (hereinafter referred to as the Act). The respondent obtained two decrees against the appellant in O. S. Nos. 167 and 168 of 1923 in the Court of the Additional First Class Subordinate Judge, Dharwar, and got these decrees transferred to the District Court of Bellary for execution as the appellant was residing in Bellary and owned properties there. The decrees were passed on 10th March 1927 and provided for payment of the amount due in instalments which were, in each case, charged on immovable properties situate in the Bellary District and carried interest at 9 per cent. per annum. The appellant claiming to be an agriculturist applied to the Court below in the course of the execution proceedings after the Act came into force for scaling down the decrees. The Court declined to grant the relief on the ground that as a Court executing the decrees, it could not interfere with the decrees which could be amended only by the Court which passed them, and the mere fact that the procedure laid down in the Act for the scaling down of decrees was not applicable to Courts in Bombay could not enlarge the powers of the executing Court.

Mr. Sitarama Rao appearing for the appellant conceded that the appellant was not entitled to claim in full measure the relief provided by S. 8 of the Act, as S. 19 was not applicable to the Court which passed the decrees in question, that is to say, he admitted that the interest due on the debts prior to the decrees and included in them could not be wiped out, as that would clearly amount to going behind the decree and would be beyond the powers of an executing Court; but he contended that there was nothing in the Act to preclude the Court from granting the more limited relief, viz., the wiping out of the interest at 9 per cent. per annum ordered to be paid from the date of the decrees, that is from 10th March 1927 to 1st October 1937, and of the further interest due for the subsequent period in excess of the statutory rate of $6\frac{1}{4}$ per cent. allowed under the Act. It was urged that this limited relief the Court below was competent, and indeed bound, to grant under S. 47, Civil P. C., as the Court being a Court of this Province was bound to give effect to the provisions of the Act as far as it lay in its power to do so.

Though the point for consideration lies in a comparatively narrow compass, the arguments ranged over a wide ground relating to the situs of judgment debts and

the competency of the local Legislature to make laws affecting decrees passed by Courts outside the Province. We do not consider it necessary to go into these questions as we are of opinion that the only procedure open to an agriculturist seeking the benefit of the Act in respect of debts which had ripened into decrees before the commencement of the Act is what is provided in S. 19, and no alternative remedy under S. 47, Civil P. C., is available in cases where S. 19 of the Act has no application. As pointed out in (1940) 2 M L J 202[1] the Act creates new rights in agriculturists debtors to have their debts scaled down in accordance with the provisions of Chap. 2 and provides a special procedure for the enforcement of the rights in cases where before the commencement of the Act decrees have been passed for the repayment of such debts, and these provisions must be read together in order to determine the scope of the relief afforded by the Act in such cases. It was accordingly held that the use of the term "decrees" in Chap. 2 must be understood as referring to decrees passed before the commencement of the Act. On the same principle, it seems to us that the term should be held to refer to decrees passed by the Courts of this Province, for, as already observed, it is conceded that S. 19 is not applicable to decrees made by Courts in other Provinces.

Mr. Sitarama Rao, however, stressed the words "shall be deemed to be discharged" in Sec. 8 as indicating that the limited relief which he now claimed for the appellant fell within the purview of S. 47, Civil P. C., and could be granted by executing Court without the decree being amended in the manner contemplated in S. 19. But when, as in this case, a decree carries interest at 9 per cent. from its date to hold that such interest shall not be recoverable until 1st October 1937, and thereafter shall be recovered only at $6\frac{1}{4}$ per cent. as provided in the Act is, in effect, to amend or alter the decree, and the mere use of the word "discharged" to indicate the compulsory scaling down of debts for which the Act provides cannot, as it seems to us, bring the matter within the scope of S. 47, Civil P. C. Indeed this conclusion seems inevitable in view of the recent decision of a Full Bench of this Court in (1941) 1 M L J 164[2] which has definitely ruled that proceedings under the Act for scaling down decree debts are not proceedings in execution under S. 47. The Court observed :

> If the scaling down does not wipe out the decretal amount then an amended decree is passed, which can only be enforced in execution proceedings separately instituted under the Code of Civil Procedure. If the scaling down wipes out the decretal amount the Court cannot pass an amended decree. It must then declare that the decree has been satisfied. But here again, the entering up of satisfaction is not in execution proceedings, but in proceedings, under the Agriculturists' Relief Act, which are of an independent nature.
>
> If the entering up of satisfaction of a decree as a result of applying the provisions of the Act is thus not a matter relating to execution of the decree, it is difficult to see how a partial reduction of the amount payable under a decree by the wiping out of the interest can be said to fall under S. 47.

On these grounds we agree with the Court below that the appellant is not entitled to the reliefs claimed and dismiss the appeals with costs. (One set in C. M. A. No. 424 of 1940).

C.R.K./K.S. *Appeal dismissed.*

1. ('40) 27 AIR 1940 Mad 910 : 194 IC 753 : I L R (1940) Mad 1023 : (1940) 2 M L J 202, Kottayya v. Venkata Punnayya.
2. ('41) 28 A I R 1941 Mad 235 : I L R (1941) Mad 261 : (1941) 1 M L J 164 (F B), Nagappa Chettiar v. Annapoorni Achi.

(28) A. I. R. 1941 Madras 811

ABDUR RAHMAN J.

Namburi Subbayya and another — *Appellants*

v.

Chaganti Chandrayya and others — *Respondents.*

Second Appeals Nos. 41 and 42 of 1937, Decided on 18th April 1941, against decree of Sub-Judge, Nellore, D/- 14th December 1935.

(a) Practice— Pleadings — Amendment of — Mere delay is no ground for refusing amendment — Amendment introducing new and inconsistent case should not be allowed — Lower Court allowing such amendment — Appellate Court must interfere, though ordinarily it would not do so with lower Court's discretion.

Mere delay is not a ground for refusing an amendment; but when the amendment is being proposed with the object of introducing an entirely new and inconsistent case, it cannot be allowed. No doubt, leave to amend a pleading is more or less a discretionary matter and the power to grant leave ought to be liberally exercised, and when once a discretion has been exercised by a Court in favour of a party, the appellate Court would not lightly interfere with that discretion; but when the Court disregards the first principles and does something which is wholly unjustifiable, it is equally the duty of an appellate Court to interfere and set the wrong right. [P 812 C 2]

(b) Hindu law — Stridhan — Illegitimate daughter is entitled to succeed in preference to illegitimate son, irrespective of whether mother belongs to Sudra or higher caste.

The illegitimate daughter is entitled to succeed to her mother's stridhan property in preference to an illegitimate son of their mother even if the mother is a Brahmin degraded woman, for there is nothing in principle to draw any distinction between the status of degraded women whether they belonged to one caste or the other — at least so far as the capacity of their illegitimate daughters to inherit their stridhanam is concerned : 21 Mad 40 and 24 M L J 223, *Rel. on* ; ('21) 8 A I R 1921 Bom 137 ; ('37) 24 A I R 1937 Mad 640 and ('40) 27 A I R 1940 Mad 463, *Expl.* [P 813 C 1]

B. V. Subramaniam — for Appellants.

T. Theyagaraja Iyer and K. Kuppuswami — for Respondents.

Judgment. — Kotamma, a Brahmin girl, became a widow while she was very young. When she grew older, she fell into evil ways and had two illegitimate children one of whom Namburi Subbamma is the present plaintiff and the other Sundararamayya, is defendant 7 in the present litigation. Kotamma died on 12th October 1919 and left some stridhanam property at the time of her death which forms the subject-matter of the present suit. The property left by Kotamma was sold by her son Sundararamayya to six defendants (defendants 1 to 6) under several sale deeds. Namburi Subbamma brought a suit out of which the present appeals arise for the recovery of their possession. If the children were not illegitimate, Kotamma's stridhanam property would, under the ordinary rule of Hindu law, devolve on her daughter Namburi Subbamma in preference to her son. But it was contended that as Kotamma was an outcaste and lived in a degraded condition, the plaintiff would be no heir to her mother and defendant 7 would succeed to her property (para. 5 of the written statement). This plea did not prevail and the suit was decreed by the District Munsif of Kanigiri. Defendants 4 to 6 did not appeal against the decree and the decree as regards the properties purchased by them has become final. Two appeals were preferred against that decree to the Court of the Subordinate Judge at Nellore, one by defendant 1 and the other by defendants 2 and 3 (A. S. Nos. 209 and 210 of 1934). With these appeals, the defendants filed two petitions for permission to amend their written statements by including an allegation that there were other heirs of Kotamma in the legitimate line who would take precedence over her illegitimate daughter in respect of succession to Kotamma's stridhanam properties. These were accepted by the learned Subordinate Judge on the ground that it was for the plaintiff to establish her title to the property and that it would not be enough for her to show merely that she had a better title than that of the defendants. But he overlooked the important fact that the plea that was being attempted to be advanced by these applications in this Court was not only a new one but inconsistent with the allegations contained in the written statements. Mere delay would not have been a ground for refusing an amendment ; but when the amendment was being proposed with the object of introducing an entirely new and inconsistent case, it could not have been possibly allowed. It is indisputable that leave to amend a pleading is more or less a discretionary matter and the power to grant leave ought to be liberally exercised. Nor can it be disputed that once a discretion has been exercised by a Court in favour of a party, the appellate Court would not lightly interfere with that discretion ; but when the Court disregards the first principles and does something which is wholly unjustifiable, it is equally the duty of an appellate Court to interfere and set the wrong right.

The defendants, in their written statements, as observed by me before, came to Court with the allegation that defendant 7 was the heir to his mother's stridanam properties and not the plaintiff. It might have been possible for them to raise an inconsistent or an alternative case when they filed their written statements in the beginning ; but not having done so, they could not be either permitted to advance new positions at the time of arguments before the trial Court or to ask for their written statements to be amended before the lower appellate Court so as to enable them to plead that although defendant 7 was not entitled to deal with his mother's property, yet there was somebody else in the legitimate line who would take precedence over both the plaintiff and defendant 7 and the plaintiff's suit must for that reason fail. There is no reference in the whole of the written statements to the existence of any person in the legitimate line and this plea was undoubtedly inconsistent with the one raised by these defendants that defendant 7 was the sole owner of his mother's stridhanam property. Moreover, the person who was alleged to be in existence in the legitimate line was not impleaded as a party to the suit but the defendants were authorized by the Court to show that such a person did exist in fact and would take precedence in law over the plaintiff. This was not quite the right thing

to do and is bound to raise further complications and increase multiplicity of proceedings. Since the order passed by the lower appellate Court permitting the defendants to set up a new and inconsistent case in appeal cannot be sustained, it must be quashed.

The next question to decide is whether the plaintiff was entitled to succeed to her mother's stridhanam properties in spite of her illegitimacy in preference to defendant 7 who was also, as stated before, an illegitimate son. There is no competition in this case between an illegitimate daughter and an illegitimate son in regard to the stridhanam property of the mother. The decision by a Division Bench of this Court in 21 Mad 40[1] is a clear authority for the proposition that the illegitimate daughters were entitled to succeed to their mother's property in preference to an illegitimate son of their mother. The only distinguishing feature of that case was that the putative father of the illegitimate son was different from that of the illegitimate daughters but the fact that the illegitimate daughters and the illegitimate son were the offspring of two different persons is, in my opinion, immaterial. It was contended that an illegitimate daughter was entitled to succeed to her mother's stridhanam property amongst Sudras alone and that no decision has gone to the extent of making the same rule applicable to the illegitimate daughters of a Brahmin degraded woman as Kotamma was. But I see nothing in principle to draw any distinction between the status of degraded women whether they belonged to one caste or the other—at least so far as the capacity of their illegitimate daughters to inherit their stridhanam is concerned. It may be that the illegitimate sons in the higher classes do not inherit their father's estate as heirs and that the illegitimate son of a Sudra may, in certain circumstances, do so; but this is surely no ground for holding that an illegitimate daughter in the three higher classes may be deprived of her mother's stridhanam and that an illegitimate son may be entitled to succeed to that property in preference to his unfortunate sisters.

The reason which existed for permitting the legitimate daughters to take their mother's stridhanam property in preference to their legitimate sons applies with equal, if not greater, force to illegitimate daughters when they are competing with illegitimate sons. I am drawing support in this conclusion from the decision of a Bench of this Court in 24 M L J 223[2] where the degraded woman was a Vysia by caste. It is true that the observations in 45 Bom 557[3] were in respect of Sudras and were guarded; but there is nothing in that decision to suggest that a different rule of law would have been applicable if the woman was not a Sudra by caste. The observations in A I R 1937 Mad 640[4] and I L R (1940) Mad 739,[5] are general and do not confine the right of illegitimate daughters to succeed to their mother's stridhanam properties amongst Sudras alone. There are certain obiter dicta in 38 Mad 1144;[6] but since the competition in this case is between illegitimate children inter se, the observations in that decision do not call for any comment. Had it been necessary for me to consider the case attempted to be put forward on behalf of the defendants before the lower appellate Court in their applications for leave to amend their written statements, the statement of law in 38 Mad 1144[6] would have to be closely examined. But in view of the order granting the amendment having been set aside, the question does not arise for decision.

For the above reasons, the appeal must be accepted and the decision of the first Court restored. The plaintiff will be entitled to her costs throughout, half from each set of respondents in each case. The court fee to be paid on the appeals will be realized from the respondent in each appeal in regard to the items in each appeal — the valuation in the memorandum in appeal being incorrect. (Leave refused.)

C.R.K./K.S. *Appeal accepted.*

1. ('98) 21 Mad 40, Arunagiri Mudali v. Ranganayaki Ammal.

2. ('13) 24 M L J 223 : 18 I C 601 : 13 M L T 88, Nammaiya Chetti v. Thiruvengadathan Chetti.

3. ('21) 8 A I R 1921 Bom 137 : 59 I C 561 : 45 Bom 557 : 22 Bom L R 1306, Dundappa Basappa v. Bhimava.

4. ('37) 24 A I R 1937 Mad 640 : 169 I C 627 : (1937) 1 M L J 28, Meenakshi Ammal v. Ramaswami Josier.

5. ('40) 27 A I R 1940 Mad 463 : 191 I C 60 : I L R (1940) Mad 739 : (1940) 1 M L J 288, Meenakshi v. Murugayya.

6. ('15) 2 A I R 1915 Mad 63 : 25 I C 957 : 38 Mad 1144 : 27 M L J 353, Meenakshi v. Muniyandi Panikkan.

(28) A. I. R. 1941 Madras 814

HORWILL J.

In re Periya Yelumalai Chetti and others Petitioners.

Criminal Revn. Case No. 1 and Petn. No. 1 of 1941, Decided on 16th July 1941, to revise judgment of Sub-divisional Magistrate, Trivellore, D/- 31st December 1940.

(a) Madras Gaming Act (3 of 1930), Ss. 3 and 6—House used for wagering or betting on horse race is common gaming house — Mere fact of papers relating to horse racing being found inside is itself evidence that house was used as common gaming house and persons found therein were present for gaming.

A house in which wagering or betting on horse race takes place is a common gaming house within the meaning of S. 3. The wording of S. 4 (i) and (ii) does not make it impossible to apply the definition of a common gaming house to a house in which wagering or betting on a horse takes place. Consequently under S. 6 the mere fact that papers relating to horse racing were found inside would in itself be evidence that the house was being used as a common gaming house and that all the persons found therein were present for the purpose of gaming: ('41) 28 A I R 1941 Cal 32, *Ref.* [P 815 C 1]

(b) Madras Gaming Act (3 of 1930), Ss. 6, 8 and 9—Common gaming house—Persons found calculating what was due by or to various persons as result of betting on horse races — Persons are guilty under S. 8 rather than under S. 9—But this is not sufficient reason for interference with conviction in revision.

Persons found in a common gaming house calculating what was due by or to various persons as a result of the betting on horse races can only be said to be assisting the persons who were conducting the betting. They cannot be said to be themselves actually gaming, and consequently despite S. 6, they would be guilty under S. 8 rather than under S. 9, but this is not a sufficient reason for interfering in revision with the conviction or the sentences imposed upon those persons. [P 815 C 2]

F. S. Vaz, T. R. Venkatarama Sastri, K. Seshagiri Rao Naidu and N. Krishnamurthi — for Petitioners.

Public Prosecutor — for the Crown.

Order.—The Inspector of Police, Ponneri, who was examined as P. W. 1 in this case, obtained a warrant from the Deputy Superintendent of Police under S. 5 (1), Madras Gaming Act (3 of 1930) to search the house belonging to accused 1 and 2. He went to that house and saw two persons lying inside the door and others busy writing something. He posted a constable and a bus conductor to see that nobody ran away and went to the front of the house. There he found accused 1 and 3 keeping watch. He knocked on the door and it was opened by accused 2 after accused 1 and 3 had called to those inside. The Inspector entered the house and found accused 6 and 9 lying down on the pial while others were busy writing slips of paper. He made a search and amongst other things found a large number of papers of various kinds relating to the business of betting on horse racing. He made out a charge sheet, and on his evidence the Stationary Sub-Magistrate of Ponneri has found accused 1 and 2 guilty under S. 4 (1) and accused 4 to 19 guilty under S. 9 of Madras Act 3 of 1930. All the convicted accused have filed this revision petition.

The principal point argued in this petition is whether the house that was searched and raided was a "common gaming house" within the meaning of the definition found in S. 3 of that Act. The main part of the section no doubt reads as if it did not apply to horse racing, because it refers to a "room or place in which cards, dice, tables or other instruments of gaming are kept or used"; such expressions being hardly applicable to the slips drawn up in connexion with betting on horse racing. But para 2 of that section, which is found only in this Act of 1930 says that "gaming . . . . includes wagering or betting on a horse race. . . . . ." That being so, one must conclude that a house in which wagering or betting on horse race takes place is a common gaming house.

The objection to the above conclusion is the wording of Ss. 4 (i) and 4 (ii) which undoubtedly does suggest that S. 4 was intended to deal with gaming on a horse race alone, thus suggesting that the rest of the Act applied to gaming other than gaming on horse races. The learned Public Prosecutor has however pointed out that it is not necessary to draw this conclusion. Section 4 (ii) makes liable to punishment any person found gaming on a horse race, the wording of this sub-section being entirely different from that of any other provision of the Act dealing with gaming in general. Section 4 (i) is worded very much the same as S. 8, and it has therefore been argued that if S. 8 applied to horse racing also, S. 4 (1) would be redundant; but, for some reason not very clear, the punishment awarded in S. 4 (i) is different from that for gaming in general under S. 8. It cannot be said therefore that the wording of Ss. 4 (i) and 4 (ii) makes it impossible to apply the definition of a common gaming house to a house in which wagering or betting on a horse race takes place. The apparent reason for this difficulty in construing the Act as a whole arises from the fact that Act 3 of 1930 is based on an older Act of 1890, the wording of which has to a great extent been

embodied in Act 3 of 1930, insufficient care having been taken in the grafting of the new provisions on to the old Act. The importance of the point whether a "common gaming house" can be applied to a house in which betting on horse racing takes place relates to section 6, for under that section "cards, dice, gaming table or cloth, board or other instruments of gaming" are evidence that such place is used as a common gaming house; so that if the house in question was a common gaming house, the mere fact that papers relating to horse racing were found inside would in itself be evidence that the house was being used as a common gaming house and that all the persons found therein were present for the purpose of gaming.

It is argued on the authority in A I R 1941 Cal 32,[1] that the mere fact that certain papers relating to horse racing were found inside the house in question is not sufficient, even if we make use of S. 6 of Act 3 of 1930, to warrant a conclusion that the house was used as a common gaming house. In the present case a large variety of papers were found in the house relating to horse racing and, above that, a number of persons were found actually making betting calculations. It is possible to conceive of cases where a person may have a common gaming house in one place and then take to his private house certain books when the day's proceedings are over. In such a case his private house would not be a common gaming house; but in the present case all the circumstances point to the fact that this house was used as a common gaming house. It is of course possible, as has been argued, that the betting actually took place somewhere else and that the slips and other papers were taken away to the house searched after the business was over and that the only purpose for which the house itself was used was for calculating the results of the bets and determining to whom money was due. I think it however more reasonable to draw the conclusion the learned Magistrate did, especially in view of the provisions of S. 6, which enables a Court to take as evidence of a building being a common gaming house the mere fact that the paraphernalia of betting were found in it. There is no evidence which points to or suggests a contrary conclusion.

The facts found by the lower Court were that accused 1 and 2 were keeping a common gaming house and that the petitioners were in that house for the purpose of gaming. So far as accused 1 and 2 are concerned, there can be no doubt that this finding was correct. The fact that the other accused were in this house calculating what was due by or to various persons as a result of the betting on horse races only shows that these persons were present in that house for the purpose of assisting the persons who were conducting the betting; but not that they themselves were actually gaming. Despite the fact that the presence of the other accused is evidence under S. 6 of the fact that they were there for the purpose, if I were trying the case myself, I would be inclined to find the other accused guilty under S. 8 rather than under S. 9, but I do not consider that this is a sufficient reason for interfering with the conviction or the sentences imposed by the trial Magistrate. The appellants, who have been fined only Rs. 75 in the case of accused 1 and 2, and Rs. 50 in the case of others, may be considered to have got off lightly. The petition is accordingly dismissed.

C.R.K./G.N. *Petition dismissed.*

1. ('41) 28 A I R 1941 Cal 32 : 192 I C 736 : 42 Cr L J 319, Benoy Krishna Ray v. Emperor.

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(28) A. I. R. 1941 Madras 815

ABDUR RAHMAN J.

Potluri Rangayya — *Appellant*

v.

Vallabhaneni Ramayya and others — *Respondents.*

Second Appeal No. 974 of 1938, Decided on 24th July 1941, against decree of Dist. Court, Kistna, at Chilakalapudi in Appeal No. 9 of 1937.

Practice—New plea—Res judicata—Ordinarily plea of res judicata cannot be allowed to be raised for first time in appeal—Final finding on which plea was based given pending appeal — Appellate Court is bound to take notice of final judgment between parties and is justified in permitting judgments to be produced before it.

Ordinarily it is not permissible to allow a plea of res judicata to be raised for the first time in appeal. But when the final finding on which the plea rests was given while the appeal was pending the appellate Court is not only justified but bound to take notice of the final judgment arrived at between the parties and give effect to the same and is justified in permitting the judgment to be produced before it : ('36) 23 A I R 1936 Mad 190, *Approved.* [P 816 C 1]

V. K. Thiruvenkatachari and N. V. B. Sankar Rao — for Appellant.

P. Satyanarayana Rao — for Respondents.

Judgment. — The lower appellate Court was not inclined to agree with the decision of the trial Court, but nonetheless, affirmed its judgment on a plea of res judicata which

was taken before it for the first time. Ordinarily this is not permissible. But when the final finding on which the plea rests was given while the appeal was pending it was not only justified but, in my view, bound to take notice of the final judgment arrived at between the parties and give effect to the same. It was very strongly urged on behalf of the appellant that the plea of res judicata should be, since it was not taken for a great length of time while the suit was pending in the first Court, taken to have been waived. It is true that the petition under S. 4, (I. A. No. 526 of 1934) was decided on 17th August 1935 and the suit was dismissed on 7th April 1936 — but it must be remembered that an appeal had been filed on behalf of the appellant from the decision of his petition in I. A. No. 526 of 1934, and the suit, O. S. No. 41 of 1932 was dismissed only on a preliminary point, viz., that it disclosed no cause of action. An appeal was preferred against this decree on 6th July 1936 and the decision by the District Judge in the appeal preferred against the order dismissing I. A. No. 526 of 1934 was not given until after three weeks of the filing of the appeal, A. S. No. 9 of 1937, from the decree passed in O. S. No. 41 of 1932. It would thus be seen that there is no merit in the objection as to waiver. The objection that the lower appellate Court was not justified in permitting additional evidence in the shape of the judgment to be produced during the pendency of the appeal has also no force. The Court was bound, as observed before, to take notice of events which had subsequently happened and justified in the circumstances to permit the judgments to be produced before it. In a similar case, Varadachariar J. had entertained a plea of res judicata in revision, 70 M L J 223.[1]

The question whether the decree passed in favour of defendant 2 was collusive was raised and decided by the Insolvency Court in pursuance of an application presented on behalf of the plaintiff-appellant in which he challenged the security bond executed by the insolvent before the date of insolvency in favour of defendant-respondent 2. This was dismissed and the decree was said to have been validly passed in favour of defendant 2 in respect of the debts which were found to be genuinely due to him. This finding was affirmed on appeal, and became final long before an application was given on behalf of the respondent to the effect that the plea of res judicata might be considered. In view of that decision, the finding of the lower appellate Court would not be seriously challenged. It was urged in the end that at all events the case should have been sent back by the lower appellate Court. But in view of the clear decisions that had been arrived at between the parties both by the Insolvency Court and by the District Court on appeal, it was hardly necessary to adopt that procedure. For the above reasons the appeal fails and is dismissed with costs. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

1. ('36) 23 AIR 1936 Mad 190 : 161 I C 219 : 59 Mad 777 : 70 M L J 223, Rangachariar v. Rangaswami Iyengar.

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(28) A. I. R. 1941 Madras 816

VENKATARAMANA RAO J.

Raman Nayar and others — Appellants

v.

Kesavan Embrandiri and others — Respondents.

Second Appeal No. 42 of 1939, Decided on 3rd April 1941, against decree of Dist. Court, South Malabar, in A. S. No. 75 of 1937.

Malabar Tenancy Act (14 of 1930), S. 14— Construction — Exceptions in S. 14 must be strictly construed—Word "requires" in S. 14 (5) does not mean "desires" but involves element of need—Real test is need of landlord.

In construing S. 14 it must be borne in mind that the object of the Malabar Tenancy Act is to confer a right of permanent occupancy on the tenant. It is with this object that the rule has been enunciated that no suit for eviction shall lie except on certain specified grounds. Therefore the exceptions in S. 14 must be strictly construed and the landlord who relies on a particular ground must satisfy the Court beyond reasonable doubt that that ground exists. [P 817 C 1]

The word "requires" in S. 14 (5) does not mean "desires" but involves element of need. A mere desire on the part of the landlord, even if bona fide, to have the land for his own cultivation is not enough. The real test is the need of the landlord and in coming to a conclusion on the question of the landlord's need being bona fide, the Court should in each case consider whether the circumstances are such that the land must be restored to the landlord for his own cultivation or cultivation by any member of the family or tarwad: ('23) 10 AIR 1923 Cal 223, *Rel. on.* [P 817 C 1, 2]

P. Govinda Menon — for Appellants.

N. R. Sesha Iyer — for Respondents.

Judgment. — The only question argued by Mr. Govinda Menon in this second appeal is that the finding of the learned District Judge that the plaintiff requires the land bona fide for his cultivation is wrong because it is based on a wrong interpretation of cl. (5) of S. 14, Malabar Tenancy Act. After listening to the learned counsel on

both sides I am of opinion that the contention of Mr. Govinda Menon should prevail and that the case should be sent back for a revised finding. Section 14 so far as it is material for the decision in the appeal runs thus :

Section 14.—'No suit for eviction of a cultivating verumpattamdar from his holding shall lie at the instance of his landlord except on the following grounds : cl. (5) that at the end of an agricultural year the landlord requires the holding bona fide for his own cultivation or for that of any member of his family or tarwad or tavazhi who has a proprietary and beneficial interest therein.

In construing this section it must be borne in mind that the object of the Malabar Tenancy Act is to confer a right of permanent occupancy on the tenant. It is with this object that the rule has been enunciated that no suit for eviction shall lie except on certain specified grounds. Therefore these exceptions must be strictly construed and the landlord who relies on a particular ground must satisfy the Court beyond reasonable doubt that that ground exists. Clause (5) has been enacted in the interests of the landlord to preserve to him the right to have the land for his own cultivation in cases where there is a real need or necessity for the landlord. The language used is "requires the holding bona fide." A mere desire on the part of the landlord, even if bona fide, to have the land for his own cultivation is not enough and in coming to a conclusion on the question of the landlord's need being bona fide, the Court should in each case consider whether the circumstances are such that the land must be restored to the landlord for his own cultivation or cultivation by any member of the family or tarwad. The real test is the need of the landlord. In this connexion I may refer to the observations of Buckland J. in 26 C W N 499,[1] a decision on S. 11, Calcutta Rent Act. The said section so far as it is relevant for the present discussion runs thus:

Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Contract Act, 1872, no order or decree for the recovery of possession shall be made so long as the tenant pays the rent to the full extent allowable by the Act and performs the conditions of the tenancy.

Provided nothing in this section shall apply . . . . where the premises are bona fide required by the landlord either for purposes of building or re-building or for his own occupation or the occupation of any person for whose benefit the premises are held.

The learned Judge observed thus :

I do not think it is enough that a plaintiff in order to defeat a plea under the Calcutta Rent Act should merely say that he desires the premises bona fide for his occupation. The word in the Act is not "desires" but "requires." This in my opinion involves something more than a mere wish and it involves an element of need to some extent at least.

I would place the same interpretation on the words "requires the holding bona fide" in clause (5) of S. 14, Malabar Tenancy Act. The learned District Judge seems to have fallen into an error in interpreting "requires" as meaning "desires." This is how he observes :

It is stated by the learned District Munsif that he has got a better land which he could have cultivated instead of this. But he has to begin cultivation of one of the two lands and if he chose to begin with this how could it be considered that it was not a bona fide desire. That the plaintiff has a bona fide desire to cultivate is apparent from the fact that even as early as 1934 in Ex. A, the notice sent by him, he had stated that he required the lands for his cultivation.

Therefore the view of the learned District Judge that a bona fide desire is enough to entitle the landlord to evict the tenant is not sound. I accordingly set aside the finding of the learned Judge and call upon the Subordinate Judge of Calicut to submit a revised finding on issue 1 in the suit in the light of the observations contained in this judgment. The finding will be submitted within four weeks of the receipt of this order by the lower Court. Time for objections is one week. [On receipt of the finding the Court delivered the following]

Judgment. — I accept the finding and dismiss the suit. In the circumstances of this case I direct each party to bear his own costs. Leave to appeal is refused.

C.R.K./G.N. *Order accordingly.*

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(28) A. I. R. 1941 Madras 817

WADSWORTH AND PATANJALI SASTRI JJ.

Gade Subbayya — Petitioner

v.

Raja Kandukuri Venkata Hanumantha Bhushanarao and another — Respondents.

Appeal No. 408 of 1940 (converted into Civil Revn. Petn. No. 656 of 1941) and Civil Revn. Petn. No. 1270 and Misc. Petn. No. 5982 of 1940, Decided on 1st May 1941, to revise orders of Sub-Judge, Narasapur, D/- 23rd January 1940.

(a) Civil P. C. (1908), O. 34, R. 5, Ss. 96 and 115 — Suit for sale on mortgage — Application for final decree dismissed — Dismissal being appealable under S. 96, no revision lies.

The dismissal of an application for a final decree in a suit for sale on a mortgage being appealable as a decree under S. 96, is not open to revision under S. 115 : ('19) 6 AIR 1919 Mad 709 and ('22) 9 A I R 1922 Mad 65, *Rel. on.* [P 819 C 1]

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1. ('28) 10 A I R 1923 Cal 223 : 69 I C 963: 26 C W N 499, Rekhabchand Doogar v. J. R. D' Cruz.

(b) Civil P. C. (1908), O. 34, R. 5—Refusal to pass final decree becoming final—Refusal based solely on S. 19, Madras Agriculturists' Relief Act—Decree-holder held could contend in revision that balance was still due under preliminary decree and in event of success ask for final decree for balance claimed.

Under the provisions of S. 19, Madras Agriculturists' Relief Act, the Court found that nothing was due to the decree-holder under the preliminary mortgage decree and therefore dismissed his application for a final decree. In the revision by the decree-holder the judgment-debtor contended that the order refusing to pass a final decree having become final the decree-holder could not be allowed to contend that a balance was still due to him under the preliminary decree :

Held that as the Court could not and did not dismiss the mortgage suit it was open to the decree-holder to contend in revision that a balance was still due under the preliminary decree and if he succeeded in his revision petition to ask for a final decree for the balance claimed to be due under the preliminary decree as the refusal to pass a final decree was based solely on the provisions of S. 19, Madras Agriculturists' Relief Act : ('24) 11 A I R 1924 P C 198, *Ref.* [P 819 C 1]

(c) Madras Agriculturists' Relief Act (4 of 1938), S. 19 Proviso—Privy Council is Court — Privy Council decree falls within purview of Act — Privy Council is not foreign Court in relation to appeals preferred from Courts in Madras Presidency — S. 19, Proviso in dealing with Privy Council decree does not affect any Crown prerogative—Even if it does, Provincial Legislature is competent to make laws affecting Crown's prerogative.

The Privy Council possesses all the essential elements of a Court and its decision is a decree properly so called. Hence a Privy Council decree falls within the purview of the Act. The Privy Council cannot be regarded as a foreign tribunal in relation to the appeals preferred from Courts in the Madras Presidency : 7 Cal 620 and ('35) 22 A I R 1935 P C 158, *Rel. on*; 14 M I A 465 (P C) and ('41) 28 AIR 1941 Mad 810, *Expl.* [P 819 C 2; P 820 C 1; P 821 C 2]

In dealing with Privy Council decrees, S. 19 Proviso cannot be said to affect any royal prerogative. The prerogative has no concern with the curtailment or modification of the rights of parties by a local law although such rights may have been ascertained and defined by an order of His Majesty in Council. [P 820 C 1]

It is a well established principle that within the limits of subject and area assigned to a Legislature by the Imperial Parliament, its power to make laws are as supreme and plenary as those of Parliament itself : (1878) 3 A C 889; (1884) 9 A C 117; ('33) 20 A I R 1933 P C 16 and ('35) 22 A I R 1935 P C 158, *Rel. on.* [P 821 C 1]

Even if S 19 Proviso affects any Crown prerogative it is within the competence of the Legislatures in India to make laws derogating from other prerogative rights of the Crown except of course in so far as such prerogatives may be comprised in matters specially excepted : 25 Mad 457, *Rel. on.* [P 820 C 1; P 821 C 1]

(d) Madras Agriculturists' Relief Act (4 of 1938), S. 19 Proviso—Judgment-debtor appealing to Privy Council and depositing security for costs of respondent under O. 45, R. 7, Civil P. C. —Appeal dismissed — Judgment-debtor's liability for costs discharged under S. 19 Proviso — Decree-holder cannot claim any payment out of deposit.

The judgment-debtor appealed to the Privy Council and under O. 45, R. 7, Civil P. C., deposited security for costs of the respondent decree-holder. The appeal was dismissed and the decree-holder was awarded his costs. On the application of the judgment-debtor his liability for costs was found to have been discharged under S. 19, Proviso :

Held that the decree-holder could not claim any payment for costs out of the deposit which must be returned to the judgment-debtor. [P 822 C 1]

(e) Practice—Costs—Advocate-General intervening is not entitled to costs.

It is not the practice of the High Court to give costs to an Advocate-General intervening : ('41) 28 A I R 1941 F C 47, *Applied.* [P 822 C 1]

M. Appa Rao and K. Ramamurthy — for Petitioner.

Advocate-General, instructed by Government Solicitor, P. Satyanarayana Rao and S. Venugopala Rao — for Respondents.

Patanjali Sastri J. — These petitions relate to the petitioner's claim to recover his costs, etc., in Privy Council Appeals Nos. 99 and 100 of 1933 in which a preliminary mortgage decree for Rs. 26,302-3-6 passed in favour of the petitioner was upheld by His Majesty in Council on 26th September 1936. The petitioner applied in C. M. P. No. 949 of 1939 in the lower Court for a final decree for the balance of the amount due under the preliminary decree after giving credit for amounts paid from time to time by the respondent judgment-debtor, and the latter filed I. A. No. 506 of 1938 to scale down the decree under the Madras Agriculturists' Relief Act (hereinafter referred to as the Act). Both these applications were dealt with together and the learned Subordinate Judge finding that sums already paid by the respondent amounted to more than twice the principal amount of the debt after adjusting such payments towards all costs decreed to the petitioner including the costs now claimed directed full satisfaction of the decree to be recorded under S. 19 of the Act and dismissed the application for a final decree. From these orders the decree-holder has preferred these civil revision petitions and he has also filed C. M. P. No. 5982 of 1940 in this Court as an alternative remedy praying that the sum of £138-13-11 awarded as costs by His Majesty in Council be paid over to him out of the deposit of Rs. 4000 made by the respondent as security for costs of the Privy Council appeals. It may be mentioned here that the only dispute between the parties related to the adjustment of the costs of the Privy Coun-

cil appeals under the proviso to S. 19 of the Act.

Preliminary objections were raised on behalf of the respondent to the maintainability of the civil revision petitions. The dismissal of the application for a final decree for sale being appealable as a decree, it was contended that C. R. P. No. 1270 was incompetent. This objection must prevail as this Court has held in 42 Mad 52[1] and 42 M L J 51,[2] that the dismissal of an application for a final decree in a suit for sale on a mortgage is appealable as a decree under S. 96, Civil P. C. As regards C. R. P. No. 656 of 1941 it was urged that the refusal of the Court below to pass a final decree having now become final, the petitioner could not be allowed to contend that a balance was still due to him under the preliminary decree as affirmed by the Privy Council. There is no force in this objection. The Court below did not purport to dismiss the suit as, indeed, it could not, having regard to the decision of the Privy Council in 4 Pat 61[3] and it would be open to the petitioner, if he succeeded in this civil revision petition, to ask for a final decree to be made for the balance claimed to be due under the preliminary decree, as the refusal to pass a final decree was based solely on the order made under S. 19 of the Act. Furthermore, it is still open to the respondent to apply for a decree in terms of O. 34, R. 5 (1), Civil P. C., and the suit must be considered to be pending till a final decree under either sub-r. (1) or sub-r. (3) of O. 34, R. 5 is passed. We therefore overrule the preliminary objection.

Turning now to the merits, the petitioner raised two contentions, viz., first, that the Privy Council was not a "Court" and its decision was not a decree properly so called and did not therefore fall within the purview of the Act; and secondly, assuming that the order of His Majesty in Council was a decree of a Court within the meaning of S. 19 of the Act, the order being one made in exercise of His Majesty's prerogative, the Provincial Legislature had no power to pass any law affecting such order. As these contentions involved questions of general importance in which the Provincial Government might be interested, we directed notice of the petitions to be issued to the Advocate-General and we had accordingly the advantage of hearing his arguments. On the first point, it is no doubt true that in the case of an appeal to the Privy Council, the Judicial Committee make a report to His Majesty containing their recommendations regarding the disposal of the case and the final order disposing of the appeal is that of His Majesty in Council. But this form is a survival from the past history of the status and function of the Privy Council, and its preservation, doubtless due to the peculiar tendency which has often marked British constitutional changes of masking them by the retention of the original forms should not be allowed to obscure the real character and function of the Judicial Committee after its reorganization by the Judicial Committee Acts of 1833 and 1844. As observed by Field J. in 7 Cal 620[4] at p. 626 :

> The essentials of a Court are (i) the actor, or plaintiff; (ii) the reus, or defendant; and (iii) the judex, or judicial power, which ascertains the facts, applies the law, and, if injury has been done, affords a remedy by its officers or otherwise. An examination of the statutes which regulates the Judicial Committee of the Privy Council will show that this tribunal possesses all these essential elements of a Court.

The same view was expressed by their Lordships of the Privy Council in (1935) A C 500,[5] where after examining the provisions of the statutes referred to above, their Lordships observed :

> It is clear that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the order in council which is made to give effect to the report of the committee is made. But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred.

The petitioner's learned counsel however placed reliance upon the observation in 14 M I A 465,[6] where their Lordships say that an order in council is

> not properly speaking the decree of a Court but an order of Her Majesty made on the recommendation of a Committee of Her Privy Council.

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1. ('19) 6 A I R 1919 Mad 709: 48 I C 298: 42 Mad 52: 35 M L J 552, Subbalakshimi Ammal v. Ramanujam Chetty.
2. ('22) 9 A I R 1922 Mad 65: 69 I C 366: 42 M L J 51, Venkataiah v. Venkatasubbiah.
3. ('24) 11 A I R 1924 P C 198: 81 I C 747: 4 Pat 61 : 51 I A 321 (P C), Lachmi Narain v. Balmukund Marwari.
4. ('81) 7 Cal 620 : 9 C L R 402, Gopal Sahu Deo v. Joyram Tewary.
5. ('35) 22 A I R 1935 P C 158: 157 I C 571: 1935 A C 500: 104 L J P C 58: 1935 Ir R 487: 153 L T 283: 79 S J 541: 51 T L R 508, British Coal Corporation v. The King.
6. ('70-72) 14 M I A 465: 17 W R 292: 10 Beng L R 101 : 2 Suther 564 : 3 Sar 62 (P C), Kisto Kinkur Roy v. Raja Burrodacunt Roy.

But this was said with reference to the forms and procedure employed by their Lordships and it was indicated that in substance an order in council did no more than

> prescribe what shall be the final decree in the cause leaving it to be executed by the ordinary process of the Courts in India.

It is worthy of note that O. 45, R. 15 which prescribes the procedure to enforce orders of King in Council speaks of "the decree passed or order made on appeal to His Majesty." We have therefore no hesitation in rejecting this contention of the petitioner. The next question relates to the competency of the Provincial Legislature to make laws affecting a decree or order passed on appeal to His Majesty. It was said that an order of His Majesty in Council was an act done in exercise of his prerogative right and the Provincial Legislature had no power to affect prerogative rights by legislation. In the first place, it is somewhat difficult to see how any royal prerogative can be said to be affected by a provision, which (so far as it is material here) enacts that a judgment-debtor, if he is an agriculturist, shall be entitled to have all payments made or amounts recovered in respect of any decree applied first in payment of the costs decreed to the creditor. In doubting the correctness of the view adumbrated in some decisions in India that an order of His Majesty in Council was not subject to any law of limitation on the ground that, such an order being an act done by virtue of royal prerogative, it was not competent to the Indian Legislature to prescribe a time limit for its enforcement, their Lordships observed in the case last mentioned :

> It (the order in council) may well thus finally ascertain and define the rights of parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence — a matter with which the prerogative has no concern. (Page 493).

It seems to us for a similar reason that the prerogative has no concern with the curtailment or modification of the rights of parties by a local law although such rights may have been ascertained and defined by an order of His Majesty in Council. However that may be, we are clearly of opinion that it is competent, generally speaking, for the Provincial Legislature to make laws affecting His Majesty's prerogative rights. There was some difference of opinion, under the Councils Act, 1861, as to whether a Provincial Council had power to affect the prerogatives of the Crown, although this Court held that it had such power after an elaborate examination of the relevant provisions of that Act : *see* 25 Mad 457[7] at p. 480. The matter was however placed beyond doubt by S. 84 (1) (a), Government of India Act, 1915, as amended by the Government of India (Amendment) Act, 1916, and it was settled law before the present Constitution Act was passed in 1935 that a local Legislature had power to make laws affecting the prerogatives of the Crown. This power was of considerable practical importance, for, as observed by Bhashyam Ayyangar J., in 25 Mad 457[7] :

> If it were otherwise, the powers of the Provincial Legislature to make laws for the peace, order and good government of the province would be unduly hampered. There is no small degree of uncertainty as to the extent of the prerogative of the Crown in India and the validity of no few enactments of the Provincial Legislature will be called into question in Courts on the ground that they directly or indirectly affect the royal prerogative. (Page 480).

It would indeed be odd if the new Constitution Act which was passed in response to much political agitation in the country aimed at securing substantially enlarged powers to the Legislatures in India should be found in practice to have deprived them of an important power which they had previously possessed. We see no reason to suppose that this could have been the intention of Parliament and we are convinced on an examination of the relevant provisions that such is not their effect. Section 99 provides that,

> subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State and a Provincial Legislature may make laws for the province or any part thereof,

and S. 100 defines and delimits the respective jurisdictions of the Federal and the Provincial Legislatures with reference to the subject-matter of legislation. The legislative authority thus conferred is subject only to "the provisions of this Act" and is otherwise unrestricted. There is no provision which excepts generally the prerogatives of the Crown. It was suggested that S. 110, cl. (b), sub-cl. (i) saving inter alia "the sovereignty . . . of the Crown in any part of India" was such a provision, as a law affecting the prerogative of the Crown affected its "sovereignty." We cannot agree that this term imports the prerogative rights of His Majesty. Prerogative is no doubt an attribute of sovereignty but is not the same thing as

7. ('02) 25 Mad 457 : 12 M L J 208, Bell v. Municipal Commissioners for the City of Madras.

territorial sovereignty which alone is saved. On the other hand, we find sub-cl. (iii) of the same provision expressly saving a particular prerogative right of His Majesty, viz., the right to grant special leave to appeal from any Court. The conclusion is therefore irresistible that it is within the competence of the Legislatures in India to make laws derogating from other prerogative rights except of course in so far as such prerogatives may be comprised in matters specially excepted.

In this connexion learned counsel for petitioner laid stress on the absence in the new Act of provisions like S. 80-A and Sec. 84 (1) (a) of the earlier Act, and argued that it must be inferred that Parliament did not intend to confer such power on the Legislatures in India. We cannot attach any significance to the omission of these provisions in the present Act which discloses a totally different scheme with its practically exhaustive enumeration of legislative powers and their distribution among the Central and Provincial Legislatures on a federal basis. The matters enumerated in the various legislative lists in Sch. 7 to the Act and the residual powers of legislation provided for in S. 104 cover the entire field of Governmental activities compendiously described as "peace and good government" in S. 80A of the Act of 1919, while S. 84 (1) (a) of that Act was, as pointed by Bashyam Ayyangar J. in 25 Mad 457,[7] really superfluous and came to be inserted only ex majore cautela for reasons connected with the history of constitutional development in this country. It is a well established principle that within the limits of subject and area assigned to a Legislature by the Imperial Parliament, its powers to make laws are as supreme and plenary as those of Parliament itself: (1878) 3 A C 889,[8] (1884) 9 A C 117[9] and (1933) A C 156.[10] In this connexion the weighty observations of their Lordships in (1935) A C 500[5] already referred to, should also be borne in mind :

> In interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in (1930) A C 124[11] at p. 126 : 'Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent but within certain fixed limits, are mistresses in theirs'.

Another contention was based upon the decision of this Bench in C. M. A. No. 424 of 1940 (53 L W summary of recent cases p. 62[12]) where it was held that the term "decree" in S. 19 of Act 4 of 1938 must be taken to refer to decrees passed by Courts in this presidency. It was argued that the Privy Council sitting and functioning in London was a foreign tribunal and S. 19 could not therefore apply to decrees passed on appeal thereto. This argument proceeds upon a misapprehension of the effect of that decision. The ratio decidendi there was that the procedure provided by S. 19 was inapplicable to decrees passed outside this province as decrees had to be scaled down under that section by Courts which passed them, and the Legislature of this province could not make laws directing Courts in other provinces to scale down decrees passed by them. The position however is entirely different in respect of a decree passed on an appeal to the Privy Council taken from this province, as the application to scale down such decree has to be made to the Court of first instance, that is a Court of this province (explanation to S. 20 of the Act read with S. 37, Civil P. C.). Nor is it correct to regard the Privy Council as a foreign tribunal in relation to appeals preferred from Courts of this province. The observations of their Lordships in the Canadian case already referred to (1935) A C 500[5] at p. 521 are here pertinent :

> It is said that this class of appeal is a matter external to Canada ; emphasis is laid particularly on the fact that the Privy Council sits in London . . . . . But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.

It only remains to consider C. M. P. No. 5982 of 1940 and the argument advanced in connexion therewith that the petitioner is, in any case, entitled to payment of the costs claimed out of the deposit of Rs. 4000 made by the respondent in this Court in P. C. A. No. 99 of 1933. The said deposit was made under O. 45, R. 7, Civil P. C., which provides

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8. (1878) 3 A C 889, Reg. v. Burah.
9. (1884) 9 A C 117 : 53 L J P C 1 : 50 L T 301, Hodge v. Reg.
10. ('33) 20 AIR 1933 P C 16 : 143 I C 91 : 1933 A C 156 : 102 L J P C 6 : 148 L T 62 : 48 T L R 652 : 43 Ll L Rep 435, Croft v. Dunphey.
11. ('30) 17 AIR 1930 PC 120: 126 IC 88: 1930 AC 124: 99 LJPC 27: 142 LT 98: 73 SJ 711: 46 TLR 4, Edwards v. Attorney-General for Canada.
12. *Reported in* ('41) 28 AIR 1941 Mad 810: (1941) 2 M L J 295, Santhappa v. Eswarappa.

that the applicant shall within the time specified "furnish security in cash or in Government securities for the costs of the respondent." It is thus clear that the deposit in question was made merely by way of security for any liability for costs which might arise in case the appeal failed. Such liability having arisen and been discharged by appropriation of amounts already received in respect of the decree as provided for in S. 19 of the Act, the petitioner can no longer claim any payment and the deposit will have to be returned to the respondent. In the result, all the petitions fail and are dismissed. The petitioner will pay the costs of respondent 1 in C. R. P. No. 656 of 1941. Following the Federal Court practice referred to in 3 F L J 157[13] we allow no costs to the Advocate-General. We do not think that the case involves any substantial question of law as to the interpretation of the Government of India Act and we decline to certify that it is a fit case for appeal to the Federal Court.

C.R.K./G.N. *Petitions dismissed.*

13. ('41) 28 AIR 1941 F C 47: 192 I C 225: (1940) 3 F L J 157 : 1940 F C R 188, Subramaniam Chettiar v. Muthusami Goundan.

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* (28) A. I. R. 1941 Madras 822

FULL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

Kandaswami Thambiran — Appellant

v.

Vagheesam Pillai — Respondent.

Appeal No. 137 of 1938, Decided on 6th March 1941, against decree of Sub-Judge, Sivaganga, in O. S. No. 27 of 1934.

*** Specific Relief Act (1877), S. 42—Religious office cannot be separated from its endowments — Plaintiff not in possession of properties of office suing for declaration of his title to office must ask for possession by reason of S. 42 — Failure to do so vitiates suit : 47 M L J 671 =('25) 12 A I R 1925 Mad 421 = 80 I C 1053, *OVERRULED.***

The office of a mahant cannot be separated from the properties which form the endowments of the office : 23 Mad 271 (P C) ; ('16) 3 A I R 1916 P C 256 and ('40) 27 A I R 1940 P C 24, *Rel. on.* [P 824 C 1]

The plaintiff who is asking for a declaration of his title to the office of a mahant and who is not in possession of its properties must by reason of S. 42 ask for possession. His failure to do so vitiates his suit : 47 M L J 671=('25) 12 A I R 1925 Mad 421=80 I C 1053, *OVERRULED;* 33 Mad 452, *Approved ;* 28 Bom 567, *Dissent.; Case law referred.* [P 824 C 2]

A. C. Sampath Ayyangar for S. Narasinga Rao — for Appellant.

K. Rajah Aiyar for V. Ramaswami Iyer — for Respondent.

Leach C. J. — This reference arises out of a suit filed by the appellant in the Court of the Subordinate Judge of Sivaganga to establish the title claimed by him to the office of Pandarasannadhi, or mahant, of the Tiruvannamalai math in the Ramnad district. In his plaint the appellant asked the Court to pass a decree in his favour for inter alia the following reliefs :

(a) Declaring that defendant 1 is not entitled to be the Pandarasannadhi of the Thiruvannamalai Athinam and (by way of consequential relief) ejecting him from the office of Pandarasannadhi of the Athinam and restoring its possession to the plaintiff as the only Thambiran of the Athinam qualified and entitled to its headship or at least to be in charge of the math and its properties till a new Pandarasannadhi comes.

(b) Restraining defendant 1 by a perpetual injunction from in any way interfering with the spiritual or secular affairs of the Athinam.

The respondent was defendant 1, who claims to be the lawful holder of the office. It is admitted that he is in possession of the properties, but notwithstanding the terms of para. (a) of the prayer the appellant said that he was not asking for an order for possession because "the servants and tenants" on the lands were prepared to hand over possession and pay rent to the holder of the office. In addition to denying the right claimed by the appellant the respondent, relying on the provisions of S. 42, Specific Relief Act, averred that the suit was not maintainable because the appellant had failed to ask for a decree directing that possession of the math properties be given to him. The Subordinate Judge held that this plea was well founded and dismissed the suit. The appellant appealed to this Court and in due course the case came on for hearing before a Division Bench consisting of King and Patanjali Sastri JJ. In consequence of the conflict between the decisions of this Court in 33 Mad 452[1] and 47 M L J 671,[2] the learned Judges have referred to a Full Bench the issue whether the suit is barred by reason of the provisions of S. 42, Specific Relief Act.

When the case was before King and Patanjali Sastri JJ. the learned advocate for the appellant applied for and obtained an order permitting the amendment of the

1. ('10) 33 Mad 452 : 5 I C 630 : 20 M L J 301 : (1910) M W N 112, Rathnasabapathi Pillai v. Ramaswami Iyer.

2. ('25) 12 A I R 1925 Mad 421 : 80 I C 1053 : 47 M L J 671, Swaminatha Iyer v. Ramier.

plaint by the omission of the words, "or at least to be in charge of the mutt and its properties till a new Pandarasannadhi comes" from the prayer for a declaration. The prayer for a perpetual injunction stands, but Mr. Sampath Ayyangar has stated that he is willing to waive this relief also should it be deemed to be in the way of his client's success in the appeal. In these circumstances the Court will treat the appellant's claims to be for (1) a declaration of his title to the office and (2) possession of the office but not of the properties attaching to it. In 33 Mad 452[1] a trustee of a temple who had been ousted by his co-trustees sued for a declaration that his dismissal from the trusteeship was invalid and for an injunction restraining his co-trustees and the temple committee from interfering with the exercise of his rights as a trustee. There was no prayer for consequential relief in the nature of an order for possession against the co-trustees. In these circumstances the Court, C. Sankaran Nair and Krishnaswami Ayyar JJ. held that the suit was not maintainable. In that case the plea was raised that the lands of the temple were in the physical possession of the tenants and the plaintiff could not get such possession himself; but it was held that the fact that the lands were in the physical possession of the tenants did not excuse the plaintiff from suing for possession.

47 M L J 671[2] was decided by Spencer J. who was then officiating as Chief Justice and Srinivasa Ayyangar J. That was a suit for a declaration that the plaintiffs were the lawful trustees of a Hindu temple and its endowments, for a direction that the defendants who claimed to be trustees should be made to restore the office to them and for an injunction restraining the defendants from interfering with the exercise by the plaintiffs of the duties of the office. Relying on the decision of the Bombay High Court in 28 Bom 567[3] (which Sankaran Nair and Krishnaswami Ayyar JJ. had refused to follow) Spencer and Srinivasa Ayyangar JJ. held that it was not necessary for the plaintiffs to sue for the consequential relief and therefore S. 42, Specific Relief Act, was no bar to the suit. The learned Judges appear to have separated the office from the properties forming the endowments of the trust. In 28 Bom 567[3] the facts were these. The plaintiff brought a suit alleging that he had been installed on the gadi of the god Swaminarayan. He claimed that he was the gadipathi and that nobody else had a right to be installed on the gadi. He complained that the defendants were wrongly attempting to place some other person on the gadi. The reliefs asked for were: (1) a declaration that a will set up by the defendants was a fraudulent document but, if established it was not binding; (2) a declaration that the right to become the acharya was in the plaintiff and that he was the owner of the gadi; (3) a perpetual injunction restraining the defendants from offering any obstruction to his occupying the gadi and (4) a perpetual injunction restraining the defendants from placing anybody else on the gadi. The Court (Jenkins C. J. and Batty J.) accepted the plaintiff's contention that the suit was not for possession of the trust properties but one to determine who was to occupy the gadi and considered that in these circumstances the plaintiff was entitled to ask for an injunction without any further relief. Jenkins C. J. in delivering the judgment said:

> We do not say that the plaintiff might not in terms have asked for possession of the office he says is his; we will assume he could, but how would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up.

The defendants were in possession of the trust properties and therefore it was not open to the Court to grant the plaintiff an injunction when he was not asking for possession against those actually in possession. This was pointed out by Sankaran Nair and Krishnaswami Ayyar JJ. in their judgment in 33 Mad 452.[1] We cannot regard 28 Bom 567[3] as being correctly decided. The judgment in 33 Mad 452[1] receives support from the decisions of this Court in 8 Mad 361;[4] 8 Mad 516;[5] 13 Mad 75;[6] 15 Mad 15;[7] 16 Mad 31;[8] 22 Mad 117;[9] 8 M L J 124[10] and 23 M L J 118.[11] In 8 Mad 361[4] which was a suit by six plaintiffs for a declaration that certain proceedings of a district temple committee removing them from office as trustees of a temple were illegal Turner C. J. and Muttuswami Ayyar J. observed:

3. ('04) 28 Bom 567: 6 Bom L R 475, Kunj Behari v. Keshavlal Hiralal.

4. ('82) 8 Mad 361, Ramanuja v. Devanayaka.
5. ('82) 8 Mad 516, Sonachala v. Manicka.
6. ('90) 13 Mad 75, Kombi v. Aundi.
7. ('92) 15 Mad 15, Abdulkadar v. Mohamed.
8. ('93) 16 Mad 31, Strinivasa Ayyangar v. Strinivasaswami.
9. ('99) 22 Mad 117, Srinivasaswami v. Ramanujachariar.
10. ('98) 8 M L J 124, Ramaswami Iyer v. Annaswami Iyer.
11. ('12) 23 M L J 118: 16 I C 630: 12 M L T 168, Appu Pillai v. Perumal Pillai.

Possession, whether it is of property or of an office may be regarded either as a physical fact, or in contemplation of the legal right to it, and it is in the former sense it should be understood in coming to a finding under S. 42 as to whether the plaintiff is, or is not, able to seek further relief.

In 15 Mad 15,[7] Muttuswami Ayyar J. sitting with Parker J. held that a suit was not maintainable by reason of S. 42, Specific Relief Act, in these circumstances. The plaintiff claimed that he was entitled to the office of Sheik of Kallai and to the properties forming the endowments of the office. He did not sue for possession of the properties which were in the possession of the defendant. He merely claimed a declaration that the defendant had no right either to the office of Sheik of Kallai or to the properties and prayed for an injunction restraining the defendant from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office. The cases in 16 Mad 31[8] and 22 Mad 117[9] concerned maths. In 16 Mad 31,[8] the plaintiffs were three disciples of a math. They sued under S. 539, Civil P. C., 1882, alleging that the defendant was in possession under a false claim of title as the successor to the last jheer and praying that it be declared that he was not the duly appointed successor to the office and that an appointment to the vacant office be made by the Court. As no consequential relief was asked for, it was held that the suit was not maintainable. 22 Mad 117[9] was a case of a similar nature. The same principle was applied in 8 Mad 516[5] which referred to a choultry and in 13 Mad 75,[6] in which the plaintiff claimed a declaration of his title to the stanom of the fifth Raja of Palghat. 8 M L J 124[10] had reference to temple properties. It was there held that a person who was in joint possession of the temple properties with others who claimed to be joint trustees with him could not sue to exclude the other persons from management without suing for sole possession of the properties. A mere declaration that he was the proper trustee and the others were not was not sufficient in the circumstances. In 23 M L J 118[11] Abdur Rahim and Sadasiva Ayyar JJ. followed 33 Mad 452.[1]

In the face of these decisions it is not feasible to accept the judgment in 47 M L J 671[2] in preference to that in 33 Mad 452.[1] Moreover it has to be borne in mind that it is not possible to separate the office from the properties which form the endowments of the office. This has been very clearly laid down by the Privy Council. In 23 Mad 271[12] which concerned the right to the office of trustee of a certain temple, Sir Richard Couch in delivering the judgment of the Board said: "Their Lordships are of opinion that there is no distinction between the office and the property of the endowment." This was emphasised by Lord Shaw in delivering the judgment of the Board in 43 Cal 707.[13] When referring to the position of a mahant Lord Shaw said:

> He sits upon the gadi, he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself.

In delivering the judgment of the Privy Council in I L R (1940) 1 Cal 266,[14] Mr. Jayakar quoted this passage from the judgment of Lord Shaw and went on to say:

> The two capacities are thus closely intermingled and a proper and efficient discharge of the one depends on the control of the other. The mahanta must have authority over the funds and income of the institution to be able to discharge his religious duties efficiently, in conformity with the customary and traditional obligations of the office and to the satisfaction of those who claim the benefit of the worship. He necessarily enjoys large patronage in the discharge of his religious functions. He cannot, in consequence, depend, for the due performance of such duties, on the mercy or caprice of another functionary, with separate or co-ordinate authority over the funds of the institution. Any division of the two capacities would lower his prestige, as also impair the efficiency of his religious functions.

Here the appellant is endeavouring to separate the office from its endowments. This he clearly cannot do and as he is asking for a declaration of his title to the office and is not in possession of its properties he must by reason of S. 42, Specific Relief Act, ask for possession. His failure to do so vitiates his suit. It may be regrettable that a person who has been ousted wrongly from an office and the control of the properties attached to it should be required to pay a court-fee based on the value of the properties before he can file a suit to remedy the wrong, but the Court cannot take such hardship into consideration when deciding the effect of S. 42, Specific Relief Act. When

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12. (1900) 23 Mad 271 : 27 I A 69 : 10 M L J 29 : 7 Sar 671 (P C), Gnanasambanda Pandarasannadhi v. Velu Pandaram.
13. ('16) 3 AIR 1916 P C 256 : 33 I C 583 : 43 Cal 707 : 43 I A 73 (P C), Ram Parkash Das v. Anant Das.
14. ('40) 27 AIR 1940 P C 24 : 185 I C 616 : I L R (1940) 1 Cal 266 : I L R (1940) Kar P C 47 : 67 I A 32 (P C), Satish Chandra Giri v. Dharni Dhar Singha.

a court-fee fixed by the Court-fees Act is unfair, it is for the Legislature to interfere. The Court cannot do so. We consider that 33 Mad 452[1] was rightly decided and that 47 M L J 671[2] was not. Consequently the answer which we give to the reference is that the present suit cannot be maintained by reason of the fact that the plaintiff has failed to ask for possession of the math properties.

C.R.K./G.N. *Answer accordingly.*

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* (28) A. I. R. 1941 Madras 825

HORWILL J.

In re Palayan— Petitioner.

Criminal Revn. Case No. 675 and Petn. No. 635 of 1941, Decided on 8th August 1941, to revise order of the Chief Presidency Magistrate, Egmore, Madras, D/- 29th July 1941.

* Criminal P. C. (1898), S. 350 (1) Proviso (a) —Accused demanding re-examination of witnesses can subsequently say that he wants only some of them to be examined—But this does not preclude the Magistrate from exercising his discretion of examining all witnesses.

Even though in the first instance the accused may demand a re-examination of witnesses, he can change his mind and say that he wishes only certain witnesses to be examined : ('25) 12 A I R 1925 Mad 317 and ('35) 22 A I R 1935 Mad 318, *Foll.* [P 825 C 2]

But there is nothing in S. 350 which prohibits the Magistrate from exercising his discretion of examining all the witnesses again merely because the accused has exercised his right under proviso (a) to S. 350 : ('35) 22 A I R 1935 Mad 318, *Expl.* [P 825 C 2]

Pais, Lobo and Alwares — for Petitioner.

K. V. Ramaseshan for Crown Prosecutor — for the Crown.

Order.—The petitioner was an accused in C. C. No. 926 of 1941 on the file of the Chief Presidency Magistrate, Egmore. Upon a transfer of the Magistrate, the petitioner invoked the provisions of Proviso (a) to S. 350, Criminal P. C., and asked the Magistrate to recall the prosecution witnesses for fresh examination. The learned counsel for the petitioner found, after cross-examining certain prosecution witnesses, that they were saying more than they had before, and he thought that it was not in the interests of his client to examine any more prosecution witnesses. He therefore asked the Magistrate not to examine the remaining witnesses. The Magistrate insisted and said:

It is not open to the accused to say after some of the witnesses were examined, that the other witnesses need not be examined. Even if he does not want the other witnesses to be examined the Court can in the interests of proper appreciation of evidence and in the interests of justice examine all the witnesses again. I therefore decide that all the witnesses will be summoned and heard again.

It is argued on behalf of the petitioner that both the reasons given by the learned Magistrate are not valid. Two decisions of this Court, 20 M L W 916[1] and 1935 M W N 179[2] make it clear that even though in the first instance the accused may demand a re-examination of witnesses, he can change his mind and say that he wishes only certain witnesses to be examined. The other question is whether, after the accused has said that he does not wish to examine all the witnesses, it is open to the Magistrate to examine them. The argument of the learned counsel for the petitioner is that once a proviso to S. 350 (1), Criminal P. C., has been invoked, the Magistrate has lost his power to summon witnesses under S. 350 (1). I should be reluctant to hold so unless the wording of S. 350, Criminal P. C, itself made that clear. Although a Magistrate might be content to decide the whole of the case on the record, yet there are obvious disadvantages in deciding the case partly on the record and partly on the witnesses heard by him; and a Magistrate might well be desirous, for a proper appreciation of the case by himself, to hear all the witnesses again if he is obliged to examine some of them. I do not find anything in S. 350, Criminal P. C., which prohibits him from exercising his discretion of examining all the witnesses again merely because the accused has exercised his right under Proviso (a) to S. 350. The judgment of Burn J., in 1935 M W N 179[3] has been quoted in support of this contention; but I do not think that Burn J., was of that opinion. The purport of his judgment is that the accused has a right to say that no more witnesses should be examined; but that his right to stop a further examination of witnesses is subject to a limitation, that limitation being the privilege of the Magistrate under S. 350 (1), Criminal P. C., to examine all. In the particular case before him there was nothing on the record to show whether the Magistrate had invoked his privileges under S. 350 (1) or not; and so the learned Judge dismissed the revision case on the ground that it was not certain that the learned Magistrate committed any error when he re-heard two prosecution witnesses whom the accused did not want him to re-hear.

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1. ('25) 12 A I R 1925 Mad 317 : 85 I C 366 : 26 Cr L J 526 : 20 M L W 916, In re Vudigalapudi Garu.
2. ('35) 22 A I R 1935 Mad 318 : 157 I C 1020 : 36 Cr L J 1265 : 1935 M W N 179, Veerappa v. Emperor.

The petition is therefore dismissed. I would like to add that the Magistrate before examining the other witnesses in the case against the wishes of the accused should consider whether he himself feels the need to examine them. Only if he does, should he re-summon and re-hear them.

C.R.K./K.S. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 826

WADSWORTH J.

Muthilakath Krishna Menon — *Petitioner*

v.

Chathankandath Chamunni's son Kunjandi — *Respondent.*

Civil Revn. Petn. No. 1448 of 1939, Decided on 16th July 1941, to revise order of Sub-Judge, South Malabar at Palghat, D/- 20th February 1939.

Madras Agriculturists' Relief Act (4 of 1938), S. 15 — Mortgage with possession by jenmi and lease executed by him on same day to mortgagee — Payment under lease is rent and not interest — Mortgagee is intermediary and jenmi is entitled to relief under S. 15.

A jenmi mortgaged his property with possession and got possession of the property from the mortgagee by executing on the same day a lease to him:

Held that the lease, although contemporaneous with and closely related to the mortgage, must be regarded as a lease and the payment thereunder must be regarded as rent and not interest: ('40) 27 A I R 1940 Mad 946, *Foll.* [P 826 C 2]

Held further that the mortgagee was an intermediary within the meaning of Malabar Tenancy Act even though the person to whom he had transferred his possession was the jenmi himself and therefore the rent under the lease deed fell within S. 15, Madras Agriculturists' Relief Act, and the jenmi was entitled to relief under that section if he had made the required deposit within the time laid down. [P 826 C 2]

P. Govinda Menon — for Petitioner.

A. K. Pavitram — for Respondent.

Order.—The petitioner in this case filed an application under S. 19, Madras Act 4 of 1938, praying that the amount due under a decree in favour of the respondent might be scaled down. The petitioner mortgaged his property to the respondent with possession and on the same day there was a lease back to the petitioner whereunder the petitioner was to pay rent to the respondent. He defaulted and in 1937 the mortgagee got a decree for the principal sum due under the mortgage and for the amount of rent due under the lease. In the lower Court the petitioner contended firstly, that the annual payments under this double transaction were interest and were to be scaled down as such and alternatively that these annual payments were rent to which S. 15 of the Act applied. The lower Court negatived both the contentions.

The contention that in a transaction of this kind the rent is really interest is no longer tenable so far as Act 4 of 1938 is concerned since the decision in (1940) 2 M L J 760.[1] The lease, although contemporaneous with and closely related to the mortgage, must be regarded as a lease, and the payment thereunder must be regarded as rent. If it is rent, then the only question remaining to be decided is whether it is rent payable to a jenmi or to an intermediary so as to attract the provisions of S. 15. The respondent is clearly not a jenmi so far as this land is concerned. The word "intermediary" is defined in the Malabar Tenancy Act as any person who, not being a jenmi, has an interest in land and is entitled by reason of such interest to possession thereof, but has transferred such possession to others. It seems to me that this definition clearly applies to the respondent. He is himself a transferee by way of mortgage from the jenmi and by reason of this mortgage he has an interest entitling him to possession of the land and has transferred the possession to which he is entitled to another. The fact that this other is the jenmi himself will not prevent the respondent from being an intermediary so far as the words of the definition go. In fact the petitioner with reference to this land was the holder of two quite separate interests, viz., the original interest of the jenmi or mortgagor and the interest of the lessee derived from the mortgagee. By reason of the latter interest, he pays rent and the person to whom he pays it is a person who comes within the definition of "intermediary." The rent therefore falls within S. 15, Madras Act 4 of 1938, and the petitioner is entitled to relief under that section if he has made the required deposit within the time laid down. The petition is therefore allowed with costs and the case is remanded to the lower Court for disposal in the light of this judgment.

C.R.K./K.S. *Petition allowed.*

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1. ('40) 27 A I R 1940 Mad 946 : (1940) 2 M L J 760, Abdul Khader v. Subramania Pattar.

(28) A. I. R. 1941 Madras 827

BURN AND HORWILL JJ.

Ramaswami Reddiar — Appellant

v.

Official Receiver, South Arcot and another — Respondents.

Appeal No. 264 of 1939, Decided on 4th April 1941, against order of the Dist. Court, South Arcot, D/- 7th November 1938.

(a) Insolvency—Sale of insolvent's assets by Official Receiver in due course of administration —Sale knocked down in favour of highest bidder *A* for Rs. 113 — In accordance with his practice Official Receiver declaring sale subject to further bids by creditors and issuing notices to other creditors that on their failure to make higher bids sale would be confirmed in *A's* favour —*B* making offer of Rs. 120—Official Receiver confirming sale in *A's* favour—Subsequently *B* depositing Rs. 120 but Official Receiver executing sale deed in *A's* favour — On *B's* appeal District Court setting aside sale holding it to be irregular — Sale held not irregular — Official Receiver held in circumstances of case justified in confirming sale in *A's* favour — Practice of Official Receiver in making highest bid at auction subject to further bids by creditors deprecated.

The Official Receiver in the due course of his administration of the assets of the insolvent held a sale on 30th August 1937 which was duly advertised. *A* being the highest bidder the sale was knocked down in his favour for Rs. 113 of which he deposited Rs. 32 at once and a further Rs. 81 on 13th September 1937. In accordance with the practice of the Official Receiver the sale in *A's* favour was subject to such further bids as might be offered by creditors. He therefore sent notices to the other creditors telling them that if they did not make any higher bids, the sale would be confirmed in *A's* favour. On 4th September 1937 *B* sent an offer to the Official Receiver which reached him on 6th September 1937. The money should have been deposited within seven days of 6th September 1937 that is on or before 13th September 1937. The money was not however paid; and the Official Receiver apparently not fully aware of the various bids that had been made and of the circulars he had issued, confirmed the sale in *A's* favour on 30th November 1937. On 16th February 1938 *B* deposited the Rs. 120 which was the amount of the offer that he had made. On 6th May 1938 the Official Receiver executed a sale deed in *A's* favour. But the District Court in appeal while concluding that the sale was really confirmed in *A's* favour on 30th November 1937, held that that sale was irregular, in that the Official Receiver had made it clear that he had no intention to confirm the sale in *A's* favour if there were higher bidders among the creditors and therefore set it aside :

Held that the sale in *A's* favour could not be said to be irregular. The Official Receiver was under no contractual obligation either to *B* or to any other person to accept their offers and that he was justified in confirming the sale in favour of *A*—especially as *B's* bid was only Rs. 7 higher than that of *A*. Although the District Judge had power to set aside the sale and to pass an order in favour of *B*, yet he should not have done so lightly after there had been a legal conveyance of the property in favour of *A*. [P 828 C 1]

Held further that the practice of the Official Receiver in making the highest bid at the auction subject to further bids by creditors was objectionable. [P 828 C 2]

(b) Provincial Insolvency Act (1920), S. 68 — Holding of sale of insolvent's assets by Official Receiver, its confirmation and execution of sale deed in favour of purchaser can all be subject of application under S. 68—On each occasion there is cause of action—Consequently application to set aside sale within 21 days of execution of sale deed in purchaser's favour after confirmation of sale must be held to be within time.

The acts of an Official Receiver in holding a sale of the insolvent's assets, in confirming it and in executing a sale deed in favour of the purchaser can all be the subject of an application under S. 68. On each of the aforesaid occasions there is a cause of action and consequently an application under S. 68 to set aside the sale filed within 21 days of the execution of the sale deed in favour of the purchaser after confirmation of sale must be held to be within time. [P 828 C 2]

A. Srinivasa Iyer and S. Seshadri—for Appellant.

K. Venkataraghavachari — for Respondents.

Horwill J. — This is an appeal against the order of the District Judge of South Arcot setting aside a sale by the Official Receiver of items 1 to 10 of an insolvent's property on 6th May 1938. The Official Receiver in the due course of his administration of the assets of the insolvent held a sale on 30th August 1937 which was duly advertised. The highest bidder was the appellant; and the sale was knocked down in his favour for Rs. 113 of which he deposited Rs. 32 at once and a further Rs. 81 on 13th September 1937. In accordance with the practice of the Official Receiver, he said that the sale in the appellant's favour would be subject to such further bids as might be offered by creditors. He appears to have sent notices to the other creditors telling them that if they did not make any higher bids, the sale would be confirmed in the appellant's favour. On 4th September 1937 the respondent sent an offer to the Official Receiver which reached him on 6th September 1937. The money should have been deposited within seven days of 6th September 1937, that is on or before 13th September 1937. The money was not however paid ; and the Official Receiver, apparently not fully aware of the various bids that had been made and of the circulars he had issued, confirmed the sale in the appellant's favour on 30th November 1937. On 16th February 1938, the respondent deposited the Rs. 120 which was the amount of the offer that he had made. The Official Receiver, on 24th March 1938, noted in EX. A that

Vasudeva Reddiar (respondent) had offered Rs. 120 and he added that notice should go to all creditors and bidders for them to show cause why the higher offer should not be accepted. He later made a note to the effect that Vasudeva Reddiar's offer was made for items 1 to 8, which had already been sold, that items 16 and 17 were not included in the list of assets disclosed by the insolvent, and that he would therefore take no further steps to call for higher bids. On 6th May 1938 he executed a sale deed in favour of the appellant. The respondent carried the matter to the District Court under S. 68, Provincial Insolvency Act, and asked the Judge to set aside the sale to the appellant on the ground that there had been no confirmation of the sale, that the Official Receiver had called for offers, and that in accordance with the memo of the Official Receiver he had deposited Rs. 120. He asked that the sale should be confirmed in his favour. The learned District Judge, while concluding that the sale was really confirmed in the appellant's favour on 30th November 1937, held that that sale was irregular, in that the Official Receiver had made it clear that he had no intention to confirm the sale in the appellant's favour if there were higher bidders among the creditors. The appellant has therefore brought the present appeal against this order of the District Judge.

We find it difficult to understand how the confirmation of the sale in the appellant's favour can be said to be irregular. The Official Receiver was under no contractual obligation either to the respondent or to any other person to accept their offers; and he might well have refused to confirm the sale in some other person's favour unless his bid was substantially higher than that of the appellant. Actually, it would appear from the note to EX. A, that the Official Receiver was ignorant of the fact that he had already sold the items to the appellant; but whether he was aware of it or not, he was justified in confirming the sale in favour of the appellant — especially as the bid of the respondent was only Rs. 7 higher than that of the appellant. Although the District Judge had power to set aside the sale and to pass an order in favour of the respondent, yet he should not have done so lightly after there had been a legal conveyance of the property in favour of the appellant. We are of opinion that there was no sufficient ground for setting aside the sale in favour of the appellant.

It is unnecessary to discuss in detail the contention of the learned counsel for the appellant that the application of the respondent was time barred. The petition, the order on which is appealed against, was filed on 2nd July 1938, which was the reopening date after the summer vacation. The sale was on 30th August 1937, the confirmation on 30th November 1937, and the execution of the sale deed on 6th May 1938. All of these acts by the Official Receiver could be the subject of an application under S. 68; for they were the acts of the Receiver against which the respondent was aggrieved. He had a cause of action not only on 30th November 1937 therefore but on 6th May 1938, also. 21 days after 6th May 1938 terminated during the summer vacation, and his petition was presented on the reopening day. It was therefore in time.

Both the appellant and the respondent are innocent victims of a system which we do not consider to be in the best interests of creditors. The auction held by the Official Receiver should be final; but it would appear that after an auction is held, the Official Receiver circularizes the other creditors, and if he then receives a higher bid, the creditors and the bidders are informed of that bid also. This process apparently continues until no higher bid is received. We consider this system to be objectionable. Clearly, persons will not come forward and bid for the property at a public auction if the highest bid is not to be accepted. This practice has led to the confusion which has resulted in injustice to both the parties in the present case. The appeal is allowed with costs in both the Courts.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 828

HORWILL J.

In re A. Venkataraghava Iyer — *Petitioner.*

Criminal Revn. Case No. 161 and Petn. No. 154, of 1941, Decided on 16th July 1941, to revise judgment of Sub-Divisional Magistrate, Saidapet, D/- 6th December 1940.

Madras Local Boards Act (14 of 1920), Sch. 7, S. 207 — Storing firewood without license is no offence.

Schedule 7 of the Local Boards Act, unlike Sch. 6 of the City Municipal Act, does not require that a license should be taken out for storing firewood. Hence a person who stores firewood without taking a license commits no offence. [P 829 C 1]

K. V. Ramachandra Iyer — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The petitioner has been convicted—and the conviction has been upheld in appeal—under S. 193, Local Boards Act, read with S. 207 and Sch. 7, for failure to obtain a license for storing and selling firewood during the year 1939-40 within the limits of the Panchayat Board of Uttaramerur and he has been fined Rs. 5. Schedule 7, Local Boards Act, unlike Sch. 6, City Municipal Act, does not require that a license should be taken out for storing firewood. It was unnecessary therefore for the petitioner to have taken out a license; and by not taking out a license he committed no offence in storing firewood. Whether he could sell firewood without a license may depend on whether by doing so he was exercising a trade. But this case did not turn on that. It was assumed that a license was necessary for storing firewood and both Courts seem to have been under a misapprehension on that point. The conviction is therefore set aside and the fine refunded.

C.R.K./K.S. *Conviction set aside.*

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(28) A. I. R. 1941 Madras 829

WADSWORTH AND PATANJALI SASTRI JJ.

P. L. P. Devarayan Chettiar — *Petitioner*

v.

Sp. Subramania Iyer and another — *Respondents.*

Civil Revn. Petn. No. 597 of 1939, Decided on 20th February 1941, to revise decree of Dist. Munsif, Erode, in S. C. S. No. 736 of 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl.—Debt under pronote due from *A*, *B* and *C* jointly and severally discharged by another pronote by *A* and *B*—Later debt is inclusion in fresh document of former debt.

Where a debt under a pronote due from *A*, *B* and *C* jointly and severally is discharged by another pronote executed by *A* and *B*, the later debt must be regarded as an inclusion in a fresh document of the former debt within the meaning of S. 8, Expl.: ('41) 28 A I R 1941 Mad 59 and ('41) 28 A I R 1941 Mad 202, *Rel. on.* [P 829 C 2]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl. — Debt renewed under S. 8 Expl., must be due from agriculturist—Meaning — Person claiming benefit of Act need not be an agriculturist at date on which prior debt of which later debt in suit was renewal came to be discharged—Essential points of time at which person claiming benefit of Act must be shown to be agriculturist, stated.

The debt which is renewed under explanation to S. 8 must be a debt due from an agriculturist. That means that it must be due from a person who is an agriculturist during the period contemplated in the definition of agriculturist in S. 3 (ii) of the Act that is to say, the period after 1-10-1937, having regard to the provisos to S. 3(ii) of the Act. The person claiming the benefits of the Act need not have been an agriculturist at the date on which the prior debt of which the later debt in suit is a renewal came to be discharged. The essential points of time under the Act at which the person claiming benefits has to prove that he was an agriculturist are 1st October 1937, 22nd March 1938 and the date on which the actual matter in question came before the Court: ('40) 27 A I R 1940 Mad 836 and ('41) 28 A I R 1941 Mad 158, *Rel. on.* [P 830 C 1, 2]

K. S. Ramabadhra Iyer—for Petitioner.

V. S. Narasimhachar—for Respondents.

Wadsworth J.—This civil revision petition is preferred by the plaintiff in a small cause suit and it raises a question as to the interpretation of the explanation to S. 8 of Act 4 of 1938. The debt in question starts with a promissory note executed by defendants 1 and 2 and one Toongan. This was discharged by another note of 1932 executed by the same three persons. On 29th July 1935 the suit note was executed by defendants 1 and 2 alone discharging the earlier note of 1932. It is not a case of a joint family debt, defendants 1 and 2 being of different castes. We have no information whether Toongan was or was not an agriculturist. It was proved that in May 1937 defendant 1 purchased lands which qualify him as an agriculturist under the Act. Defendant 2 appears to have been an agriculturist throughout. Three contentions have been placed before us on behalf of the petitioner to show that the lower Court was wrong in scaling down the debt as against both the defendants. Firstly it is contended that it is not the same debt as that incurred in 1932, the debtors being different. It seems to us that this contention must be negatived on the authority of the decisions in (1940) 2 M L J 651[1] and (1940) 2 M L J 786.[2] The debt of 1932 was apparently due jointly and severally from the defendants and Toongan and it is discharged by another debt due from the defendants. This, according to our rulings, is sufficient to make the later debt an inclusion in a fresh document of the former debt.

A further contention is that even if the suit debt is deemed to be a renewal of the debt of 1932, it cannot be a renewal so far as Toongan's share in the debt is concerned, he not being shown to be an agriculturist, and that at the most the debt is to be scaled down only as to two-thirds of this amount. This contention is apparently based on an assumption that the three debtors under

1. ('41) 28 A I R 1941 Mad 59: (1940) 2 M L J 651, Doraikannu Odayar v. Veerasami Padayachi.
2. ('41) 28 A I R 1941 Mad 202: (1940) 2 M L J 786, Periakaruppan Chettiar v. Appaji Naidu.

the 1932 document were each liable only for one-third of the debt which does not appear to be the case. It seems to be an ordinary case of a joint and several promissory note, each of the debtors being liable for the whole debt. There is therefore no basis for assuming that as to one-third of the amount the new note is a renewal of Toongan's debt and not a renewal of the liability binding the defendants by reason of the earlier note. A more serious contention is based on the assumption that defendant 1 was not an agriculturist before he purchased the property in May 1937. There is no finding by the trial Court that he was not possessed of any interest in agricultural land before May 1937; but assuming this to be the case, can it be said that defendant 1 is not entitled to claim the benefit of the explanation to S. 8 by reason of the fact that at the time when his prior debt was discharged he had not got the qualifications laid down for an agriculturist? We held in (1940) 2 M L J 174[3] that the explanation to S. 8 postulated that the earlier debt of which the suit debt was a renewal must itself have been a debt due from an agriculturist. In that case there was no question as to the point of time at which the debtor under the prior debt had to possess the qualifications of an agriculturist. It is, however, argued that in order that the antecedent debt should be due from an agriculturist, it must have been due from an agriculturist at least at the time of its discharge and there is a certain prima facie plausibility about this argument. It might be contended that if the antecedent debtor only acquired the status of an agriculturist at some later point of time, the antecedent debt was not due from an agriculturist at all. There are, however, very serious difficulties in the way of adopting this view.

In the case reported in (1940) 2 M L J 887[4] which was a case under S. 19 and raised no question of renewals, we pointed out that the essential points of time under the Act at which the person claiming benefits had to prove that he was an agriculturist were 1st October 1937, 22nd March 1938 and the date on which the actual matter in question came before the Court. We are asked to add to these points a still earlier point of time namely, the date on which the prior document of which the suit document is alleged to be a renewal came to be discharged. The acceptance of this view involves an inquiry into the property of the debtor at the time when the earlier debt was discharged which may be many years ago. It also involves the application of the definition of an 'agriculturist' to a state of affairs which cannot possibly have been contemplated by the Legislature when this definition was framed. The provisos to S. 3 (ii) of the Act are based on the state of affairs existing during the period immediately anterior to 1st October 1937. If during this period the alleged agriculturist was assessed to income-tax or to profession tax for more than a certain amount or to property tax above a certain rate, he becomes disqualified from claiming to be an agriculturist. It is impossible to apply this definition to a state of affairs existing before the period contemplated in the proviso had begun. The result of attempting to do so would be to treat as an agriculturist in 1932 a person who, had he paid the same taxes some five years later, would not have been an agriculturist at all. That is to say, it involves the application of a different criterion for the status of an agriculturist to that contemplated in the Act by rendering inoperative the taxation provisos. It seems to us that this cannot be correct and it follows that when we say that the debt which is renewed under the explanation to S. 8 must be a debt due from an agriculturist we must necessarily mean that it must be due from a person who is an agriculturist during the period contemplated in the definition, that is to say, the period after 1st October 1937, having regard to the provisos to S. 3 (ii) of the Act.

Applying this criterion to the present facts, defendant 1 has been proved to have been an agriculturist at the time of the suit and also to have had the necessary qualifications ever since May 1937. His debt which was discharged by the suit debt was discharged at a time when he may not have had any saleable interest in land or other qualification; but seeing that on the relevant dates he had the qualifications of an agriculturist, we are of opinion that the debt now being scaled down must be treated as a renewal of a previous debt due from an agriculturist. In the result therefore we dismiss the revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

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3. ('40) 27 A I R 1940 Mad 836 : 193 I C 470 : (1940) 2 M L J 174, Krishnaswami Iyer v. Nagalinga Mudaliar.

4. ('41) 28 A I R 1941 Mad 158 : (1940) 2 M L J 887, Palani Goundan v. Peria Goundan.

(28) A. I. R. 1941 Madras 831

WADSWORTH AND PATANJALI SASTRI JJ.

Tirugnanavalli Ammal by agent Rajamanikkam Pillai—*Appellant*

v.

P. Venugopala Pillai and others — *Respondents.*

Civil Misc. Appeal No. 349 and Civil Revn. Petn. No. 1416 of 1939, Decided on 1st May 1941, against order of Dist. Court, South Arcot, D/- 25th October 1938.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 20—Order under—No appeal lies.

No appeal lies from an order under S. 20. [P 831 C 1]

(b) Madras Agriculturists' Relief Act (4 of 1938), S. 20— Order of lower Court neither perverse nor embodying irregularity relating to jurisdiction—No interference in revision.

Where on an application under S. 20 the lower Court has come to a conclusion which cannot be described as perverse and certainly embodies no irregularity relating to jurisdiction, the High Court will not interfere in revision as its powers of interference are confined solely to powers of revision under S. 115, Civil P. C. [P 832 C 1]

T. R. Venkatarama Sastriar for T. E. Ramabhadrachariar — for Appellant.

K. Bhashyam Ayyangar and J. R. Gundappa Rao — for Respondents.

Wadsworth J. — This appeal and the alternative revision petition arise out of an order allowing an application under S. 20 of Madras Act 4 of 1938, to stay proceedings in execution of a decree. The only question argued before us relates to the eligibility of the respondents, who were the petitioners before the lower Court, to be agriculturists having regard to proviso C to S. 3 (2) of Act 4 of 1938. It is now settled that no appeal lies from an order under S. 20, so that we have to consider whether if there is an error, there are grounds to justify interference in revision under S. 115, Civil P. C. It is common ground that the respondents will be excluded from the category of agriculturists if house No. 105 is deemed to be a house in respect of which respondent 1 has been assessed to property tax. That house admittedly forms part of the property of the Chokapuraswami Mutt and is held by respondent 1 under a usufructuary mortgage of the year 1932. The property tax in respect of this house is payable under the mortgage contract by the mortgagee and was so paid in the years immediately following the mortgage. It is also established that respondent 1 applied to the municipality for a vacancy remission in respect of this house and described himself as the owner thereof. For the purpose of proviso C the important question is what happened during the two years immediately preceding 1st October 1937. It is established that the municipal property register in respect of these two years showed the Chokapuraswami Mutt as the owner of this house, but it seems clear that the demand notice for the tax was sent to the mortgagee, respondent 1, in respect of the tax for these two years. He did not pay the tax and a suit was filed by the municipality against respondent 1 alone, without impleading the manager of the mutt until a later stage. That suit was pending at the time of the application to the lower Court. After the suit was filed, the taxes for the two relevant years appear to have been paid to the municipality by the manager of the mutt, who has deposed that he expected to recover the money from the mortgagee.

Now on these facts the lower Court has found that the municipality did not actually treat the mortgagee as the owner for the purpose of the collection of the tax on house No. 105 and that there was no evidence that the mortgagee actually paid the property tax for the two relevant years. The latter finding is undoubtedly justified, although it may be that the money which the mutt paid to the municipality will eventually be recovered from him. The finding that the municipality did not actually treat the mortgagee as owner seems to overlook the very wide definition of "owner" in Sec. 3, Madras District Municipalities Act. Under this Act the usufructuary mortgagee being entitled to collect the rent, would presumably come within the definition of an owner. It has been argued before us that, even assuming that proviso C to S. 3 (2) of Act 4 of 1938 contemplates the assessment of a person as owner, it does not contemplate any form of ownership higher than that which suffices to render a person liable to property tax under the District Municipalities Act. We do not think it is necessary for the purpose of this case to decide whether proviso C would have no application to the case of an assessment imposed upon a person who is not an owner, nor do we think it incumbent upon us to attempt any precise definition of what is meant by assessment under this proviso. There are difficulties in the way of treating the entries in the assessment register as the sole criterion of assessment and there are also difficulties in the way of regarding the demand for the tax as the sole criterion of assessment. In the present case the register indicates that

the assessee in respect of house No. 105 was the mutt and the receipt shows that the mutt actually paid the tax for previous years. The demand was almost certainly made in the first instance of the mortgagee who was liable to pay the tax not only under his contract, but also under the District Municipalities Act as an "owner." The question whether in such circumstances it can be said that the mortgagee has been assessed to this tax for those two years is one of considerable difficulty upon which the learned District Judge has come to a conclusion which cannot be described as perverse and certainly embodies no irregularity relating to jurisdiction. In such circumstances, since no appeal lies and our powers of interference are confined solely to powers of revision under Sec. 115, Civil P. C., we are of opinion that, even assuming the learned Judge's view as to what constitutes assessment in such a case to be incorrect, there are no grounds which would justify interference in revision. The appeal and revision petition are therefore dismissed with costs. One advocate's fee only.

C.R.K./K.S. *Appeal and revision dismissed.*

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(28) A. I. R. 1941 Madras 832 (1)

LAKSHMANA RAO J.

Public Prosecutor — Appellant

v.

Ramanatham Pillai — Respondent.

Criminal Appeal No. 870 of 1940, Decided on 6th February 1941, against acquittal by Sessions Judge, Salem, in Criminal Appeal No. 68 of 1940.

Penal Code (1860), S. 328—Accused charged under S. 328 with causing arsenic to be mixed in *A's* food through girl of 13 years — Accused convicted on testimony of girl who according to prosecution was innocent agent but subsequently acquitted on ground of girl being accomplice — View that girl was accomplice held could not be accepted and hence acquittal was not justified.

The accused was charged under S. 328 for causing arsenic to be mixed in food of *A* through a girl of 13 years with intent to injure *A* and was convicted on the testimony of the girl who according to the prosecution was an innocent agent but was acquitted in appeal on the ground that the girl was an accomplice:

Held that the view that the girl was an accomplice could not be accepted and therefore the acquittal was not justified. [P 832 C 2]

Appellant in person.

K. S. Jayarama Iyer and G. Gopalaswami — for Respondent.

Judgment. — This is an appeal by the Provincial Government against the acquittal of the respondent of an offence under S. 328, Penal Code. The respondent is stated to have caused arsenic to be mixed in the food of P. Ws. 4 and 5 through P. W. 3, a girl aged 13 years, with intent to injure them; and according to the prosecution, P. W. 3 was an innocent agent. The Assistant Sessions Judge convicted the respondent on her evidence; and on appeal he was acquitted by the Sessions Judge on the ground that P. W. 3 was an accomplice. Hence this appeal, and the view of the Sessions Judge that P. W. 3 was an accomplice cannot be supported. The order of acquittal is therefore set aside and the appeal is remanded to the Sessions Judge for disposal on the merits.

C.R.K./G.N. *Case remanded.*

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(28) A. I. R. 1941 Madras 832 (2)

LAKSHMANA RAO J.

In re Thachamparambath Abdurahiman Haji — Petitioner.

Criminal Revn. No. 475 and Petn. No. 451 of 1940, Decided on 4th October 1940, to revise order of Sub-divisional Magistrate, Calicut, D/- 20th May 1940.

Merchant Shipping Act (1923), S. 274 (1) — Planks washed away from person's timber yard — Taking possession of same by him without notice to Receiver of Wrecks is no offence.

A person cannot be convicted under S. 274 (1) for not reporting to the Receiver of Wrecks his taking possession of his planks which had been washed away from his timber yard and were floating down in a tidal river towards the sea. [P 833 C 1]

V. Rajagopalachari and M. S. Varadachariar — for Petitioner.

Public Prosecutor — for the Crown.

FACTS. — The accused were charged for an offence under S. 274, Merchant Shipping Act, 1923, for taking possession of certain wrecks from a certain tidal river and not reporting the fact to the Receiver of Wrecks. The accused admitted that he took possession of the wrecks through his men and that no report was given. But the defence was that what he took possession was not "wreck". They were timber from his timber yard, about one furlong up the river, which according to the accused were disturbed from his yard and floated in the river down towards the sea in the low tide and which he directed his men to bring back. It was not disputed that the timber belonged to the accused and on evidence the lower Court held that the planks did not constitute a wreck under cls. (a) to (e) of S. 272. The Court further held that as other things may be included in the definition to

the word "wreck" and therefore a thing which is tied to the shore in a tidal river and which became loose and floated on the river also and that the accused was bound to report the finding to the Receiver of Wrecks under cl. (a) to S. 274 (1) and he had failed to do so and found him guilty under S. 274(2). Against this conviction the present revision petition is filed.

Order. — The case of the petitioner that the planks in question were washed away from his timber yard was not disputed and his conviction under S. 274 (1), Merchant Shipping Act, 1923, is unsustainable. It is therefore set aside and the fine if levied will be refunded.

C.R.K./G.N. *Conviction set aside.*

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(28) A. I. R. 1941 Madras 833 (1)

LEACH C. J. AND HAPPELL J.

In re S. Ramachandra Iyer —

Petitioner.

Civil Misc. Petn. No. 5985 of 1940, Decided on 5th December 1940, for leave to file memorandum of cross-objections in forma pauperis.

Civil P. C. (1908), O. 44, R. 1 — Filing of cross-objections in forma pauperis — Principle under O. 44, R. 1 applies — Respondent must show that he is within O. 44, R. 1.

There is no special provision in the Code relating to the filing of cross-objections in forma pauperis, but when a respondent files cross-objections he is in fact filing a cross appeal and therefore the principle under O. 44, R. 1 must be applied. Consequently the respondent must show that he comes within O. 44, R. 1 : ('37) 24 A I R 1937 Rang 81, *Not foll.* [P 833 C 1, 2]

T. S. Ramaswami Iyer — for Petitioner.

Leach C. J. — This is an application for the respondent in the appeal to be allowed to file a memorandum of cross-objections in forma pauperis. The respondent was the plaintiff in the Court below and succeeded in part. The defendants have appealed and the respondent wishes to challenge that portion of the judgment which refused him his full claim. Order 44, R. 1, Civil P. C., does not allow an appeal in forma pauperis unless the Court, upon a perusal of the application and of the judgment and decree appealed from, sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. There is no special provision in the Code relating to the filing of cross-objections in forma pauperis, but when a respondent files cross-objections he is in fact filing a cross-appeal and the same principle must be applied. The learned advocate for the respondent has quoted to us the decision of the Rangoon High Court in A I R 1937 Rang 81,[1] in which it was said :

> We think it our duty to look carefully at the circumstances and see the judgment having been impugned by one party, whether the other party would not also be in a position to attack it from another angle.

The question whether the Court had reason to believe that the judgment was contrary to law or usage or unjust or erroneous apparently did not matter. We have no hesitation in refusing to follow this decision. In our opinion it neglects an express provision of the Civil Procedure Code which has application. If it is a question of meeting an attack on a judgment a respondent is not confined to the grounds given by the Judge for his decision. The petition must be rejected as he has not shown that he is within the rule, but we will give the respondent time until 9th December in which to pay the court-fee.

C.R.K./G.N. *Petition rejected.*

1. ('37) 24 AIR 1937 Rang 81 : 168 I C 407, Secretary of State v. J. C. Maurice.

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(28) A. I. R. 1941 Madras 833 (2)

LAKSHMANA RAO J.

Maki Nanji Reddi and others —

Accused

v.

Narasamma — Complainant.

Criminal Revn. Case No. 387 and case referred No. 10 of 1940, Decided on 23rd October 1940, case referred by Dist. Magistrate, Anantapur, D/- 27th April 1940.

Criminal P. C. (1898), S. 209 — Complaint to Magistrate having no jurisdiction to enquire into case — He should direct complainant to present complaint to proper Court and not discharge accused.

Where a Magistrate to whom a complaint is presented finds that he has no jurisdiction to enquire into the case he should return the complaint to the complainant for presentation to the proper Court and not discharge the accused. [P 833 C 2; P 834 C 1]

R. Krishna Sastri — for Accused.

P. S. Kailasam for N. Somasundaram — for Complainant.

Public Prosecutor — for the Crown.

FACTS.—The reference is by the District Magistrate under Ss. 438 and 185 (1), Criminal P. C., against the order of the Stationary Sub-Magistrate, Kadiri, who finding that he had no jurisdiction to enquire into the case discharged the accused under S. 209 (2), Criminal P. C. The ground for reference was that the Stationary Sub-Magistrate under the circumstances ought to have submitted the records for a transfer of the case to a Court of competent jurisdiction.

Order. — The reference is accepted. The order of the Stationary Sub.Magistrate of Kadiri dated 16th February 1940 and made in P. R. C. No. 3 of 1940 is set aside and he is directed to return the complaint to the complainant for presentation to the proper Court.

C.R.K./K.S. *Reference accepted.*

✻ (28) A. I. R. 1941 Madras 834 (1)

VENKATARAMANA RAO J.

Manbuval Hasanath Hamedia Madrasa School, by its Trustee, S. Muhammad Sheriff Sahib — Appellant

v.

Municipal Council, Tiruvarur — Respondent.

Second Appeal No. 1125 of 1940, Decided on 16th July 1941, against decree of Sub-Judge, Mayavaram, in A. S. No. 35 of 1940.

(a) Madras District Municipalities Act (5 of 1920), S. 267A—Owner of private market has no right to prevent municipality from opening new market.

All that S. 267A says is that it is open to the Municipal Council to acquire the rights of any person to hold a private market. That does not confer any right on the owner of a private market to compel the municipality to acquire his right and not to open a new market. [P 834 C 1, 2]

* **(b) Market—Right to hold—Right of owner of private market to prevent another market being opened—English law does not apply.**

The rule of English law that the owner of a private market can prevent another market being opened within a radius of 6-2/3 miles is an artificial rule and is not countenanced even in England as being a sound one. Further it is not a rule which is based on any equity or good conscience and as such does not apply to India : ('20) 7 A I R 1920 Cal 255, *Rel. on.* [P 834 C 2]

K. S. Rajah Ayyar and K. S. Desikan — for Appellant.

S. Muthiah Mudaliar — for Respondent.

Judgment. — The question for decision in this appeal is whether the owner of a private market in a municipality is entitled to prevent the municipality from opening a new market. Both the lower Courts have decided against the plaintiff. Two grounds are urged before me : (1) that under the provisions of the Madras District Municipalities Act, a private owner has got such a right. The sections referred to are Ss. 259 to 267 and Mr. Desikan relies very strongly on S. 267A as conferring that right by necessary implication. I am not able to see how Sec. 267A gives rise to such a necessary implication at all. All that the section says is that it is open to the Municipal Council to acquire the rights of any person to hold a private market. That does not confer any right on the owner of a private market to compel the municipality to acquire his right and not to open a new market.

The second ground is that under the common law of England the owner of a private market can prevent another market being opened within a radius of 6-2/3 miles, and, in the absence of any positive enactment in India, that rule ought to be followed. Such a contention was advanced in a case in Bengal and their Lordships of the Calcutta High Court were not prepared to uphold it. In 47 Cal 1079,[1] Richardson J., observed that "there appears to be no such thing as a market franchise or a right to hold a market, conferred by grant from the Crown," in Bengal. I do not think that a different principle applies to this presidency. At the same time, the question is whether I should give effect to that rule of English law. It seems to me that the rule is an artificial rule and is not countenanced even in England as being a sound one. I do not think it is a rule which is based on any equity or good conscience, which compels me to adopt it. The view of a lower appellate Court seems to me correct. I therefore dismiss this second appeal with costs. Leave to appeal is refused.

C.R.K./K.S. *Appeal dismissed.*

1. ('20) 7 A I R 1920 Cal 255 : 58 I C 879 : 47 Cal 1079 : 24 C W N 800, Hem Chandra v. Kristo Chandra.

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(28) A. I. R. 1941 Madras 834 (2)

HORWILL J.

In re A. S. Sehu Mohammed Maraikayar — Petitioner.

Criminal Revn. Case No. 259 and Criminal Revn. Petn. No. 245 of 1941, Decided on 24th July 1941, to revise judgment of Sub-Divisional First Class Magistrate, Tinnevelly, in C. A. No. 42 of 1940.

Madras Local Boards Act (14 of 1920), S. 229 —'Molest', meaning—Molestation to be punishable under S. 229 must in some way interfere with work.

The word 'molest' carries with it some suggestion of interference or restraint or obstruction. Section 229 does not make punishable a molestation *during* the course of the performance of the duty but *in* the performance of duty, which suggests that the abuse should not merely take place while the person is engaged in his duty, but it must in some way interfere with his work. Hence abusing a bill collector who had gone to the accused to serve a demand and done that work is not punishable under S. 229. [P 835 C 1, 2]

S. Ramachandra Iyer — for Petitioner.

Public Prosecutor — for the Crown.

Order.—The petitioner was convicted by the second class Magistrate of Tiruchendur,

of an offence punishable under S. 229, Local Boards Act, for having uttered offensive abuse on the occasion of a demand for tax being presented to him by the complainant, a bill collector of the panchayat board of Kayalpatnam. He was fined Rs. 15 and the conviction and sentence were affirmed on appeal to the sub-divisional first class Magistrate of Tinnevelly. The learned advocate for the petitioner contends that even though it was true that the petitioner uttered the abusive language complained of, it would not be an offence punishable under S. 229, Local Boards Act. Section 229 runs thus :

> No person shall obstruct or molest a local board, or any person employed by the local board, in the performance of their duty or of anything which they are empowered or required to do by virtue, or in consequence, of this Act or of any bye-law, rule, regulation or order made under it.

It was contended by the prosecution that the bill collector was molested. The word 'molest' to my mind carries with it some suggestion of interference or restraint or obstruction, but that is not the ordinary dictionary meaning. The Oxford Dictionary does give a meaning of this kind, "to interfere or meddle with (a person) injuriously or with hostile intent;" but it adds that this meaning is almost exclusively used in negative contexts. The positive meaning would seem to be "subject to intentional annoyance;" in which case it might be said that the accused did molest him. This meaning is sometimes used in English law; for example, a woman is said to molest a man within the meaning of the "Bastardy Act" if she falsely imputes to him that he is the father of her illegitimate child; and a creditor who is a signatory to a deed of agreement is said to molest a debtor if the agreement is broken by his bringing an action against the debtor for a debt included in the deed. It is of some interest that a definition of 'molestation' is given in Ordinance No. 5 of 1932, which was drawn up in connexion with the boycot of 1931/1932, and the principal part of that definition was that a person is said to molest another person who

> with a view to cause such other person to abstain from doing or to do any act which such other person has a right to do, or to abstain from doing, obstructs or uses violence to, or intimidates such other person or anyone in whom such person is interested, or loiters at or near a house where such person or anyone in whom such person is interested, resides or works or carries on business or happens to be or persistently follows him from place to place or interferes with any property owned or used by him or deprives him of or hinders him in the use thereof.

This definition conveys what, in my opinion, seems to be the essence of molestation. However that may be, S. 229, Local Boards Act, does not make all molestation punishable, but only molestation of a person in the performance of his duty. If, for example, the bill collector had been prevented or hindered in the fulfilment of his duty by this vulgar abuse, I think the petitioner would have been rightly convicted. But it appears that the bill collector went to the house of the petitioner merely for the purpose of serving a demand, and even if he had not been abused by the petitioner he could have done no more than he did. Having served his demand notice, he had nothing to do but to leave again. Section 229 does not make punishable a molestation during the course of the performance of the duty but in the performance of the duty, which suggests that the abuse should not merely take place while the person is engaged in his duty, but it must in some way interfere with his work. It is not immaterial to state that the person abused was not the bill collector, but some unnamed person inimically disposed towards the petitioner who had given information leading to an exaggerated assessment. Although the petitioner would perhaps have merited the fine imposed on him if he had been charged under S. 504, Penal Code, yet the conviction under S. 229, Local Boards Act, cannot stand and must be set aside. The conviction is therefore set aside and the fine, if paid, ordered to be refunded.

C.R.K./K.S. *Conviction set aside.*

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(28) A. I. R. 1941 Madras 835

LAKSHMANA RAO J.

In re Ardhanari Iyer — Accused.

Criminal Revn. Case No. 619 and Case Referred No. 27 of 1940, Decided on 15th October 1940, from orders of Dist. Magistrate, Coimbatore, D/- 9th August 1940.

Madras Forests Act (5 of 1882), S. 43 — Confiscation is not imperative.

Under S. 43, confiscation is not imperative.

[P 836 C 1]

L. S. Veeraraghava Iyer — for Accused.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

FACTS. — The accused after obtaining permission from the District Forest Officer cut some sandal wood trees in S. Nos. 549 and 593 of Bargur, but he was refused permission to remove them from the place where it was cut and he was directed to comply with certain rules. The accused removed the trees without complying with

Rr. 3, 9 (ii), 9 (iii) (a) (4). The range officer on knowing of this seized the sandal wood concerned and instituted a case. The accused while admitting the facts pleaded not guilty. The accused was found guilty under R. 12, Sandal Wood Transport Rules. The lower appellate Court found that the accused had no intention to defraud the Government and that it would certainly be a crushing punishment to confiscate the seizure. Holding that the words "shall be liable" in S. 43 of the Act appears different from "shall be confiscated" and did not make confiscation imperative and as confiscation did not appear warranted in this case he reversed the order and directed the seizure to be released subject to further observance of rules. The District Magistrate made the reference to the High Court for an order revising the lower appellate Court's order and for confiscating the seizure.

Order. — The view of the District Magistrate is opposed to the language of S. 43, Madras Forest Act, and the Public Prosecutor does not support the reference. The records will therefore be returned.

C.R.K./K.S. *Reference answered.*

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(28) A. I. R. 1941 Madras 836

FULL BENCH

LEACH C. J., VENKATARAMANA RAO AND HORWILL JJ.

In re N. Kayambu Pillai — Petitioner.

Application in S. R. No. 27375 of 1939, Decided on 12th August 1940, for review of order of High Court, in A. S. No. 343 of 1931, D/- 4th March 1938.

Court-fees Act (1870), Sch. 2, Art. 1 (d) and Sch. 1, Art. 4 — Order dismissing appeal for non-payment of court-fee and failure to furnish security under O. 41, R. 10, Civil P. C., is not decree — Application for review falls within Sch. 2, Art. 1 (d).

An order dismissing an appeal for non-compliance with an order requiring security under O. 41, R. 10, Civil P. C., is not a decree within the meaning of S. 2 (2), Civil P. C.: 18 All 101 (FB); 8 I C 436 (Mad) ; 1932 M W N 655 ; ('32) 19 AIR 1932 Cal 482 ; ('28) 15 AIR 1928 Mad 964 and ('22) 9 AIR 1922 Cal 246, *Rel. on.* [P 837 C 2]

An order dismissing an appeal for non-payment of court-fee is an order of dismissal for default within the meaning of S. 2 (2), Civil P. C. : 21 Mad 152; 16 Mad 285 and 22 Mad 155, *Disting.* [P 837 C 2]

Consequently an order dismissing an appeal for non-payment of court-fee and for failure to furnish security under O. 41, R. 10, Civil P. C., not being a decree within the meaning of S. 2 (2), Civil P. C., an application for review of the same falls under Sch. 2, Art. 1 (d). [P 838 C 1]

S. Sundaresa Ayyar — for Petitioner.

Government Pleader — for the Crown.

Leach C. J.—This matter has been placed before a Full Bench as it raises a question of importance under the Court-fees Act and involves the consideration of certain Bench decisions of this Court. The petitioner was allowed to file an appeal in forma pauperis, but, at a later stage, it was discovered that he was not a pauper and an order was passed by Horwill J. dispaupering him. In addition to directing that the petitioner should pay the appropriate court-fee on the memorandum of appeal the learned Judge directed him to furnish security for the costs of the respondent in the sum of Rs. 8000 within three months from 4th November 1937. This order was not complied with, and on 4th March 1938 the appeal was placed in the list of Venkatasubba Rao and Abdur Rahman JJ. who passed the following order :

> The security ordered has not been furnished. The appellant has been dispaupered. Both sides agree that the appeal has to be dismissed, and it is accordingly dismissed. We fix the advocate's fee at Rs. 750. The appellant will pay to the Government the court-fee payable on the memorandum of appeal.

After the expiration of ninety days the petitioner presented a petition asking the Court to review its order dismissing his appeal. This petition bears a stamp of the value of Rs. 2 which the petitioner maintains is the proper court-fee by virtue of the provisions of Art. 1 of Sch. 2, Court-fees Act. The question of the correctness of the stamping having been raised, it was referred to the taxing officer, who held that the application should be stamped ad valorem under Art. 4 of Sch. 1 of the Act. Article 1 (d) of Sch. 2 provides that a court-fee of Rs. 2 shall be paid on an application or petition when presented to a High Court. Article 4 of Sch. 1 states that on an application for review of judgment, if presented on or after the ninetieth day from the date of the decree, the fee leviable shall be the fee leviable on the plaint or memorandum of appeal. Therefore, the question is whether this Court's order of 4th March 1938 dismissing the petitioner's appeal for default in payment of the required court-fee and in furnishing the required security is a decree within the meaning of Article 4 of Sch. 1, Court-fees Act. It has not been suggested that the word "decree" here has any different meaning from the word " decree " as defined by the Code of Civil Procedure. Section 2 (2) of the Code says :

> Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties

with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include —

(a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default.

Sub-clause (14) of S. 2 defines the word 'order' as meaning the formal expression of any decision of a civil Court which is not a decree. The learned Government Pleader accepts the proposition that an order dismissing an appeal for non-compliance with an order requiring security is not a decree within the definition given in the Code. In fact there is ample authority of this Court and other High Courts that such an order is not a decree. The question was first raised in 18 ALL 101[1] where a Full Bench of the Allahabad High Court held that an order rejecting an appeal under S. 549, Civil P. C., of 1882 (which corresponds to O. 41, R. 10 of the present Code) was not appealable, either as an order or as a decree. The basis of the decision was that an order under S. 549 was not a final expression of an adjudication upon any right claimed or defence set up. In the Code of 1882 the definition clause read as follows:

'Decree' means the formal expression of an adjudication upon any right claimed, or defence set up, in a civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit (or appeal). An order rejecting a plaint or directing accounts to be taken, or determining any question mentioned or referred to in S. 244, but not specified in S. 588, is within this definition; an order specified in S. 588 is not within this definition.

This view was accepted as being the correct view by this Court in 9 M L T 117[2] and 1932 M W N 655.[3] The first of these cases was decided when the Code of 1882 was in force and the second after it had been replaced by the Code of 1908. The Calcutta High Court took the same view in 59 Cal 388.[4] In that case Suhrawardy J. dealt with the effects of S. 107, Civil P. C., in this connexion. Section 107 confers upon an appellate Court the same powers as are conferred by the Code on a Court of original jurisdiction in respect of suits. Suhrawardy J. pointed out that S. 107 does not purport to give an order passed by an appellate Court the same effect as an order passed by an original Court of a like nature. Section 2 expressly says that the word 'decree' shall be deemed to include the rejection of a plaint. If it was the intention of the Legislature to include within the definition of 'decree' an order rejecting a memorandum of appeal it would, he considered, have expressly said so. In 55 M L J 330[5] this Court accepted the judgment in 49 Cal 355,[6] as embodying the correct statement of the law.

An examination of the language used in defining the word 'decree' in S. 2 (2), Civil P. C., convinces me that the order which Venkatasubba Rao and Abdur Rahman JJ. passed on 4th March 1938, directing that the appeal should be dismissed for non-payment of court-fee and for failure to furnish security, is not a decree. After saying that the word 'decree' means the formal expression of an adjudication which, so far as the Court expressing it, conclusively determines the rights of parties with regard to the matters in dispute in the suit, the section goes on to say what the expression shall be deemed to include and what it shall not include. It does not include two kinds of orders namely, (1) an adjudication from which an appeal lies as an appeal from an order and (2) an order of dismissal for default. What was the order of 4th March 1938 but an order dismissing the appeal for default? The appeal had been admitted in forma pauperis but on it becoming apparent that the appellant was not a pauper the Court in effect said "you shall not proceed unless you pay the proper court-fee as you are no longer a pauper." The appellant failed to pay and therefore entitled the Court to dismiss the appeal for default in payment. The fact that there was a further condition unfulfilled—the condition with regard to the furnishing of security—and that O. 41, R. 10 (2) directs that, where security is not furnished within such time as the Court orders, the Court shall 'reject' the appeal, does not turn the order dismissing the appeal into a decree. As I have shown there is ample authority for the proposition that an order under O. 41, R. 10 (2) is not a decree.

Our attention has been drawn to three decisions of this Court, 21 Mad 152;[7] 16 Mad

1. ('95) 18 All 101 : 1895 A W N 238 (FB), Lekha v. Bhauna.
2. ('10) 9 M L T 117 : 8 I C 436, Singani Muppan v. Krishnachar.
3. ('32) 1932 M W N 655, Guruswamy Nayudu v. Narayana Nayudu.
4. ('32) 19 AIR 1932 Cal 482 : 138 I C 643 : 59 Cal 388, Jnanadasundari Shaha v. Madhabchandra Mala.
5. ('28) 15 AIR 1928 Mad 964 : 117 I C 791 : 55 M L J 330, Srinivasam Pillai v. Rukmani Ammal.
6. ('22) 9 AIR 1922 Cal 246 : 62 I C 751 : 49 Cal 355 : 35 C L J 131 : 26 C W N 1020, Rameshchandra Das v. Sarada Kripalala.
7. ('98) 21 Mad 152, Venkatarayudu v. Rangayya Appa Rao.

285[8] and 22 Mad 155,[9] but these cases are not really in point. In the first of them an appeal petition was presented with an insufficient court-fee. It was accordingly returned to the appellant, but after the period of limitation had expired it was again presented, this time with a sufficient stamp. The District Court refused to admit the appeal. It was held on appeal to this Court that no appeal lay. In 16 Mad 285[8] the facts were that an appeal had not been properly presented within the meaning of S. 541 of the Code of 1882 which corresponds with O. 41, R. 1 of the present Code, and an order was passed rejecting it. It was held that this order was a decree. In 22 Mad 155,[9] a memorandum of appeal was returned to the lower appellate Court because certain language used in the document was disrespectful. The appellant refused to alter his memorandum of appeal and the appeal was rejected. It was held that an appeal lay against the order of rejection. In none of these cases was it a question of 'default.' It follows that in my opinion the order of 4th March 1938, dismissing the appeal, was not a decree within the meaning of the definition of the term in the Code of Civil Procedure, and this being so, the petitioner is entitled to stamp his application for review with a court-fee of Rs. 2 under Art. 1 of Sch. 2, Court-fees Act.

Venkataramana Rao J.— I agree. The order passed on 4th March 1938, in this case was passed for non-compliance by the petitioner in respect of two matters, (1) non-payment of the court-fee and (2) not furnishing security for costs. In so far as the order of dismissal for non-compliance with the order for furnishing security for costs is concerned, there can be no doubt that it is not a decree. This view has been consistently held by all the High Courts, including our Court. The next question is whether the order, in so far as it purports to be an order of dismissal for non-compliance in regard to payment of the court-fee, is a decree. I agree with my Lord that it is an order of dismissal for default within the meaning of S. 2 (2), Civil P. C., and therefore is not a decree. The order, though it purports to be one for non-compliance with an order for payment of the court-fee, is strictly an order for non-compliance of an order passed in consequence of an order of dispaupering made under O. 33, R. 9. The word 'default' in S. 2 (2) (b), Civil P. C., in my opinion, need not be confined only to default of appearance, but may include other defaults as well, and certainly this default. Therefore I agree that the proper court-fee that is payable in respect of this application is only Rs. 2 under Art. 1 of Sch. 2, Court-fees Act.

Horwill J. — I agree.

C.R.K./G.N. *Order accordingly.*

8. ('93) 16 Mad 285, Ayyanna v. Nagabhushanam.
9. ('99) 22 Mad 155 : 8 M L J 304, Zamindar of Tuni v. Bennayya.

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(28) A. I. R. 1941 Madras 838

WADSWORTH J.

Official Receiver, East Godavari at Rajahmundry — Appellant

v.

Tadi Veerreddi and another — Respondents.

Appeal No. 6 of 1941, Decided on 17th February 1941, against order of Sub-Judge, Cocanada, D/- 14th October 1940.

Hindu Law — Partition — Suit for, by guardian on behalf of minor coparcener — Severance of status takes place at least from date of plaint, only if Court finds proposed partition beneficial to minor — Before Court gives finding minor's share should not be sold in satisfaction of father's debt.

When a guardian of a minor files a suit for partition, he remains a coparcener until the Court gives a finding that the proposed partition is beneficial to the minor and when that has been done, a severance of status takes place which dates back at any rate to the date of the plaint. This is the view in Madras Presidency : *Case law reviewed.*

[P 840 C 1]

Therefore the minor being still a coparcener, though liable retrospectively to cease to be a coparcener, the position is that the father's right to sell the minor's property in discharge of his debts which are not illegal or immoral still subsists until the Court finds whether a partition is or is not beneficial to the minor. But in the case of an affirmative finding any sale of the minor's share during the pendency of the suit will become void. Until that finding is given no one can say whether the sale by the father (or by his representative the Official Receiver in case the father is insolvent) will or will not confer any title in the minor's property. In such circumstances it is most undesirable that a sale of the minor's share should be held before it is established that there is anything to sell and it is equally undesirable that the sale should be postponed by a long delay in coming to a finding on this fairly simple question of benefit to the minor. The proper course is to postpone the sale until the Court gives the necessary finding and to expedite the proceedings so that a finding may be given early. [P 840 C 1, 2]

K. Kameswara Rao and B. V. Subramaniam — for Appellant.

K. Bhimasankaran — for Respondents.

Judgment. — This appeal is preferred against an order granting a temporary injunction against the Official Receiver acting in the insolvency of defendants 1 and 2, restraining him from selling the interest of the minor plaintiffs in the family property in

discharge of the debts incurred by their father, defendant 1. The history of this litigation is an illustration of the deplorable results flowing from dilatory procedure. Defendant 1 is the father of defendant 2 and also of the two minor plaintiffs. On the eve of the insolvency of defendants 1 and 2 in 1931, defendant 2 filed a suit for partition and after the adjudication of defendants 1 and 2 in November 1931 the minor sons were transposed as plaintiffs and continued the suit with their mother as guardian. Some three years later the mother was replaced by an uncle. The Official Receiver asked that the creditors, some ninety in number, should be impleaded so that any decree might be binding upon them all so far as the minor's share was concerned, as well as to the extent of the shares of the insolvents. The business of impleading these creditors spread over a period no less than of eight years, at the end of which the suit ended by the return of the plaint for want of jurisdiction. Why, if the Court had no jurisdiction, it had not discovered the fact eight years earlier, is a matter on which I have no information. There was an appeal against this decision which was dismissed in 1940. After this appeal was dismissed, yet another next friend of the minor plaintiffs filed a fresh suit, O. S. No. 58 of 1940, without reference to the previous suit, praying for a partition and in this suit a petition was filed for an injunction restraining the Official Receiver from selling the family properties. The lower Court has restrained him from selling the plaintiffs' share in the family properties pending the decision of the suit.

It would appear that the observations of the learned Subordinate Judge about the delay of the Official Receiver in taking action for the sale of the properties are based on a misunderstanding; as for the major portion of the period the Official Receiver was bound by the injunction in another litigation. The learned Subordinate Judge comments adversely upon the character of this litigation and the way in which it has been conducted and regrets that he is obliged by the decision of the Full Bench in 51 Mad 417[1] (though the corresponding reference in an unauthorised report is given) to hold that the filing of the suit by the minors creates a division in status and that thereafter the Official Receiver has no power to exercise the father's authority to sell his sons' share in joint property. It is a curious thing that though the decision of the Full Bench quoted arose clearly from a case in which the plaintiffs were minors, the learned Judges do not refer to the question whether the filing of a suit on behalf of a minor coparcener for partition effects automatically a division in status; as it certainly does in the case of a major coparcener. There is an earlier Full Bench decision in 39 Mad 159[2] which merely purports to decide that a coparcener becomes separated by the mere fact of suing for partition, with reference to which decision it has also been remarked in later rulings that this was a case of a minor plaintiff, though the fact is not adverted to in the judgment. Now, these two Full Bench decisions by implication, though not by express words, would appear to decide that the filing of a suit by a minor coparcener, just like the filing of a suit by a major coparcener, must be regarded as an unambiguous declaration of an intention to divide, creating a division in status.

There is, however, a long and well-established line of authority, showing that this is not the case. In 41 Mad 442[3] a Bench held that the filing of a suit by a minor for partition will not effect a severance of status because it is for the Court to determine whether a partition is or is not beneficial to the minor and there is no positive right of the minor's next friend to claim a partition on his behalf regardless of the finding of the Court on the question of benefit. This Bench refers to the Full Bench decision in 39 Mad 159[2] and expresses the opinion that the fact of minority must have been overlooked in that case. The decision in 41 Mad 442[3] has been considered in a number of subsequent cases and its authority has been shaken on the question of the effect of the death of a minor plaintiff pending a suit for partition. There has also been some development of authoritative opinion on the question of the effect of the filing of a suit for partition by a minor when a decree for partition or a finding that the partition is necessary follows. In 48 Mad 465[4] the Bench accepts the view that the filing of a partition suit on behalf of a minor does not automatically effect a complete severance of status, but

1. ('28) 15 A I R 1928 Mad 735 : 112 I C 541 : 51 Mad 417 : 55 M L J 175 (F B), In re Balusami Ayyar.

2. ('16) 3 A I R 1916 Mad 1170 : 33 I C 858 : 39 Mad 159 : 29 M L J 816 (F B), Soundararajan v. Arunachalam Chetty.

3. ('18) 5 AIR 1918 Mad 379 : 42 I C 860 : 41 Mad 442 : 34 M L J 213, Chelimi Chetti v. Subbamma.

4. ('25) 12 A I R 1925 Mad 717 : 88 I C 424 : 48 Mad 465 : 48 M L J 354, Krishnaswami Thevan v. Pulukaruppa Thevan.

the learned Judges point out that if the minor's suit results in a decree, the status of the minor becomes divided and the view is taken that such a severance of status will date back to the filing of the plaint. This view has been followed by two subsequent Benches 50, Mad 866[5] and 52 Mad 856.[6] The matter came up for consideration by the Full Bench which decided 57 Mad 95.[7] The learned Judges hold that the decision in 41 Mad 442[3] was wrong to the extent that a partition suit by a minor would not abate by the death of the minor, but they accept the position that the filing of a suit for partition by the minor does not automatically create a final severance of status between the minor and his family. Ramesam J. seems inclined to the view that the filing of the suit by the minor effects a sort of conditional severance of status which would become final on the Court giving a finding that a partition would be for the benefit of the minor. The other two learned Judges incline to the view that on the Court finding a partition to be for the benefit of the minor a severance of status is created with retrospective effect from the date of suit or perhaps from the date of notice of suit. The judgments in this case do not contain any reference to the Full Bench decision in 51 Mad 417,[1] on which the Court below has relied. In this state of rulings it seems to me that the balance of authority so far as this High Court is concerned favours the view that when a guardian of a minor files a suit for partition, he remains a coparcener until the Court gives a finding that the proposed partition is beneficial to the minor and when that has been done, a severance of status takes place which dates back at any rate to the date of the plaint.

That being the law as I understand it, it remains to consider what is the proper order to make when on behalf of the minor plaintiff an application is made to restrain the sale of the minor's share in the family properties in satisfaction of the debts of the father pending the partition suit. The minor being still a coparcener, though liable retrospectively to cease to be a coparcener, the position appears to be that the father's right to sell the minor's property in discharge of his debts which are not illegal or immoral still subsists until the Court finds whether a partition is or is not beneficial to the minor. But in the case of an affirmative finding any sale of the minor's share during the pendency of the suit will become void. Until that finding is given no one can say whether the sale by the father (or in the present case by his representative, the Official Receiver) will or will not confer any title in the minor's property. In such circumstances it seems to me most undesirable that a sale of the minor's share should be held before it is established that there is anything to sell and it seems to me equally undesirable that the sale should be postponed by a long delay in coming to a finding on this fairly simple question of benefit to the minor. After all, it is not in the interests of the creditors that the minor's share should be sold for less than its true value if the suit is eventually to be dismissed. Nor is it desirable to hold a speculative sale, that which is sold being the chance of the minor's failure in the suit. The proper course therefore seems to be to postpone the sale until the Court gives the necessary finding, but to expedite the proceedings so that a finding may be given in the course of the next few months. In this case the same process of impleading ninety odd creditors is, I understand, in contemplation and though it is to be hoped that the process will not take as long as it did on the former occasion, it will necessarily involve some time. It is however quite unnecessary that all the creditors should be on the record for the purpose of this preliminary finding. They are, so far as the debts of the father are concerned, represented by the Official Receiver who is quite competent to put forward on behalf of the creditors any evidence or any contentions which may be available against the view that this partition is for the benefit of the minors.

In the result therefore the order of the lower Court is confirmed, but the lower Court is directed to proceed forthwith to take evidence and record a finding on the preliminary question whether the partition is beneficial to the minors and for the purposes of recording this finding it is not necessary to await the impleading of all the creditors. If the finding is adverse to the plaintiffs, the suit will presumably be dismissed and no question of restraining the sale of the Official Receiver will arise. If the Court finds that the partition is for the benefit of the minors, then quite clearly the

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5. ('27) 14 A I R 1927 Mad 801 : 104 I C 472 : 50 Mad 866 : 53 M L J 189, Sri Ranga Thathachariar v. Srinivasa Thathachariar.

6. ('30) 17 A I R 1930 Mad 326 : 121 I C 837 : 52 Mad 856 : 57 M L J 720, Rama Rao v. Hanumantha Rao.

7. ('33) 20 A I R 1933 Mad 890 : 146 I C 269 : 57 Mad 95 : 65 M L J 630 (F B), Rangasayi v. Nagarathnamma.

injunction restraining the Official Receiver from selling the minors' share will have to stand. In the view that I take, I think it fitting that each party should bear his costs in this appeal. The Official Receiver may take his costs from the estate.

C.R.K./K.S. *Order accordingly.*

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(28) A. I. R. 1941 Madras 841

GENTLE J.

O. M. P. L. Palaniappa Chettiar and another — Plaintiffs

v.

N. V. E. N. N. Nachiappa Chettiar — Defendant.

Civil Suit No. 229 of 1938, Decided on 26th March 1941.

(a) Limitation Act (1908), Art. 60 — Oral demand sufficient.

Under Art. 60 an oral demand is sufficient. [P 844 C 1]

(b) Limitation Act (1908), S. 10 — Custom among Nattukottai Chettis of keeping presents given to bride at time of marriage with some person — Such person is express trustee within Section 10.

It is the custom among the Nattukottai Chettis to treat the presents given to the bride at the time of her marriage as a fund or asthi for the benefit of the children of the marriage and to entrust that fund with some "sound man" of their community for investment and accumulation in the name of the bridegroom to the order of the bride's father who is called the "orderdar" or "maraldar." The husband has no personal right to these moneys his duty being to guard these moneys for the children. On the death of the maraldar the husband is entitled to demand and receive payment but he cannot utilize the money for his own purposes. He is only a trustee and the children are the cestui que trusts. [P 842 C 1; P 844 C 1]

Where the defendant, the person with whom the presents made to a bride in a Nattukottai Chetty community at the time of the marriage were deposited well knew that they were deposited with him in the name of the husband to the order of the bride's father, the maraldar, for purposes of earning interest and to be augmented for the benefit of the children of the bride and bridegroom and that whoever could demand payment whether it was the maraldar during his lifetime or the husband on the death of the maraldar, the fund and its accretions were not personal either to the maraldar or the husband but were the children's property :

Held that he had control of the fund which was placed with him for the specific purpose of interest being earned and the total fund being increased or augmented for the benefit of the children, that the said fund was a trust money, that the defendant was an express trustee coming within the meaning of S. 10 and that S. 10 applied to a suit claiming the amount from him : 69 E R 285; (1900) 2 Ch 561; (1865) 11 L T 153 and (1911) 55 S J 76, *Discussed.* [P 845 C 1]

(c) Limitation Act (1908), S. 10—"Trust for specific purpose."

The phrase in S. 10 "trust for a specific purpose" is merely a more expanded mode of expressing the same idea as that conveyed by the expression "express trust" in English law : ('23) 10 A I R 1923 Mad 578 and 32 Bom 394, *Foll.* [P 845 C 1]

V. Ramaswami Iyer and K. S. Ramamurthy — for Plaintiffs.

K. Krishnaswami Ayyangar and T. A. Vijayaraghavachari — for Defendant.

Judgment. — The parties to this suit belong to the Nattukottai Chetti community. Plaintiff 1 married the sister of the defendant and plaintiff 2 is their minor daughter who is now represented by her husband as next friend, this marriage having taken place in 1939. Plaintiff 1's wife died in 1939. Her father was S. A. A. Adaikalavan Chetti who died in the year 1926. In the plaint it is alleged that two sums, Rupees 2045-2-0 and Rs. 417-3-3, were deposited with the defendant at interest according to the Madras nadappu rate on 22nd May 1919 and 16th July 1921 respectively. These amounts were credited to plaintiff 1 in the defendant's books of account. According to the custom and usage prevailing in the community these deposits were repayable on demand, which, it is alleged, was made on 17th May 1938. In the plaint claim is made for a sum of Rs. 2462-5-3 as principal and Rs. 7539-5-3, interest at the date of suit, totalling Rs. 10,001-10-6 to which sum plaintiff 1 alleges he is solely entitled under the law and custom of the community. In the written statement the defendant denies that he has had any transaction with the plaintiffs or he is in any way bound or liable to pay them on any account or there was any contract or agreement between them. He alleges that the account referred to in the plaint as O. M. P. L. stridhanam account relates to a transaction between himself and his natural father, the late S. A. A. Adaikalavan Chetti (to whom it is hereafter convenient to refer as S. A. A.). The transaction between the defendant and his late father was by way of deposit by the latter of a certain sum for purposes known to S. A. A. and was payable to his order, and subsequent to his death the account was closed and settled. It is further alleged that the suit is barred by limitation. It is of some significance to point out that neither the sum alleged to have been deposited by S. A. A. nor the purpose for which it was so deposited is mentioned in the written statement.

About a year after the written statement was filed, with the leave of this Court, plaintiff 2 filed a supplemental pleading

alleging that on the occasion of the marriage of plaintiff 1 with plaintiff 2's mother presents were given to her amounting to about Rs. 8500 and according to the custom of their community it was constituted a fund or asthi for the benefit of the children out of which Rs. 2045-2-0 was entrusted to the defendant on 22nd May 1919 for investment and accumulation in the name of plaintiff 1 and to the order of the bride's father, S. A. A. Further, on 16th July 1921, an additional sum of Rs. 417-3-3 representing the share of Kaluthuru of plaintiff 1's wife was also similarly entrusted to the defendant for the benefit of the children. After the death of plaintiff 2's mother plaintiff 2 alleges that she became solely entitled to the moneys deposited with the defendant and as she is a minor and the moneys deposited with the defendant were trust moneys he occupied a fiduciary position, and no question of limitation in regard to the claim for payment of the moneys together with interest in his hands arises.

Plaintiff 1 in his evidence said it was the custom of his community that presents were given to a bride by her father in cash and his wife received a sum of Rs. 3045-2-0 the details of which were set out in Ex. P-1 dated 16th May 1919 which document was prepared at the time and was written by one Muthayya, elder brother of the defendant and of his sister, plaintiff 1's wife, and signed by himself. This document contains a number of items, for instance nine measures of ghee, two rams, coloured mats, against each of which a sum of money is entered and also includes stridhanam of Rs. 1500 of the total of Rs. 3045-2-0. The witness said that although these articles are set out in the document, according to the custom, the presents were made in cash and not in kind and the amount of the cash was invested in the bridegroom's name to the order of the bride's father for the benefit of the children. The person by whom the order is to be made is called orderdar or maraldar. Out of the money presents which were given to his wife, plaintiff 1 said, a sum of Rs. 2045-2-0 was deposited with the defendant. He said it was the practice to choose some "sound man" with whom this money was to be invested for profit and augmentation. At the time of the deposit there were present S. A. A., the bride's father, plaintiff 1, the defendant Muthayya and two or three others. It was, he said, customary for the depositee to acknowledge by a letter the receipt of the money. He was informed by S. A. A. that the defendant had written a letter acknowledging receipt of the fund which he was keeping in some safe place. About two years after the marriage plaintiff 1's wife received a sum of Rs. 417-3-3 as being her share of her mother's stridhanam property which amount was similarly deposited with the defendant. The witness admitted that the husband had no personal right to these moneys, his duty being to guard them for the children. (His Lordship discussed the evidence as regards the letters P-11 and P-12 demanding payments of the money and P-1, the slip containing the details of the present made to plaintiff 1's wife, and then proceeded.) It is now convenient to consider the manner in which the deposit with the defendant was treated. In his evidence he substantially agreed as to the existence of the custom to which plaintiff 1 and his son-in-law spoke when they were in the witness box. He said that a sum of Rs. 2000 odd was deposited by his father S. A. A. but he was unable to recollect the circumstances. He said he could not remember whether it was stridhanam property and he failed to recollect whether Exs. P-9, P-10. P-13 and P-14 were interest chittas sent by him to S. A. A. Plaintiff 1 said that periodically these chittas were given to S. A. A. by the defendant and in turn handed to him. These four exhibits show credit of two sums, Rs. 2045 and Rs. 417 and periodically a balance is struck and interest accrued to the date of the balance added. The account is called O. M. P. L. stridhanam account. O. M. P. L., it is common ground, means plaintiff 1 in whose name the account was opened.

I accept the evidence of plaintiff 1 with regard to these chittas. The defendant was prepared to go no further than to say that he is unable to remember or recollect whether these were his chittas or accounts. A number of letters have been produced written by plaintiff 1 to the defendant between 28th February 1921 and 2nd December 1923 — Exs. P-2, P-3, P-6, P-7 and P-8—in which the plaintiff makes enquiries regarding the account. The defendant wrote to plaintiff 1 on 16th October 1921 Ex. P-15 referring to "your interest chitta" and saying that this had been sent to S. A. A. and if he had not given it to plaintiff 1 a copy would be sent. Exhibit P-5 dated 1st May 1926 is another letter written by the defendant to his own father in which reference is made to the O. M. P. L. account.

In his evidence the defendant admitted that about twenty years ago Rs. 2000 odd was deposited with him in plaintiff 1's name to the order of S. A. A. He said in the case of such an account in the name of one person to the order of another, the latter is called orderdar or maraldar upon whose death, the person in whose name the account is maintained, is entitled to payment after consulting the heirs of the deceased person and he added that such person was paid if he informed the depositee that permission had been given by the heirs. I accept the evidence of plaintiff 1 that at the time the deposit was made with the defendant plaintiff 1 and S. A. A. were present. The admission by the defendant of the existence of the custom to provide money and deposit it in the way which has been discussed earlier is a clear indication that the defendant knew that this money was trust money inasmuch as it was for the benefit of the wife or children of the marriage which took place at the time between plaintiff 1 and plaintiff 2's mother. The chittas refer to stridhanam account over a period of years and interest is added. When the second sum of Rs. 417 was deposited this was included in the same account and treated in exactly the same way. The last chitta Ex. P-14 concludes on 13th April 1926 with a total credit from the two principal sums with interest, of Rs. 4289.6.1.

In the written statement the defendant pleads that subsequent to his father's death this account was settled and closed. In his evidence he said that after some years he found himself in some financial difficulty and desiring to assist his relatives he repaid the total amount of the account at that particular time to his father in his lifetime and the account was accordingly closed. He has not produced any books although he carried on business as a banker. He said that his business having closed, his books were either lost or deposited in various Courts in connexion with suits of which he was unable to give any detail of any sort. I reject his evidence in this respect entirely and I have come to the conclusion that it is entirely untrue. The evidence he gave is in direct conflict with the plea raised in his written statement. He denied that plaintiff 1 had orally requested him to make any repayment or that he had given the excuses or promises which the plaintiff mentioned in his evidence.

The defendant was a thoroughly unreliable and unsatisfactory witness and except that I do believe him when he said that he received Ex. P-12 in December 1927, I have no hesitation in rejecting the whole of his testimony save where it is in accord with other evidence which I believe. In many respects, such as non-production of his books, his failure to identify Exs. P-9, P-10, P-13 and P-14, and his statement that he paid his father the full amount of the account in the latter's lifetime, I am satisfied that he was saying nothing more or less than what he knew to be absolute untruths.

I find as a fact, after considering all the oral and other evidence placed before me, the following: In May 1919 at the time of the marriage between plaintiff 1 and his wife, the bride's father S. A. A. provided a sum of money as her stridhanam property. Out of this sum, Rs. 2045-2-0 was deposited in the name of plaintiff 1 to the order of S. A. A. with the defendant and the defendant well knew exactly the nature of the money and its source, and the purpose for which it was being deposited. On the death of S. A. A. in 1926 plaintiff 1 was entitled to demand and receive payment, he could not utilize the money for his own purposes but he then became, if he was not already so, a trustee. Demand was made by plaintiff 1 by letter Ex. P-12 and thereafter on frequent occasions oral demands were made, all of which met with non-compliance. I reject the story that the defendant has repaid this money either before or after the death of his father and I hold that it is still in his hands. I also find as a fact that an additional sum of Rs. 417 was deposited similarly and formed the wife's share in her mother's property. There has been no attempt on behalf of the defendant to distinguish between the first and the second deposits or as to the character or nature of them and the person entitled to receive them; the argument which has been addressed has been on the basis that both the sums were of a similar kind and nature. I also find as a fact that the custom which is pleaded in the supplemental pleading and upon which Vairavan Chetti gave evidence has been established.

The question which now arises is what follows from the facts which I have found. The defendant in his written statement pleads that the suit is barred by reason of the provisions of the statute of limitation. The money in the hands of the defendant according to the evidence was payable on demand. Article 60, Limitation Act, provides a period of three years from the date

of demand in respect of moneys for which payment is to be demanded. The evidence of plaintiff 1 is that he made oral demands and it is conceded that an oral demand is sufficient. On the date on which EX. P-12 was written S. A. A. had died and plaintiff 1 was the person entitled to demand payment. The limitation period expired from the date of the above letter long before the institution of the suit. Consequently if the matter rested there, the plaintiffs' claim would inevitably fail. It now becomes material to consider the plea put forward in the supplemental pleading that the moneys in the hands of the defendant are trust funds and consequently no period of limitation applies in respect of a claim for payment of these moneys. Section 10, Limitation Act, provides, so far as it is material, as follows:

> Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose . . . . shall be barred by any length of time.

In order that the plaintiffs can avail themselves of the provisions of this section it must be shown that the moneys deposited with defendant vested in him for a specific purpose. It is convenient when considering this aspect of the case to bear in mind that the defendant well knew that the moneys which were deposited with him formed part of the cash provided by his own father and the father of the bride as her marriage presents or her stridhanam and that they were deposited with him in the name of the husband, plaintiff 1, for the purpose of earning interest and to be augmented for the benefit of the children of the bride and bridegroom and that whoever could demand payment from him, whether it was the maraldar (S. A. A. in his lifetime) or the husband on the death of the maraldar the fund and its accretions were not personal either to the maraldar or the husband but were the children's property. In other words the maraldar and/or the husband were trustees of this fund of which the children were the cestui que trusts. Reference has been made to a number of English authorities in which the question of trusteeship has been considered. In 69 E R 285,[1] the relevant facts were that in 1825 G. V. Drury borrowed from the executors of a will, a fund which was bequeathed to them in trust for himself for life and then for other persons, Sir W. Page Wood V. C. said in the course of his judgment at p. 289:

> I think that Drury in this case must be taken to have received these moneys into his hands as trust moneys.

In that case the recipient knew when he obtained the loan that the moneys were trust moneys. In (1900) 2 Ch 561[2] the trustees of a marriage settlement with the wife's consent lent trust funds in cash, to the husband who took with full notice that it was trust money and liable to investment on interest bearing securities. It was held that he was in the position of an express trustee. In the course of his judgment Webster M. R. at p. 574 said:

> I think that the position of the husband, in taking the money and giving such a bond as this, brings him within the class of those persons who are regarded as bound to a great extent by the same rules as bind express trustees.

Collins L. J. who delivered a concurring judgment, at p. 583, referred to the case in 69 E R 285[1] and observed that that case was undistinguishable from the matter then before him. The respondent was aware and knew at the time he received the moneys that they were trust funds. In (1865) 11 L T 153[3] the trustees of a marriage settlement advanced a portion of the trust moneys to the husband. The Vice-Chancellor at p. 154 observed:

> It was a trust fund, known, of course, by the husband to be a trust fund, received by him as part of the trust fund, in his hands as part of the trust money, and, until it was repaid, retaining the character of trust money.

In (1911) 55 S J 76[4] the executors were not in terms appointed trustees but such duties were imposed upon them, and it was held that the executors although not trustees under the provisions of the will may become express trustees by reason of entries in their accounts earmarking certain funds as held for or on account of the persons interested. Warrington J., as he then was, in the course of his judgment, said that the executors put in their books of account explanations indicating that these sums of money were held for individual persons interested under the will to which he referred; in some cases they used the words "in trust" and in others "for the account of"; and in the learned Judge's view it made no difference whichever expression was used. The important characteristic of these entries was that the sums of money set apart from the rest were by these entries earmarked and held by the persons who did hold them for or on

1. 69 E R 285, Spickernell v. Hotham.

2. (1900) 2 Ch 561 : 69 L J Ch 609 : 83 L T 129 : 48 W R 665, In re Dixon; Henyns v. Dixon.

3. (1865) 11 L T 153 : 12 W R 1272, Coxwell v. Franklinski.

4. (1911) 55 S J 76, Parker v. Comptyz.

account of the persons interested. It was equivalent to saying that they were trustees for the other persons. In the present case the chittas Exs. P-9, P-10, P-13 and P-14 which I am satisfied as I have already said were given by the defendant to his father refer to the investment being stridhanam property. According to the written statement the account was in the name of plaintiff 1 and the defendant in his evidence admitted that the account was in the name of plaintiff 1 and to the order of the defendant's father. This account is similar to the account referred to in the last authority to which I have referred. Consideration of the provisions of S. 10, Limitation Act, came before a Bench of this Court in 44 M L J 431,[5] in which it was held by Sir Walter Schwabe C. J. and Wallace J. that the phrase in S. 10 "trust for a specific purpose" is merely a more expanded mode of expressing the same idea as that conveyed by the expression "express trust" in English law; and in so holding the Court approved of the decision in 32 Bom 394.[6] At p. 433 the learned Chief Justice observed as follows :

> I do not think that the word 'vested' in S. 10 means anything more than properly having control of the property.

The defendant had control of the fund which was placed with him for the specific purpose of interest being earned and the total fund being increased or augmented for the benefit of the children of plaintiff 1 and his wife. According to the English authorities to which I have referred, having accepted both the deposits—Rs. 2045 and Rs. 417—with knowledge that they were trust moneys he became an express trustee. In 44 M L J 431[5] it was laid down that the phrase in S. 10, Limitation Act, "trust for a specific purpose" is merely a more expanded mode of constituting express trust in English law. Following the authorities and by reason of the facts to which I have referred I hold that the defendant was and remains still a trustee of this money, that it vested in him for a specific purpose and that the provisions of S. 10, Limitation Act, apply. Consequently no period of limitation will run to defeat the claim which has been put forward by plaintiff 2 to recover moneys in the defendant's hands and I hold that she is entitled to succeed. There is no distinction as I have already pointed out between the two sums which were deposited with the defendant.

Plaintiff 1 admitted in his evidence that he was not entitled to the benefit of this fund and it was plaintiff 2 who was the rightful person to receive it. The claim which he put forward that he alone was entitled to receive it was abandoned. There will be a decree in favour of plaintiff 2 for the amount of the claim together with interest which is set out in the plaint. There has been no dispute that the amount claimed for interest up to the date of suit is the correct sum. The total amount will bear interest from the date of suit until to-day at 6 per cent. per annum. Hereafter, the decretal amount will carry interest at the same rate. The question of costs is one which requires a little attention. The original claim for payment to plaintiff 1 alone has been, as I have mentioned, abandoned, but plaintiff 2 has recovered the total amount for which the suit was instituted. I hold that she is entitled to her costs to be ascertained on the decretal sum. I make no special order, but if the inclusion of plaintiff 1 has increased the amount of costs of the suit I direct that they will not be recoverable from the defendant. The amount of costs will bear interest at the rate of 6 per cent. per annum from the date of taxation.

C.R.K./K.S. *Suit decreed.*

5. ('23) 10 A I R 1923 Mad 578 : 72 I C 842 : 44 M L J 431, Kishtappa Chetty v. Lakshmi Ammal.
6. ('08) 32 Bom 394 : 10 Bom L R 540, Bhurabhai Jamnadas v. Bai Rukmani.

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(28) A. I. R. 1941 Madras 845

LAKSHMANA RAO J.

Public Prosecutor — Appellant

v.

Jevan and others — Respondents.

Criminal Appeals Nos. 116 to 126 of 1941, Decided on 29th April 1941, against acquittal by Sub-Magistrate, Mettupalayam, in C. C. Nos. 703, 808, 810, 812, 814, 816, 818, 825, 828, 839 and 850 of 1940, respectively.

Motor Vehicles Act (1939), Ss. 123 (1) and 42 (1) — Whoever drives vehicle in public place without permit under S. 42 (1) is punishable under S. 123 (1) —That permit is to be obtained by owner makes no difference.

Whoever drives a vehicle in a public place without a permit under S. 42 (1) authorizing the use of the vehicle in that place is punishable under S. 123 (1). That the permit is to be obtained by the owner cannot make any difference.

[P 846 C 1]

Appellant in person.

Judgment. — These are appeals by the Provincial Government against the orders of acquittal of the respondents of an offence under S. 123 (1), Motor Vehicles Act. The

respondents are drivers of transport vehicles and they were prosecuted under S. 123 (1), Motor Vehicles Act, for driving the vehicles on the public road without a permit authorising the use of the vehicles in a public place. They pleaded that it was the duty of the owner to obtain the permit and accepting their plea, the Sub-Magistrate acquitted them. The alleged driving of the transport vehicles on the public road without a permit authorizing the use of the vehicles in a public place was not denied by the respondents; and so far as is material, S. 42 (1), Motor Vehicles Act, provides that no owner of a transport vehicle shall use or permit the use of the vehicle in any public place save in accordance with the conditions of a permit authorizing the use of the vehicle in that place. The driving of a transport vehicle on the public road without such a permit would certainly contravene S. 42 (1) of the Act; and S. 123 (1) enacts that whoever drives a motor vehicle in contravention of the provisions of sub-s. (1) of S. 42 shall be punishable with fine. That the permit is to be obtained by the owner cannot make any difference and whoever drives the vehicle in a public place without a permit authorizing the use of the vehicle in that place would be punishable under S. 123 (1) of the Act. The orders of acquittal are therefore set aside and the respondents are convicted under S. 123 (1), Motor Vehicles Act. They are sentenced to pay a fine of Rs. 5 each and in default to simple imprisonment for one week.

C.R.K./G.N. *Appeals allowed.*

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(28) A. I. R. 1941 Madras 846

WADSWORTH J.

Rajah V. Rajeswara Rao Garu and another — Petitioners

v.

Chintapatla Venkata Rayanim Garu and others — Respondents.

Civil Revn. Petn. No. 475 of 1941, Decided on 16th July 1941, to revise order of Sub-Judge, Bezwada, D/- 18th February 1941.

Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii), proviso (d)—"Undivided Hindu family" covers joint families reunited as well as joint families which have never separated.

The term "undivided Hindu family" in S. 3 of the Act covers those joint families which have reunited, as well as those joint families which have never separated. For the purposes of the Act, there is no apparent difference between the two classes of joint families in their obligations, their management and their rights. Therefore members of a reunited Hindu family which pays more than Rs. 100 as kattubadi are disqualified from receiving the benefits of the Act. [P 847 C 2]

Sir Alladi Krishnaswami Iyer, B. C. Seshachala Iyer and C. Krishna Reddy — for Petitioners.

Ch. Raghava Rao — for Respondents.

Order.—The petitioners were the transferee decree-holders against whom the respondents filed an application under S. 19 of Madras Act 4 of 1938, praying the Court to scale down the decree debt and to record full satisfaction. In objection to this application it was urged that the applicants as members of an undivided Hindu family paid more than Rs. 100 as kattubadi and were therefore not entitled to claim relief as agriculturists having regard to proviso (d) to S. 3 (ii) of the Act. The contention of the present petitioners that the respondents were members of an undivided Hindu family was based upon an assertion that in the respondents' family there had been a reunion. The lower Court held the view that a reunited family could not be described as an undivided Hindu family. Against this decision the present petition is filed.

It has been pointed by the learned Advocate-General for petitioners that the Privy Council has laid down, *vide* 10 M I A 403[1] at p. 406, that on a reunion the family is remitted to its former status as a joint Hindu family and that reunion cancels a partition and not only remits the parties to their original status, but makes them subject to all the incidents of a coparcenary: *vide* 55 M L J 132.[2] Mr. Raghava Rao has contended quoting 11 M L J 353[3] at p. 361, that though the position of the members of a reunited family may not be merely contractual, their status is not that of an undivided Hindu family. It is pointed out that there are certain peculiarities in the rules of succession to a deceased member of a reunited family as compared with the rules governing ordinary coparceners; so that it cannot be said that a reunited family is clothed with all the incidents of an ordinary undivided family.

It is also urged that in the texts a reunited family is described by a special term samsrishta to distinguish it from the undivided family which is always called avibaktha and that in interpreting this Act, 4 of 1938, we should read the words "an

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1. (1863-66) 10 M I A 403 : 5 W R 11 : 1 Suther 609 : 2 Sar 164 (PC), Prankishen Paul v. Mothoormohan Paul.
2. ('28) 15 A I R 1928 Mad 1064 : 112 I C 184 : 55 M L J 132, Babu v. Gokuldas Govardandas.
3. ('01) 25 Mad 149 : 11 M L J 353, Suthersanam Maistri v. Narasimhalu Maistri.

undivided Hindu family" as referring to that which was known in ordinary legal parlance as an undivided Hindu family and not as denoting something which is similar to that institution, but different from it. The Court below has based its decision mainly on the fact that the definition in S. 3 uses the word 'undivided' rather than 'joint.' It cannot, I think, be denied that a reunited family is a joint family. It is joint in status and in obligations and is subject to joint management just as the original undivided family was. In fact the only difference in law between the position of the members of a reunited family and that of the members of a family which has never divided consists in certain very minor differences in the rules of inheritance. The argument from the use of the word 'undivided' instead of 'joint' loses much of its force when we find that S. 19 of the Act talks of a joint family debt and an application of any member of the family as if a joint family were the same thing as the undivided family referred to in the definition clause. It is, I think, established—at any rate so far as this High Court is concerned—that a reunited Hindu family is a coparcenary to which survivorship applies, which is managed by a joint family manager and which is subject to the same rules regarding joint obligations as an ordinary undivided family. If we want to be absolutely precise we have to call such a family a reunited family. But it is also not inaccurate to describe it as an undivided family, the word 'undivided' not being historical, but descriptive of the existing status.

The real question therefore is, what was the sense in which the Legislature used the words 'undivided Hindu family' in the definition of person in S. 3 (1) of the Act. Clearly the reason for treating an undivided family as a person was not the historical origin of the family nor the future devolution of property on the death of the members of the family. The real reason for treating the family as a unit was the way in which its property is held and its obligations are incurred jointly. From this point of view there is absolutely no reason to differentiate between the joint family which has never been divided and the joint family which has been divided and has become reunited. Similarly with reference to the question with which we are now concerned especially, namely, the property qualification which is to exclude a family from the rights of an agriculturist, there is no apparent reason why an historically undivided family should be disqualified from claiming to be an agriculturist because it pays over Rs. 100 as kattubadi, while a reunited but actually undivided family is allowed to claim those benefits, although it jointly pays the same amount. It seems to me that what the Legislature had in mind in treating an undivided Hindu family as a person, was the present undivided status of that family and not the historical origin of that status. Nor does it seem to me likely that the Legislature intended to differentiate between those joint families which in certain exceptional cases were affected by special rules of inheritance arising out of a reunion and those joint families to which the ordinary rules of inheritance applied. The reasonable course seems to be to regard the term 'undivided Hindu family' in S. 3 of the Act as covering those joint families which have reunited, as well as those joint families which have never separated. For the purposes of the Act, there is no apparent difference between the two classes of joint families in their obligations, their management and their rights. I therefore hold that it is open to the present petitioners to contend that the respondents are disqualified from receiving the benefits of the Act by proof that they constitute a reunited family which pays more than Rs. 100 as kattubadi. The petition is therefore allowed and the case is remitted to the trial Court for further disposal in the light of this judgment; costs to abide by the result.

C.R.K./K.S. *Petition allowed.*

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(28) A. I. R. 1941 Madras 847

VENKATARAMANA RAO AND SOMAYYA JJ.

P. Venugopala Pillai — Appellant

v.

Thirugnanavalli Ammal — Respondent.

Appeal No. 192 of 1938 and Civil Misc. Petn. No. 1447 of 1941, Decided on 6th August 1941, against decree of Sub-Judge, Cuddalore, D/- 1st November 1937.

Set off — Payment of Government revenue not claimed to be set off in suit for mesne profits—Subsequent suit to recover such payment is maintainable.

The case of Government revenue would stand on quite a different footing from other outgoings incurred by a person in possession of an estate without title and it would be open to such a person to maintain an action for the recovery of the amount paid. It may also be open to him to set off the amount in a suit for mesne profits, and what could be set off could always be claimed in an independent action and the fact that a set off was not claimed against a demand in a prior action for

mesne profits would not preclude the claim being agitated in an independent action: 21 Cal 142 (P C), *Foll.*; 17 Bom 35 and ('34) 21 A I R 1934 Cal 503, *Disting.*; 4 Cal 566, *Ref.* [P 850 C 1]

J. R. Gundappa Rao — for Appellant.

T. E. Ramabhadrachariar — for Respondent.

Judgment.—This is an appeal from the judgment of the learned Subordinate Judge of Cuddalore, dismissing the plaintiff's suit. It was brought for the recovery of a sum of Rs. 10,848-4-7 being the amount of kist paid by the plaintiff in respect of the properties mentioned in Sch. B to the plaint for faslis 1333 to 1335 (1924 to 1926). The plaint was filed on 1st April 1936 and on 13th October 1937 he withdrew his claim in respect of fasli 1333 on the ground that it had been adjusted in O. S. No. 4 of 1933 on the file of the same Court and confined his claim only to faslis 1334 to 1335. The circumstances under which the plaintiff had to pay the said kists are set out by him as follows: The properties belonged to one Thangasami Pillai who executed a will on 6th July 1915 bequeathing them to his daughter, the defendant who was then a minor and appointing Sundarathachi, his mother, and the grandmother of the defendant to be her guardian to manage the property during her minority; in the course of the said management, the said grandmother leased the property to the plaintiff for a term of three years at a fixed rent to be paid by him and one of the stipulations in the lease deed was that Sundarathachi should pay the kist on the property, but as she failed to pay the same the plaintiff was obliged to pay the same in order to preserve the produce raised on it. The contention of the defendant was that the said lease was a fraudulent transaction brought about by Sundarathachi with a view to defeat the claim of the defendant, that the said payments were voluntary and not made bona fide and therefore not recoverable.

It was further pleaded that the defendant filed O. S. No. 6 of 1927 on the file of the District Court of South Arcot against Sundarathachi and various alienees from her to set aside the several alienations including the lease in favour of the plaintiff who was defendant 4 in that suit, that the lease was set aside as a fraudulent transaction, that mesne profits for faslis 1334 and 1335 were decreed against him and that the plaintiff ought to have asked for the said payments being taken into account in assessing the mesne profits and as he failed to do so, he was debarred from claiming the said amount by an independent action and further the said payments must be deemed to have been taken into account and therefore the plaintiff was precluded from recovering them on the grounds of res judicata. The learned Subordinate Judge on the evidence held that the plaintiff did make the payment of kist for faslis 1334 and 1335 but in view of the finding in the prior litigation O. S. No. 6 of 1927, that the lease was a fraudulent transaction he held that the plaintiff could not be said to have made the payments bona fide and therefore could not claim the reimbursement of the kists paid as payments made on defendant's behalf either under S. 69 or S. 70, Contract Act. On the question of res judicata he held that the defendant's claim for kist was by way of a set off and that an independent suit was not therefore barred but held that the claim was adjudicated upon in the prior suit and therefore the suit was barred on the ground of res judicata. The learned Judge also held that if it be held that the plaintiff is entitled to the relief claimed, he would be entitled to a charge on the suit lands. On these findings the learned Judge dismissed the suit and it is against this decision this appeal has been preferred by the plaintiff.

Mr. Sitarama Rao on his behalf has canvassed all the findings of the lower Court. It seems to us that if the plaintiff's claim had merely rested on the fact of the lease in his favour, it may be that the decision of the lower Court would be correct. But the plaintiff's claim does not rest on the mere fact of his having been a lessee, at any rate in regard to a portion of his claim. The previous suit was filed in the Sub-Court of Cuddalore as O. S. No. 11 of 1925; this was subsequently transferred to the District Court of Cuddalore and registered as O. S. No. 6 of 1927, and on the same day an application for the appointment of a receiver was made in the Sub-Court. On 19th March 1925 the plaintiff who was defendant 4 in that suit filed a counter affidavit opposing the application. There was apparently some sort of an informal understanding between the parties the result of which was that the present plaintiff filed an affidavit undertaking that he would lease out the properties described in the lease deed by means of documents for cultivation during fasli 1335 and file them in Court, that he would lease them out on a certain rate of rent, that if the leases were to be given for a rent lower than that rate, he would take the directions of the Court and abide by its

orders and that he would submit a monthly return to the Court of the collections made by him and also the expenses incurred in respect thereof. On this the learned Judge passed the following order :

In view of the undertaking contained in the affidavit of defendant 4 the appointment of a receiver is not necessary. Defendant 4 will strictly act according to the terms of the undertaking.

It will thus be seen that though there was no formal appointment of a receiver, the present plaintiff undertook to administer the property under the directions of the Court and he was permitted to be in possession in pursuance of the order made by the Court and he was thus in possession till he was actually divested of it in 1927. It is conceded before us that during the period he was in possession in pursuance of the undertaking given by him he paid Rupees 2155-8-7. It was in respect of this amount that Mr. Sitarama Rao pressed the claim on behalf of the appellant. The question for decision is whether his claim in regard to this amount should not be sustained. It was frankly conceded by Mr. Venkatarama Sastri on behalf of the defendant that though the plaintiff might be considered as the trespasser by reason of the fact that the transaction of lease was set aside as fraudulent, he would have been entitled to the payments made by him towards the kist if he had set up his claim by way of reduction of damages in O. S. No. 6 of 1927 when the mesne profits in respect of fasli 1335 were assessed and decreed against him but he having omitted to do so, it is not open to him now to maintain an independent action. His contention is that in a claim for mesne profits it was incumbent upon the defendant to have set up this claim as and by way of reduction of damages and that that is the only course open to him. In support of his contention he relied upon the decision in 4 Cal 566[1] and on a passage in Mayne at page 436 based on 2 C & M 145.[2] In 4 Cal 566[1] a question arose between two rival purchasers in execution of different decrees against the same judgment-debtor as to whose sale should prevail. One of the purchasers instituted a suit for a declaration that his sale is valid and after getting the said declaration filed a suit for recovery of mesne profits for the period he was not able to get possession of from the other purchaser. That suit was not only dismissed, but a decree in favour of the defendant for the difference between the rents received and the revenue paid for the property during the three years was given. This decree was reversed on appeal by the High Court on the ground that though payments of revenue might be used to reduce the mesne profits, they could not be treated as a substantive set-off. Then a suit was filed for recovery of the amount that was awarded in the other suit and the question was whether the action was maintainable. The learned Judges took the view that it was not. Garth C. J., who delivered the judgment observed thus :

In a suit for mesne profits the plaintiff is only entitled to recover the actual loss which he has sustained by being kept out of possession; and therefore, in ascertaining the amount of such loss, it is right to take into consideration the receipts on the one hand and the necessary payments on the other. But it does not follow from this that if a man has wrongfully taken possession of property, and held it adversely to the true owner, and has been a loser in consequence, he has right to recoup himself for his losses as against the true owner. He must be content in such case to bear the burden of his own wrong.

The correctness of these observations came into question in a case reported in 21 Cal 142[3] which went up to the Privy Council. The question there was whether a person who was in possession of an estate in pursuance of a decree of Court but ultimately reversed on appeal was entitled to recover the amount paid for Government revenues during the period he was in possession. The Subordinate Judge decreed the plaintiff's suit but on appeal the decree was reversed by the High Court and the learned Judges remarked as follows :

A person who is in wrongful possession is not entitled to recover sums paid on account of outgoings, although he may be able to use them for the purpose of reducing the mesne profits. This proposition is clear from 4 Cal 566.[1]

Lord Macnaughten pointed out that the possession of the purchaser in that case could not be held to be wrongful possession and that he was not prepared to give assent to the proposition as laid down in 4 Cal 566.[1] He remarked as follows :

Even if the rule stated by the learned Judges admitted of no exception—a proposition which it would be difficult to maintain, having regard to the recent case in (1892) A C 166,[4] in the House of Lords—it seems to be a somewhat strong thing to hold that the appellant when he paid the Government revenue was in wrongful possession of the estate. He was in rightful possession at the time. He was in possession under the authority of the highest Court in India.

1. ('79) 4 Cal 566 : 3 C L R 456, Tiluk Chand v. Soundamini Dasi.
2. 4 Tyrwh 29 : 2 C & M 145, Doe v. Hare.
3. ('94) 21 Cal 142 : 20 I A 160 : 6 Sar 366 (P C), Dakhina Mohun Roy v. Saroda Mohan Roy.
4. (1892) 1892 A C 166: 61 L J Ch 749: 66 L T 536: 7 Asp M C 225, Peruvian Guano Co. Ltd. v. Dreyfus Bros. & Co.

He then pointed out that the Government revenue was a paramount charge on the land and that if default was made in payment, the estate would be sold in a summary way and later enunciated the principle applicable to the case thus :

It seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents.

He further observed that the claim was in the nature of salvage and that the law relating to sales for arrears of Government revenue recognized an equity to repayment in the case of a person who not being proprietor paid the Government revenue in good faith to protect a claim which afterwards turned out to be unfounded. It is clear from this judgment that the case of Government revenue would stand on quite a different footing from other outgoings incurred by a person in possession of an estate without title and that it would be open to such a person to maintain an action for the recovery of the amount paid. It may also be open to him to set off the amount in a suit for damages, and what could be set off could always be claimed in an independent action and the fact that a set-off was not claimed against a demand in a prior action would not preclude the claim being agitated in an independent action. This proposition is not disputed by Mr. T. R. Venkatarama Sastri. In this case there can be no doubt that from the date of the order by which the plaintiff was allowed to be in possession in pursuance of the undertaking given to the Court he must be held to be in rightful possession of estate and must be held entitled to recover any payments made by him for Government revenue to preserve the estate which he was bound to pay according to the terms of the undertaking. This claim would therefore be directly covered by the principle of the said Privy Council decision and we therefore hold that the suit is maintainable. The cases relied on by Mr. Venkatarama Sastri, *viz.*, 17 Bom 35[5] and 38 C W N 384,[6] are all cases where the claim was set up and reduction allowed but they did not decide that if the claim was not set up the action was barred. So far as the amount of Rs. 2155-8-7 paid since the date of the order is concerned, the plaintiff will be held entitled to recover. Mr. Sitarama Rao after some argument has confined his claim to this amount in view of the finding that his client was held not to be a bona fide lessee of the estate, a finding which he was unable to challenge; we therefore think it unnecessary to go into the exact scope of the decision in 4 Cal 566[1] in regard to the earlier payments.

Another point was raised on behalf of the respondent that the claim must actually be deemed to have been negatived by the Court in the prior litigation in O. S. No. 6 of 1927. From the written statement in that case, it is clear that the plaintiff did not plead that he was entitled to a deduction from the amount of mesne profits to be ascertained, the payment towards kist which he had made upto that date. No doubt in the evidence he stated that he paid certain amounts as receiver but his deposition was ultimately rejected on the ground that he did not submit himself to cross-examination and the learned District Judge who tried the case did not go into the said question at all. Though a memorandum of grounds was taken that there must be deduction on this head, it does not appear to have been considered by the High Court apparently because the claim was not pleaded. It could not be said that the Court had expressly or impliedly overruled the claim of the defendant in regard to the payment of kist. We therefore overrule the contention of the respondent on this point.

In the result we set aside the decree of the lower Court, and pass a decree for the said amount with interest at 6 per cent. per annum from the various dates of payment. So far as the rest of the claims are concerned, they are dismissed. Each party will bear his own costs in this appeal but so far as the lower Court is concerned, the plaintiff will get his costs on the amount allowed here. An application has been filed by the defendant-respondent under Madras Act, 4 of 1938. This petition will be forwarded to the lower Court for adjudication on the merits. The decree passed herein will be subject to the relief the defendant might get in the said petition. The plaintiff will have leave to file a counter-affidavit. The plaintiff will have a charge for the amount decreed on the suit properties.

C.R.K./K.S. *Order accordingly.*

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5. ('93) 17 Bom 35, Kachar Ala Chela v. Sha Oghadbhai Thakershi.
6. ('34) 21 A I R 1934 Cal 503: 151 I C 922: 38 C W N 384, Kiran Chandra Rai v. Erfan Karikar.

(28) A. I. R. 1941 Madras 851

LEACH C. J. AND
CHANDRASEKHARA AYYRA J.

T. M. Venugopala Mudaliar and another — Appellants

v.

T. K. Embaru Naidu and others— Respondents.

Appeal No. 4 of 1941, Decided on 18th July 1941, against order and judgment of Gentle J., D/- 10th January 1941, in C. S. No. 236 of 1939.

Madras High Court (Original Side) Rules, O. 45, R. 1 (d)—O. 45 provides summary remedy in specific circumstances and not alternative remedy to administration action—O. 45, R. 1 (d) applies only where money is shown to be actually in hands of executors, administrators or trustees and not to money which ought to be in their hands.

Order 45 is intended to provide a summary remedy in specific circumstances and not an alternative remedy to an administration action. An originating summons under O. 45, R. 1 (d) can be issued only when money is shown to be actually in the hands of the executors, administrators or trustees. It is not sufficient that it ought to be in their hands and they are responsible for it. Consequently there can be no investigation into accounts and a consequential order on an originating summons taken out under O. 45, R. 1 (d) : (1894) 3 Ch 408, *Rel. on.* [P 852 C 1,2]

N. Panchanatha Ayyar — for Appellants.

V. Sundararajan — for Respondents.

Leach C. J. — This appeal is concerned with the interpretation of O. 45, R. 1, cl. (d) of the Rules of the Original Side of this Court. Order 45 states when an originating summons may issue. Clause (d) provides for the issue of an originating summons to compel executors, administrators or trustees to pay into Court moneys in their hands. The appellants say that before an order can be passed under this clause it must be admitted by the defendant that he has money actually in his hands. The respondents say that this interpretation is too narrow and the Court can on the issue of an originating summons investigate accounts of an executor, administrator or trustee and order him to pay into Court what is found to be due by him. The relevant facts of this case are these. On 7th December 1926, one Chellammal died leaving a will dated 19th August 1926. She appointed three executors, two of whom are the present appellants. On 4th May 1927, the executors applied to this Court for probate of the will and probate was granted. The will directed that a sum of Rs. 6000 should be paid to Balammal, a grand-daughter of the testatrix, for the purchase of a house. The will also directed that the house should be enjoyed by Balammal during her lifetime and that after her death the property should be divided equally among her children when the youngest had attained majority. The respondents are the children of Balammal and on 20th October 1939 they took out the originating summons which has given rise to this appeal. They asked that the appellants should be directed (1) to pay into Court a sum of Rupees 3717 alleged to be in their hands as executors, (2) to exhibit a true and proper account of receipts and disbursements in connexion with the administration of the estate and (3) to bring into Court such further sums as might be found to be due on the taking of the account. The allegation that the appellants had in their hands the sum of Rs. 3717 was based on a statement of account filed in Court by the executors on 3rd November 1927 in accordance with the provision of S. 317, Succession Act, requiring a statement to be filed within one year of the grant of probate. It is common ground that until the present proceedings were instituted no final statement of account was filed by the executors. The defence was that the appellants had not got in their possession this sum of Rs. 3717. They averred that they had lawfully disposed of it in connexion with the administration of the estate.

Without considering whether in these circumstances the respondents were entitled to ask for an order against the appellants under O. 45, R. 1, cl. (d), the Assistant Registrar embarked upon an investigation into the accounts and his conclusion was that the appellants were liable to the estate in the sum of Rs. 716-15-0. The Assistant Registrar did not hold that the appellants had this money in their hands. His order indicates that he accepted the appellants' statement that the money had been expended, but he found that they were liable for the Rs. 716-15-0 because the disbursements which they pleaded were wholly or partially unwarranted. For instance, the appellants said that they paid an advocate Rs. 300 for obtaining probate. The Assistant Registrar apparently did not doubt that the advocate had been paid, but he considered that a reasonable fee was Rs. 75, which was all that he allowed. Another sum of Rs. 300 was disallowed because the Assistant Registrar was not satisfied that this disbursement had been authorized by Balammal. The appellants had debited the estate with the sum of Rs. 560 as being costs incurred in a certain suit. The Assistant Registrar disallowed Rs. 130 out of this amount. There

is no suggestion in the Assistant Registrar's report from beginning to end that the appellants had the Rs. 716-15-0 in their hands.

The Assistant Registrar's report was considered by Gentle J. who accepted it and directed that the appellants should pay into Court the sum of Rs. 716-15-0. The learned Judge's order proceeds on the basis that the appellants had the money in their hands. He did not consider whether the respondents were entitled to an order in the circumstances. The failure to consider this question was no doubt due to the fact that the case was not put before him as it has been put before us. The wording of cl. (d) of R. 1 of O. 45 is free from any ambiguity. An originating summons may be taken out under its provisions for an order directing payment into Court of moneys in the hands of executors, administrators or trustees. The clause does not refer to moneys which ought to be in their hands. This rule corresponds to O. 55, R. 3, cl. (d) of the Rules of the Supreme Court in England. The wording is almost identical. The meaning to be attached to O. 55, R. 3, cl. (d), was considered by the Court of appeal in (1894) 3 Ch 408[1]. There Lindley, Lopes and Davey L. JJ. had no hesitation in holding that money cannot be ordered to be paid into Court by executors, administrators or trustees under O. 55, r. 3, cl. (d) unless the money is actually in their hands. It is not sufficient that it has been in their hands and they are responsible for it. Lindley L. J. said:

> I think that rule means what it says. It applies only to money actually in the hands of the trustee, executor or administrator, and if it is not in his hands, although he is responsible for it and ought to have it, that rule does not apply.

Lopes L. J. said:

> I agree that the rule means what it says, and that it is confined to money which is actually in the hands of the executors, administrators or trustees.

Davey L. J. said that before an order is made under it for payment into Court it must be shown that the trustee has money belonging to the trust actually in his hands; it does not apply to money which may or may not be found due from him on the result of an investigation. Mr. T. S. Venkatesa Ayyar has draw our attention to a passage in Williams on Executors, Edn. 12, Vol. II, p. 1286 where it is said that :

> When there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by showing any unauthorised application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor.

The learned authors are here referring to the position before the passing of the Judicature Act when there was no O. 55, R. 3, cl. (d). This statement is based on decisions arising out of administration actions. There can be no doubt whatever that the appellants can be made to refund to the estate all moneys which they have improperly expended ; but that is not what the Court is now concerned with. The Court is concerned with the question whether there can be an investigation into accounts and a consequential order passed on an originating summons taken out under the provisions of O. 45, R. 1, cl. (d) of the Rules of the Original Side of this Court. It seems to me that the only conclusion which can legitimately be arrived at is that the respondents misconceived their remedy. In the circumstances the remedy is by suit and not by an originating summons under O. 45. The Court is not considering a case where an executor has denied possession of funds and it is clear that his denial is false. Moreover, it must be remembered that O. 45 is intended to provide a summary remedy in specific circumstances and not an alternative remedy to an administration action.

In (1894) 3 Ch 408[1] the Court was able to deal with the matter without relegating the plaintiffs to a regular suit, but that was because cl. (c) of R. 4 of the English Order 55 provides that any of the persons named in R. 3 may in like manner apply for and obtain an order for the administration of the trust. There is no corresponding rule in O. 45 of our Rules. It is unfortunate that the matter has been allowed to go so far, but the respondents are mainly to blame for this. They applied for the issue of an originating summons in respect of an account which had been filed 12 years before and much could have happened in the meantime. It has been impressed upon us that the respondents are minors but that fact does not preclude them from bringing a suit nor does it in any way alter the position. If they have not the means to pay the necessary court-fee there is procedure by which they could be allowed to sue in forma pauperis. It may be that the matter of the court-fee was the factor which governed the procedure adopted. It has not been suggested that the allowing of the appeal will adversely affect the respondents but, even if it

1. (1894) 3 Ch 408 : 63 L J Ch 932 : 7 R 491: 71 L T 508: 43 W R 18, Nutter v. Holland.

should, we have no option but to hold that O. 45, R. 1, cl. (d) does not apply to a case like this. The appeal will be allowed but we will make no order as to costs. It is said that the appellants have paid into Court Rs. 1235. The respondents state that they will file a suit within a fortnight and by consent this money will remain in Court to the credit of the suit to be filed. If the suit is not in fact filed within that time, the appellant will be entitled to withdraw the money from Court.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 853

LAKSHMANA RAO J.

In re Marudamuthu Pillai—Appellant.

Criminal Appeal No. 372 of 1940, Decided on 28th November 1940, against order of Sess. Court, Coimbatore Division, D/- 20th April 1940.

Penal Code (1860), S. 409 — Conviction for misappropriation of bank's money and accused fined also — Bank going into liquidation — Fine recovered should be ordered to be paid to liquidator and not to creditor of bank at whose instance prosecution was launched.

Where the secretary of a bank (in liquidation) was charged and convicted of offences committed before it went into liquidation of misappropriation of moneys belonging to the bank by falsely alleging that they were advanced as loans to fictitious persons and he was ordered to pay a fine :

***Held*, that the fine if received should have been ordered to be paid to the liquidator for the benefit of all the creditors and not to one fixed deposit holder whose deposit had matured at the time the misappropriation took place and at whose instance the case was launched.** [P 854 C 1]

A. C. Sampath Ayyangar — for Appellant.

Public Prosecutor — for the Crown.

Judgment. — The appellant has been convicted under Ss. 409, 467 and 471, Penal Code, and sentenced to rigorous imprisonment for four years for each of the offences, the sentences being directed to run concurrently. He has also been fined Rs. 2000 with rigorous imprisonment for one year in default and the fine, if levied, has been ordered to be paid to P. W. 1. Notice was issued to P. W. 1 and she does not appear. The appellant was the secretary of the Mahalakshmi Bank, Coimbatore, and he was in charge of the cash and securities of the bank. The opening balance on 27th August 1938 was Rs. 2099 according to the accounts, and the fixed deposit of P. W. 1 for Rs. 2450 matured that day. She applied for payment and the appellant asked her to return ten days later, saying that the funds were insufficient. She got nothing in spite of several visits thereafter, and the bank went into liquidation. It was then discovered that there were ample funds on hand on 27th August, and they were shown to have been utilized for three loans of Rs. 1000, 500 and Rs. 500, to three railway officials : M. S. Narayanaswami Iyer, Smith and Hazeline. Investigation disclosed that these were fictitious persons, and their loan applications were missing. Exhibits D and E, the promissory notes executed by two of them, were delivered to the liquidator by the appellant, and there was a note by him in Ex. F, the loan register, that the promissory note executed by Hazeline had been sent to the Insolvency Court. There was however no insolvency proceeding by or against any one named Hazeline, and the appellant was charged with criminal breach of trust in respect of the cash on hand on 27th August, forgery of Exs. D and E, the promissory notes and using them as genuine.

The appellant denied the offences and before the committing Magistrate he alleged that the three borrowers were brought and introduced to him as railway officials by P. W. 11 the president of the bank. The loan applications and promissory notes were prepared under P. W. 11's directions and he paid the money to the borrowers. Interest was received subsequently through P. W. 11, and the amount was credited in the accounts. Notices for repayment of the loans were not sent, as P. W. 11 stated that they were respectable persons, and he handed over the loan applications and promissory notes to the liquidator. He adhered to this statement in the Sessions Court except for a variation regarding the loan applications which, he alleged, were handed over to the clerk of the liquidator and he did not examine any witnesses. That the alleged borrowers were fictitious persons was proved beyond dispute by P. Ws. 6, 7 and 8, the railway officials; and the evidence of P. W. 4, the clerk of the bank, shows that he prepared and gave the loan applications to the appellant under his directions on 27th August. The borrowers were not present and the appellant went out with the applications to obtain their signatures. He returned with the applications about 2.30 P. M. with the signatures on them and the witness prepared and gave the promissory notes to the appellant as directed. The appellant then left saying that he was going to Podanur to obtain the signatures and he returned the next day with the promissory notes with the signatures and got the witnesses to make the necessary entries in the registers. P. W. 5,

the peon, corroborates P. W. 4 as to what happened on 27th August; and the plea of the appellant that the borrowers were brought by P. W. 11 and he paid the amounts to them is unfounded. Under the circumstances it cannot reasonably be doubted that the appellant misappropriated the amount and fabricated the promissory notes to cover up the fraud, and he would be guilty under Ss. 409, 467 and 471, Penal Code. The conviction is therefore correct and the sentences are not excessive. The conviction and sentences of the appellant are accordingly confirmed and the appeal is dismissed. But the amount misappropriated was the money of the bank, and the fine if recovered should have been ordered to be paid to the liquidator for the benefit of all the creditors. The order for payment to P. W. 1 is therefore set aside and the fine if levied will be paid to the liquidator for the benefit of the creditors.

C.R.K./K.S. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 854

WADSWORTH J.

Koti Nagabhushanam — Petitioner

v.

Chukkapalli Venkayya — Respondent.

Civil Revn. Petn. No. 1451 of 1939, Decided on 26th February 1941, to revise decree of Sub-Judge, Tenali, in S. C. S. No. 10 of 1939.

Madras Agriculturists' Relief Act (4 of 1938), S. 8, Expl. and S. 9 — For determining whether antecedent debtor was agriculturist regard must be had to state of affairs subsisting on 1st October 1937 and after—Testator executing pronote in 1933 and 1935 and dying in 1935 — Sole legatee discharging aforesaid debts by executing consolidated pronote in 1936—Testator held could not be said to be agriculturist at time of his death — Consolidated pronote held could not be treated as renewal of previous debts so as to import benefits of S. 8, Expl. — Debt under consolidated pronote could be scaled down under Section 9.

For the purpose of finding out whether the antecedent debtor was or was not an agriculturist, regard must be had to the state of affairs subsisting on 1st October 1937 and thereafter, the reason being that the definition of an agriculturist includes certain provisos which relate only to the financial status of the alleged agriculturist during the two years anterior to 1st October 1937 and it is impossible to apply this definition to the state of affairs existing before the time when those provisos would be effective. Consequently where the testator after executing pronotes in 1933 and 1935 died in 1935 and his sole legatee discharged the aforesaid debts by executing a consolidated pronote in 1936, it cannot be said that the testator was an agriculturist at the time of his death for by that time the state of affairs contemplated in the definition of an agriculturist had not come into being and therefore it is impossible to show that the antecedent debts of the testator were debts due from an agriculturist. Consequently the debt under the consolidated pronote cannot be treated as a "renewal" of the previous debts so as to import the benefits of the explanation to S. 8. The debt must therefore be scaled down as a fresh debt coming under S. 9 : ('41) 28 A I R 1941 Mad 829, *Rel. on*; ('40) 27 A I R 1940 Mad 836, *Ref.* [P 855 C 1]

K. Bhimasankaran — for Petitioner.

K. Kotayya — for Respondent.

Order. — This case raises a question under the explanation to S. 8 of Act 4 of 1938. The defendant was the sole legatee under the will of one Pitchayya who appears to have died about the end of 1935. Pitchayya shortly before his death had executed to the plaintiff a promissory note (Ex. B) dated 17th August 1935 which was itself a renewal of an earlier promissory note and he was also indebted to the plaintiff under a separate promissory note (Ex. 4) of 13th September 1933. After Pitchayya's death, the defendant under the will became entitled to his estate and also liable to discharge the debts and on 13th January 1936 he executed a consolidated promissory note (Ex. A) in favour of the plaintiff discharging Pitchayya's notes (Exs. 4 and 5). In the suit on Ex. A, the question was raised whether the debt had to be scaled down under S. 9 as one arising in 1936 or whether the defendant by virtue of the proviso to S. 9 could treat the debt as a renewal of the earlier indebtedness of Pitchayya, calling in aid the explanation to S. 8. There is, I think, no Bench decision as yet on the question whether the legatee can be deemed to be the same debtor as the testator whose estate the legatee has taken. But assuming for the moment that he can, the question arises whether Pitchayya's debt was a debt within the definition in S. 3 (iii) of Act 4 of 1938. A Bench of which I was a member held, *vide* (1940) 2 M L J 174,[1] that in order to take advantage of the explanation to S. 8, the debtor must show that the antecedent debt of which the suit debt is alleged to be a renewal was a debt within the definition of the Act, i. e., a debt due from an agriculturist. In a more recent case C. R. P. No. 597 of 1939[2] the same Bench had to consider the effect of that decision with particular reference to the point of time at which the antecedent debtor must have been an agriculturist. That was a case in which the

1. ('40) 27 A I R 1940 Mad 836 : 193 I C 470 : (1940) 2 M L J 174, Krishnaswami Iyer v. Nagalinga Mudaliar.

2. *Since reported in* ('41) 28 A I R 1941 Mad 829, Devarayanchettiar v. Subramania Iyer.

debtor at the time of the proceedings before the Court was an agriculturist, but was alleged to have acquired that status by a purchase of land in May 1937 and he claimed the right to treat as a renewal the discharge of a previous debt due from himself and others, the date of which debt was anterior to May 1937, and the contention was raised that at the time of this antecedent debt he was not an agriculturist and therefore by reason of (1940) 2 M L J 174,[1] there could not be a renewal within the meaning of the explanation to S. 8. We held that this objection was unsustainable and that for the purpose of finding out whether the antecedent debtor was or was not an agriculturist, regard must be had to the state of affairs subsisting on 1st October 1937 and thereafter, the reason being that the definition of an agriculturist includes certain provisos which relate only to the financial status of the alleged agriculturist during the two years anterior to 1st October 1937 and it is impossible to apply this definition to the state of affairs existing before the time when those provisos would be effective.

Now applying the logic of that decision to the present case, we find that the petitioner claims that his promissory note (EX. A) is a renewal of two earlier promissory notes executed in 1933 and 1935 by the testator Pitchayya who died in 1935. It cannot be said that Pitchayya was an agriculturist at the time of his death, for by that time the state of affairs contemplated in the definition of an agriculturist had not come into being. It seems to follow therefore that it is impossible to show that these antecedent debts of the testator were debts due from an agriculturist. For all we know, had Pitchayya continued to live for another two years, he might have been assessed to income-tax or had to pay profession tax or incurred one or other of the disqualifications contemplated in the definition. It follows therefore that the debtor is not able to show that the antecedent debts were debts due from an agriculturist within the definition of the Act and that the suit debt cannot be treated as a "renewal" of those previous debts so as to import the benefits of the explanation to S. 8. The debt must therefore be scaled down as a fresh debt coming under S. 9 which is what has been done by the Court below. I wish to make it clear that I am not concerned with what would have been the case had Pitchayya lived long enough to make the definition of an agriculturist applicable to him, and I express no opinion on the question whether in such a case a legatee who was obliged to pay his testator's debt could or could not claim that a fresh document in discharge of the testator's debt was a renewal thereof. The petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 855

LEACH C. J. AND VENKATARAMANA RAO J.

General Agencies and Trades Ltd. by Managing Director, V. Dharma Rao — Appellant

v.

K. N. Viswanathan, Official Liquidator representing abovenamed company — Respondent.

Appeal No. 6 of 1941, Decided on 21st April 1941, from judgment and order of Gentle J., D/- 28th November 1940.

Companies Act (1913), S. 171 — Creditor required to prove claim against liquidated company not doing it even though given time — Subsequently allowed to prove it by suit — No suit filed within time granted — Application by him to have his claim proved in liquidation proceedings on basis of subsequent decision should be dismissed.

A creditor of a company in liquidation was required by the Official Liquidator to prove his claim and the Court decided that it would not enter into an adjudication of the matter in liquidation and directed the creditor to take such steps as he deemed necessary to enforce the claim. This he failed to do within the time granted. He was also allowed further time. He eventually asked to be allowed to prove his claim by a suit and this application was granted on terms which were not fulfilled in time and the Court refused to grant any further extension. No appeal was filed against this order and so no suit was filed. The creditor relying on a later decision (reported in 52 M L W 635 = ('41) 28 A I R 1941 Mad 18) applied again to the Court to have his claim inquired into and adjudicated in the liquidation proceedings itself. The Court dismissed this application on the ground that it did not lie because the creditor had failed to prove his claim within the time allowed :

Held in appeal that the suit not having been filed within the time allowed by the Court and the Court having refused to grant a further extension which order had become final the order amounted to a dismissal of the claim. If the creditor had at the beginning insisted on the Court adjudicating his claim without recourse to a suit the case would have fallen within the judgment reported in 52 M L W 635=('41) 28 A I R 1941 Mad 18. But he having preferred to have his claim adjudicated in suit he could not now be allowed to turn round and ask the Court to change the procedure he himself had considered to be proper. [P 856 C 2; P 857 C 1]

G. N. Chari for K. Kameswara Rao — for Appellant.

K. Narasimha Aiyer — for Respondent.

Leach C. J. — The appellant was the managing agent of the Garland Petroleum

Co. (Madras) Ltd., which is being wound up by this Court under a compulsory winding up order passed on 2nd April 1938. The Court directed that all claims against the company should be presented by 15th July 1938. The appellant presented a claim for Rs. 25,313-8-2, which was said to be due by way of commission and advances made to the company. The appellant's claim together with others were mentioned to the Court (Gentle J.) on 16th September 1938. The Official Liquidator then informed the Court that he required the appellant to prove the claim in detail. The learned Judge decided that he would not enter upon an adjudication of the matter at that stage, and adjourned the matter for one month in order to allow the appellant to take such steps as he might deem necessary to enforce the claim. Apparently nothing was done, and when the matter came before Mockett J. on 14th March 1940 he gave the appellant two weeks in which to prove his claim. The learned Judge directed that if no action was taken within the period the appellant would be excluded from the benefit of any distribution which might be made. On 11th April 1940 the appellant asked that the Judge's summons which he had taken out should be treated as an application for leave to file a suit against the Official Liquidator under S. 171, Companies Act, in order to prove his claim. The learned Judge pointed out that the appellant had been very slow in prosecuting his claim, which was in amount equal to almost the entire assets of the company. The learned Judge however decided to grant on terms the application for leave to file a suit. He directed that the suit should be filed before 24th April 1940 and that the appellant should give security for costs to the satisfaction of the Registrar in the sum of Rs. 1500. The learned Judge also ordered that if the suit was not filed within the period allowed the application should be re-posted for orders on the 25th of that month.

The suit had not been filed by 25th April, but on that date the appellant asked that further time be allowed to him in which to file the suit. This application was dealt with by Gentle J. who granted further time until noon on 1st May 1940. The learned Judge stated that his order was to be regarded as being "final and peremptory." The appellant presented his plaint on 1st May 1940, but did not tender the security until three quarters of an hour after the time allowed, and Gentle J. refused to grant a further extension. The consequence was that the appellant had failed to prove his claim within the time granted by the Court. He had undoubtedly been guilty of great procrastination, and in the circumstances it is perhaps not surprising that no appeal was filed against the order of Gentle J. of 1st May 1940 refusing to condone the delay of three-quarters of an hour. The result was that the order of Gentle J. became final. On 19th October 1940 the judgment of this Court in 52 M L W 635,[1] was published in "The Law Weekly." It was there held that the general law of insolvency applies to the winding up of an insolvent company and that when an application is made under S. 230A (5), Companies Act, for an order rescinding a contract with the company and for an award of damages to the applicant, the applicant is entitled to have his application heard without being relegated to a regular suit. On 5th November 1940, obviously as the result of the publication of this judgment, the appellant took out a Judge's summons calling upon the Official Liquidator to show cause why the claim should not be inquired into and adjudicated on in the liquidation proceedings. This summons came before Gentle J. on 28th November 1940 and the learned Judge dismissed it on the ground that it did not lie, because the appellant had failed to prove the claim within the time allowed.

We consider that the decision of the learned Judge must be confirmed. The appellant was required to prove his claim by 15th July 1938 and this he failed to do. He was allowed further time and he eventually asked to be allowed to prove his claim in a suit. This application was granted on terms which were not fulfilled. The suit not having been filed within the time allowed by the Court and the Court having refused to grant a further extension, the order amounted to a dismissal of the appellant's claim. The appellant accepted the justice of this order until the idea was conceived of taking advantage of the judgment in 52 M L W 635.[1] If the appellant had at the beginning insisted on the Court adjudicating on his claim without recourse to a suit the case might have fallen within that judgment, but he preferred to have his claim decided in a suit and it is far too late in the day to allow him to turn round and ask the Court to

1. ('41) 28 A I R 1941 Mad 18: 193 I C 818: I L R (1941) Mad 328: (1940) 2 M L J 697 : 52 M L W 635, R. C. Bhide v. Travancore National and Quilon Bank Ltd.

change the procedure which he himself had considered to be proper. Ample time was given to him to prove his claim and he failed to take advantage of it. The present application is merely an afterthought. For these reasons the appeal fails and will be dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 857

SOMAYYA J.

Rentala Narasimha Rao — Appellant

v.

Rentala Venkataramana Rao — Respondent.

Second Appeal No. 278 of 1939, Decided on 31st July 1941, against decree of Sub-Judge, Rajahmundry, in A. S. No. 40 of 1338.

(a) Jurisdiction—Civil Court— Right created by special statute and remedy provided therein for violation of such right — That remedy must be pursued.

Ordinarily, when a right is created by a special statute, and a remedy is provided by that very statute for cases of violation of that right, the party aggrieved must pursue the remedy given by the statute. [P 857 C 2]

(b) Madras Hereditary Village Offices Act (3 of 1895), Ss. 13, 21 — Suit for mere declaration that defendant is illegally appointed karnam ignoring plaintiff's claim — Civil Court cannot entertain such suit.

A civil Court cannot entertain a suit for a mere declaration that the defendant is illegally appointed karnam ignoring the plaintiff's claim. Such a suit is barred by S. 21 and a suit under Sec. 13 in the revenue Court for recovery of the office will give the plaintiff adequate and complete relief. In such a suit the plaintiff will necessarily get an adjudication whether the defendant's appointment can prevail over his rights. By asking for a declaration that the defendant's appointment is illegal which really is unnecessary he cannot have a trial in the civil Courts. [P 857 C 2; P 858 C 1]

(c) Declaratory suit—Mere declaratory relief—Grant of, is discretionary — It should not be granted by civil Court when such relief is unnecessary and plaintiff can get what he wants in revenue Court.

The granting of a mere declaratory relief is discretionary; the Court is not bound to grant it in every case even when the plaintiff proves a right. The civil Courts should refuse to entertain a suit where the remedy which the plaintiff asks in the civil Court is unnecessary and where the relief which he really wants is to be sought in the revenue Courts. [P 858 C 1]

K. Kameswara Rao — for Appellant.

K. Venkatarama Raju — for Respondent.

Judgment. — The respondent, a minor, filed the suit out of which this second appeal arises for a declaration that the order appointing the appellant as the karnam of the village of Kapavaram is illegal and ultra vires, to register him as the karnam and to appoint a deputy for him. The plaintiff's case is that his grandfather Rentala Achyutharamayya who was the holder of the office in question died in 1928 leaving two sons, defendants 1 and 2 that the plaintiff's father defendant 2, who was the elder of the two sons was then holding the karnam's office of another village, that the Revenue Divisional Officer appointed defendant 1, the younger son ignoring the senior line of the plaintiff and that defendant 1's appointment is contrary to the provisions of section 10 (2), Madras Hereditary Village Offices Act. Defendant 1 contended that the plaint should have been filed in the revenue Courts under S. 13 (1) of the Act and that the civil Courts have no jurisdiction to try the suit. The plaintiff then withdrew the reliefs regarding the registry of the office in his name and the appointment of a deputy and confined the suit to one for a declaration of the invalidity of the defendant's appointment.

The question is whether the Civil Courts ought to entertain such a suit? In the plaint the defendant is said to have been illegally appointed ignoring the plaintiff's right by succession under the Act. It is the Madras Hereditary Village Offices Act that confers the right by succession claimed by the plaintiff. If a third party was appointed by the Revenue Divisional Officer in violation of his right, his obvious remedy was to sue in a revenue Court for the recovery of the office from the person who according to him was wrongfully appointed. In such a case the question whether the plaintiff or the defendant was under the Act entitled to be appointed would be decided. Indeed, in most of the suits under S. 13 of the Act, that would be the main question arising for decision. Ordinarily, when a right is created by a special statute, and a remedy is provided by that very statute for cases of violation of that right, the party aggrieved must pursue the remedy given by the statute. In fact S. 21 bars the civil Courts from entertaining such a suit. In this case, the plaintiff wants to recover the office; in fact the plaint started as such. Can the plaintiff be permitted to have the matter agitated before the civil Courts by merely confining the relief to one for a declaration of the invalidity of the defendant's appointment?

A suit in the revenue Court for recovery of the office will give the plaintiff adequate and complete relief. In such a suit the plaintiff will necessarily get an adjudication whether the defendant's appointment can

prevail over his rights. It is not as if he is suing for establishing a right on behalf of his family where the only remedy available is a declaration of the invalidity of the defendants's appointment which suit does not lie under S. 13 of the Act. In this case, the plaintiff seeks to enforce his own personal right to succeed to the office which is expressly provided for by S. 13. He cannot, therefore, be permitted to do indirectly what he cannot do directly. If the plaint is for recovery of the office which is the relief arising on the plaint allegations he must file the suit in the revenue Court ; and that Court will as it is bound to do, decide the question whether the defendant or the plaintiff was entitled to be appointed. By a mere trick in pleading and framing the relief as one for a declaration of the invalidity of the defendant's appointment, the plaintiff is really trying to get behind the plain provisions of Ss. 13 and 21 of the Act. Further, such a declaration is really unnecessary to ask ; if the plaintiff files the suit under S. 13 asking for recovery of the office, the Court will in adjudicating his claim, decide whether the appointment of the defendant was illegal. The plaintiff need not ask for a separate relief by way of a declaration that the defendant's appointment is illegal. By asking for a declaration that the defendant's appointment is illegal which really is unnecessary he cannot have a trial in the civil Courts. The granting of a mere declaratory relief is discretionary; the Court is not bound to grant it in every case even when the plaintiff proves a right. The civil Courts should refuse to entertain a suit of this kind where the remedy which the plaintiff asks in the civil Court is unnecessary and where the relief which he really wants is to be sought in the revenue Courts. Otherwise, the provisions of Ss. 13 and 21 of the Act, will be rendered useless in the vast majority of the cases for which they are intended. The plaintiff has only to confine the prayer to one of a declaration that the defendant's appointment is invalid; and he can always file such a suit in the civil Court. The decisions of the lower Courts are reversed and the suit is dismissed with costs throughout. No leave.

C.R.K./K.S. *Appeal allowed.*

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* (28) A. I. R. 1941 Madras 858

PANDRANG ROW AND KING JJ.

Al. Ct. Alagappa Chettiar through agent Ranganatha Ayyangar—Appellant

v.

Ramakrishna Ayyar and others — Respondents.

Appeal No. 37 of 1938, Decided on 26th March 1941, against order of Sub-Judge, Madura, D/- 2nd February 1937.

*** (a) Limitation Act (1908), Art. 182 (5) — "Final order" means final order on application and not final order as against any judgment-debtor.**

Under Art. 182 final order means the final order on the application and not the final order as against any judgment-debtor. [P 859 C 2]

A petition filed in November 1929 was finally disposed of on 18th December 1933. In so far as certain judgment-debtors (respondents) were concerned the executing Court passed an order on 30th March 1931 calling upon the petitioner to make fresh application with fuller and better particulars. Subsequent execution application was filed in 1935. The respondents contended that as against them the date of the final order was 30th March 1931:

***Held* that the contention could not be accepted, that the date of the final order was 18th December 1933 and as such application in 1935 was in time.** [P 859 C 2]

(b) Limitation Act (1908), Art. 182 (5)—Proper Court — Court transmitting decree still retains jurisdiction to execute under certain circumstances.

The Court which has transmitted the decree still retains its jurisdiction to execute it under certain circumstances and is 'proper Court' within the meaning of Art. 182 (5) : ('38) 25 A I R 1938 Mad 113 and ('41) 28 A I R 1941 Mad 731, *Foll.* [P 859 C 2]

R. Gopalaswami Ayyangar—for Appellant.

T. S. Muthuswami, O. V. Baluswami, K. V. Srinivasa Ayyar and K. Vaidhyanathan — for Respondents.

King J. — The appellant here is the assignee of the decree in O. S. No. 70 of 1916 of the Ramnad Sub-Court. His assignor had attached a decree in O. S. No. 53 of 1910, and as assignee he applied in March 1935 to execute that attached decree as against certain of the defendants. Those defendants were ordered by the decree, as amended in appeal in 1928 to pay back the amounts which they had drawn from Court out of the late Rajah's allowance money with interest. In withdrawing the money from Court they had offered the security of immovable property. This application of 1935 by the appellant is to sell the property which they thus offered as security. The appellant relied upon certain previous applications, one of which was filed in November 1928 seven months after the appellate decree, and two of which were filed in 1931 and 1932 respec-

tively. These later applications were not filed by himself but by another attaching decree-holder. It was held by the learned Additional Subordinate Judge of Madura that the application of 1935 was barred by limitation on the ground that it was the first application made after the appellate decree in 1928 to proceed against these particular properties. Apparently the learned Subordinate Judge had overlooked the fact that the decree was granted also personally against these defendants. There is therefore no discussion in the order of the learned Subordinate Judge of the question whether the application of November 1928 was or was not directed against these particular defendants. We find it quite clear that the appellant prayed in general terms for the transmission of copies of the decree to various Courts and for simultaneous execution in order that he might proceed against these defendants as well as the others. There is also an order of the executing Court passed in March 1931 which shows clearly that it was in this sense that the execution application was understood by the Court itself. It is quite clear therefore that in November 1928 the appellant desired to proceed against the present respondents.

According to Art. 182, Limitation Act, he will now be entitled to reckon as the date from which limitation begins to run for his next application the date of the final order on that application. The petition in question was finally disposed of by the Court on 18th December 1933. The learned advocate for the respondents no doubt brings to our attention the fact that in so far as his own clients are concerned the executing Court passed on 30th March 1931 an order calling upon the appellant to make fresh applications with fuller and better particulars. He argues therefore that it is only from this date that the appellant is entitled to count time in regard to limitation and that for our present purpose 30th March 1931 must be considered to be the date of the final order. We are unable to accept this contention. The language of Art. 182 is very simple. It refers to the date of "the final order passed on an application made in accordance with law to the proper Court." Although for certain purposes, as is set out in the explanation, applications have to be analyzed and their effect considered as against particular judgment-debtors, there is nowhere in the section any further explanation which deals with the meaning of this expression "final order." If the Legislature had wished to constitute the final order as against any particular judgment-debtor as the final order to be considered in any future application against him, it would have been easy for it to have said so explicitly. Without any such explicit statement it seems clear to us that the final order on an application can only mean just what it says and that in this case the date of the final order is undoubtedly 18th December 1933. If therefore there are no other objections it is clear that the application of 1935 is within time in its relation to the application of 1928.

There are however two other objections raised on behalf of the respondents. The first is that the application of 1928 was not made to the proper Court. As has already been stated, the prayer in the application was to transmit the decree to certain other Courts and we have been informed that in actual fact the decree had been transmitted years before to these other Courts and had never been returned. It was therefore argued that since the decree had been transmitted before from the executing Court, the Court which transmitted it had lost all jurisdiction in the matter of further execution and therefore this petition was not presented to the proper Court. A very similar argument was addressed to us only last week in connexion with another Civil Misc. Appeal No. 342 of 1939[1] and we have there dealt with it in full, and have given reasons for holding that the Court which has transmitted the decree still retains its jurisdiction to execute it under certain circumstances. We have there followed a decision of a Bench of this Court in I L R (1938) Mad 326.[2] Nothing has been addressed to us in the argument today which leads us to dissent from the views which we expressed so recently. We are accordingly of opinion that the present application, which is similar in its facts to the one with which we then dealt, was made to the proper Court.

Finally it is argued that under S. 48, Civil P. C., the appellant is barred from filing this particular execution application on the ground that although the execution of the decree in O. S. No. 53 of 1910 may not be barred, the execution of the decree in O. S. No. 70 of 1916 was barred by 1935. No doubt the period between 1916 and 1935 is well in

1. *Reported in* ('41) 28 A I R 1941 Mad 731 : (1941) 1 M L J 837, Kandaswami Chettiar v. Gokuldas Madanji & Co., Tuticorin.
2. ('38) 25 A I R 1938 Mad 113 : 176 I C 753 : I L R (1938) Mad 326, Muthu Rama Reddi v. Motilal Durga.

excess of 12 years, but we can see no reason for holding that in proceeding to execute the decree in the 1910 suit which had been attached by his assignor years before, the appellant was in reality executing his own decree of 1916. In our opinion, by the act of attaching the decree in the 1910 suit the appellant has done all he can to secure for himself in his 1916 suit the property of his judgment-debtor. In proceeding to execute the decree which he has attached he is essentially doing nothing more than he would be doing if he proceeded to sell ordinary landed property which he had attached. We are not therefore convinced that the present application in any sense involves the execution of the decree of 1916. It is therefore irrelevant that the decree of 1916 was barred by 1935. In the result there are no grounds whatever for holding that the application now in question was barred by limitation. This appeal must accordingly be allowed and the application restored to file and disposed of by the learned Subordinate Judge in accordance with law. The respondents must pay the appellant's costs in this Court. The costs of the execution application will abide the result.

C.R.K./K.S. *Appeal allowed.*

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* (28) A. I. R. 1941 Madras 860

VENKATARAMANA RAO J.

Paruvastu Pattabhirama China Govinda Charyulu — Appellant

v.

Punyamurthula Seshagiri Rao — Respondent.

Second Appeal No. 854 of 1937, Decided on 8th August 1940, against decree of Sub-Judge, Rajhmundry, in A. S. No. 47 of 1936.

* **Tort — Libel — Accord and satisfaction — Withdrawal of criminal complaint on tender of unconditional apology does not bar civil action for damages unless specifically agreed to between parties that acceptance of apology should operate as accord and satisfaction.**

A certain act might give rise to a cause of action in tort and at the same time furnish a ground for a criminal complaint. One remedy is different from the other and any adjustment of the criminal complaint would not operate as an accord and satisfaction of the civil action for damages. In one case in the interests of the State the wrongdoer is punished whereas in the other compensation is awarded to the person who suffers by the injury. Therefore unless at the time of giving the unconditional apology on which the criminal complaint is withdrawn it was specifically agreed between the parties that the acceptance of the apology should also operate as an accord and satisfaction of the civil action for damages for the libel, a civil action for damages is not barred. [P 861 C 1, 2]

K. Krishnaswami Ayyangar and A. Seshachari — for Appellant.

K. Bhimasankaran — for Respondent.

Judgment. — This second appeal arises out of an action for damages for libel filed by the plaintiff against the defendant in respect of certain allegations made by the latter in writing to the Superintendent of Post Offices concerning an appointment to the branch post office at Vadapalli. This was in December 1932. On 8th February 1933 the plaintiff sent a notice to the defendant requiring him to tender an unconditional apology within 15 days of the date of receipt of this notice and threatening a civil or criminal action in case he failed to do so. On 26th February 1933 the defendant sent a reply stating that the allegations made by him in his petition were not false, that he never intended to harm his reputation and that he was sorry that the allegations which he had made should have given rise to any misapprehension in regard to his intention. Of course this was not an unconditional apology as required by the plaintiff. Thereupon the plaintiff filed a criminal complaint. The defendant justified his action and the criminal complaint was dismissed. A revision petition was preferred against the said order and after a lengthy argument addressed by both sides as observed by the Sessions Judge who disposed of the case, the defendant herein withdrew his allegations against the plaintiff and expressed regret. In view of the unconditional apology the plaintiff withdrew the criminal complaint, and made an endorsement to that effect on the complaint petition. Subsequent to this, some misunderstandings apparently arose and this suit had been filed for damages. In the written statement filed by the defendant he justified his action, pleaded qualified privilege and also alleged that he having tendered an apology in the criminal Court, the suit ought not to have been filed. The learned District Munsif went elaborately into all the questions and found against the plea of qualified privilege and that the apology was no defence to a civil action in tort and in assessing damages he observed as follows :

I do not think that damages to the extent of Rs. 100 should be granted to the plaintiff, because if the defendant acted meanly in sending the petition with a view to cause loss to his enemy and gain to his own relative, the plaintiff acted at least equally meanly in filing the criminal case and more meanly in filing this suit.

He therefore thought that the plaintiff was entitled to nominal damages and gave

him Rs. 5 for damages and also the costs of the suit. It would have been better if both the parties had contented themselves with this decision, but the defendant chose to file an appeal against that decision to the learned Subordinate Judge. The appeal was dismissed and against that dismissal this second appeal has been preferred. Mr. Krishnaswami Ayyangar for the defendant has urged before me two points, (1) that his client was justified in sending the petition containing the allegations because he was a person interested as a villager in making the complaint to the Postal Superintendent and therefore his client was protected by qualified privilege and (2) that the unconditional apology given in the Sessions Court and accepted by the plaintiff who in consequence withdrew the criminal revision petition operates as an accord and satisfaction of the action for damages for libel. In regard to the first point I fail to see what interest the defendant had in a matter concerning an appointment by the Government. I think that the view taken by the learned Subordinate Judge is perfectly sound and no question of qualified privilege arises in this case.

In regard to the second point raised by Mr. Krishnaswami Ayyangar there was undoubtedly some force in his argument that the defendant while giving an apology never contemplated that a civil action would again be brought against him. But the question is not what his client thought, but the question is, what is the effect of the unconditional apology given before the criminal Court? A certain act might give rise to a cause of action in tort and at the same time furnish a ground for a criminal complaint. Ordinarily, in English law, where a certain act gives rise to an indictment for felony and also to a civil action in tort, it is usual to have recourse to criminal proceedings before an action in tort for damages is filed. One remedy is different from the other and any adjustment of the criminal complaint would not operate as an accord and satisfaction of the civil action for damages. In one case in the interests of the State the wrongdoer is punished whereas in the other compensation is awarded to the person who suffers by the injury. Therefore unless at the time of giving the unconditional apology it was specifically agreed between the parties that the acceptance of the apology should also operate as an accord and satisfaction of the civil action; prima facie I must take it that the parties intended to terminate the criminal litigation by the unconditional apology. I am inclined to agree with the lower Court and hold that the endorsement in the criminal complaint made by the Sessions Judge terminates only the criminal complaint and cannot be construed as a release of the plaintiff's right of suit for damages.

It appears that even after the termination of the criminal proceedings this apology was published in the newspapers and the plaintiff may well have been content with that. But he has chosen to assert his legal right to get redress for the injury he has sustained and he cannot be deprived of his legal right, though discretion may be vested in the Court in assessing damages. That is what the first Court has done and I cannot say that the damage awarded is excessive nor Mr. Krishnaswami Ayyangar complains that it is. I am also of opinion that the order for costs is not wrong, because the defendant did not content himself with pleading that the unconditional apology given by him in the criminal case operated as an accord and satisfaction but began to justify his action by pleading qualified privilege and the Court had to investigate into the matter. If he had not taken this other plea, I would probably have deprived the plaintiff of his costs of the litigation, but in the circumstances I cannot say that the exercise of discretion by the lower Court in awarding costs to the plaintiff is wrong. The second appeal fails and is dismissed with costs. Leave to appeal refused.

C.R.K./K.S. *Appeal dismissed.*

*** (28) A. I. R. 1941 Madras 861**

KING J.

Maharaja of Cochin, by agent the Secretary to Government of Cochin —

Appellant

v.

Thupran — Respondent.

Appeal No. 68 of 1939, Decided on 20th August 1940, against appellate order of Sub-Judge, Ottapalam, in A. S. No. 68 of 1937.

***Res judicata—Execution proceedings—Decision on point raised at one stage of execution application operates as res judicata on same point in later stage of same execution application if decision is final one.**

The provisions of S. 11, Civil P. C., are not exhaustive and the principle of res judicata can be extended to cases which do not fall strictly within their terms: 6 All 269 (PC) and ('21) 8 AIR 1921 P C 11, *Foll.* [P 862 C 2]

A decision on a point which would be final at one stage of an execution application prevents the

same point being raised in a subsequent stage of the same execution application irrespective of whether the decision is right or wrong. [P 862 C 2]

In response to a notice of sale proclamation, an objection was raised that certain property mentioned in the proclamation did not come within the boundaries of the property described in the decree and that in any case, the objector was entitled to compensation. These contentions were not substantiated on the date of hearing and sale was ordered to be held. As the sale was not held on the date fixed, a fresh proclamation was ordered whereupon the objector raised the same objections :

Held that the decision on the construction of the decree was final as the objector though he had right of appeal did not appeal and operated as res judicata : 10 I C 632 (Mad) ; 24 Mad 683 and 6 All 269 (PC), *Rel. on* ; ('18) 5 AIR 1918 Mad 1167, *Expl.* [P 863 C 1]

V. Radhakrishnayya and K. P. Ramakrishna Iyer — for Appellant.

B. Pocker — for Respondent.

Judgment.—This appeal arises in execution, and raises a question of the application of the principle of res judicata. The appellant, who is the decree-holder applied in execution to sell the properties which he alleged were included in his decree. Amongst them was a certain site on which stands a school building, and to this property the respondent who was defendant 31 in the suit lays claim. Sale was ordered and notice of the proclamation of sale issued under O. 21, R. 66 to the respondent. In response to this notice respondent filed objections contending that the site in question was not included within the boundaries of the property with which the decree dealt, and also that in any case the school building was an improvement for which he had to be paid. On the day of hearing, however, the respondent made no attempt to substantiate these contentions, and sale was ordered to be held on 27th February 1935. There was no sale on that day. A fresh proclamation was ordered on 1st March, fixing 5th June as the date of the sale. On 4th June, respondent applied under S. 47, Civil P. C., for an order excluding the property now in dispute from the sale. This application was dismissed by the learned District Munsif of Chowghat on the ground that the matter in issue was res judicata. On appeal the learned Subordinate Judge of Ottapalam reversed this finding and gave a declaration that respondent is not debarred from proving in later proceedings that he is entitled to be compensated for his improvements. It is against this order that the present appeal has been filed. The reason given by the learned Subordinate Judge for allowing the appeal before him is one which cannot be supported, and has not been supported in the arguments before me. He says in effect that in law the respondent's claim to have his improvements exempt from sale in this suit was unanswerable, and that therefore he need have paid no attention to the notice served upon him. This appears to mean that if a party has a good point of law to raise, he need not raise it, but can rely upon the omniscience of the Court—and it ignores altogether the elementary principle that a decision may be res judicata whether it be right or wrong.

The question then arises whether the learned Subordinate Judge's decision can be supported on any other ground. I do not think it can. No doubt this case does not fall strictly within the provisions of S. 11, Civil P. C., but as the Privy Council has pointed out, *see* 6 ALL 269[1] and 48 Cal 499,[2] the provisions of S. 11 are not exhaustive, and the principle of res judicata can be extended to cases which do not fall strictly within their terms. No doubt also there is no direct authority for the application of the principle to a subsequent stage of the same execution application but cases like the present in which negligence at the stage of settling the sale proclamation is followed by reawakened activity before the sale is actually held are certain to be rare ; and I can see no logical reason why a decision which would be final if the sale were not held, and a fresh execution application were filed should not be equally final in the circumstances of this case. The question to my mind really depends upon the nature of the decision. Is it a decision which would be final if not appealed against ? Some matters which a Court decides in approving a sale proclamation are of course administrative only—others cannot from their nature be res judicata. If for instance, there is a personal decree against A and the decree-holder applies to sell certain property on the ground that it belongs to A, the Court may hold that he may do so, but if that sale is not held, and a subsequent application is filed it is obviously open to an assignee from A to contend that after the assignment the property is no longer saleable. That is to say, the decision is merely one that property is saleable in particular circumstances and at a particular time. But the decision to sell the present property is one which would clearly be binding upon an assignee. It goes

1. ('84) 6 All 269 : 11 I A 37 (PC), Ram Kirpal v. Rup Kuari.
2. ('21) 8 AIR 1921 P C 11 : 60 I C 631 : 48 Cal 499 : 48 I A 187 (PC), Hook v. Administrator-General of Bengal.

to the root of the construction of the decree. The decree provides that certain property may be sold. If this property comes within the description of the property specifically covered by the decree it must be sold. Similarly, the question whether compensation is payable to the respondent must depend upon the construction of the decree. On these questions of title it cannot seriously be denied that the respondent had the right of appeal: *see* 45 M L J 478.[3] He has not appealed and in approaching the executing Court itself with a petition under S. 47 has misconceived his remedy. Cases are numerous in which a decision on the construction of a decree has been held to be res judicata : *see* for instance 10 I C 632,[4] 24 Mad 683[5] and 6 ALL 269.[1]

Respondent's learned advocate relies upon 40 Mad 1016,[6] but I find nothing in that case which assists him. The learned Judges who decided it point out that though caution should be used in applying the principle of res judicata to execution proceedings the Judicial Committee has pointed out that parties should not be allowed to agitate the same question after it has once been decided; and they base their judgment in the case on the fact that the judgment-debtors there had no notice that execution was proceeding against any particular item of property. In the present case the title to the property in dispute was directly in issue. I am of opinion therefore that the decree of the learned Subordinate Judge must be set aside and the decree of the learned District Munsif restored dismissing respondent's application with costs throughout. Leave granted.

C.R.K./K.S. *Appeal allowed.*

3. ('24) 11 AIR 1924 Mad 365 : 77 I C 148 : 45 M L J 478, Vedaviasa Iyer v. Madura Hindu Labha Nidhi Co., Ltd.
4. ('11) 10 I C 632 (Mad), Kondama Naidu v. Venkalakshmi.
5. ('01) 24 Mad 683, Subbarama Iyer v. Nagammal.
6. ('18) 5 AIR 1918 Mad 1167 : 38 I C 627 : 40 Mad 1016, Subramania Iyer v. Raja Rajeswara Dorai.

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(28) A. I. R. 1941 Madras 863

VENKATARAMANA RAO
AND HORWILL JJ.

V. Ranga Rao — Appellant

v.

Collector of Trichinopoly — Respondent.

Appeal No. 419 of 1938, Decided on 31st March 1941, against order of the Dist. Collector, Trichinopoly, D/- 21st April 1938.

Madras Village Courts Act (1 of 1889), S. 8— Requisition by District Judge to Collector for taking action against Village Munsif without giving opportunity to Village Munsif and order of removal from office—Order should be set aside.

Once the Collector receives a requisition from the District Judge calling upon him to act under the section, the power vested in him under the section is only in regard to the punishment whether in the circumstances of the case he should pass an order of suspension or removal. But before the District Judge makes up his mind to send a requisition it is his duty to give notice to the Village Munsif to show cause why he should not recommend to the Collector that an action should be taken against him under S. 8 of the Act and hear him, and if he offers any evidence receive and consider it. If he does not give an opportunity to the Village Munsif, the order of the Collector for removal from office should be set aside. [P 864 C 2]

K. G. Srinivasa Ayyar — for Appellant.

Government Pleader — for Respondent.

Venkataramana Rao J. — The question for decision in this appeal is whether the order of the Collector of Trichinopoly removing the appellant from the office of the Village Munsif of Bikshandar Koil is valid. The relevant facts are few and not in dispute. On 3rd November 1937 an application was made to the Judge of the Court of Small Causes, Trichinopoly, for a transfer of Suit No. 1 of 1937 on the file of the Bikshandar Koil Village Court filed by Mookka Nadar against Lakshmayi Ammal. The application for transfer was made by Lakshmayi Ammal and she obtained a stay order on 4th November 1937 directing the Village Munsif not to proceed with the trial of the suit which was posted for 5th November 1937. In spite of the stay order which is alleged to have been communicated to him on the 5th, the appellant went on with the suit and decreed it. Thereupon an application was made for revision of the decree and the learned Judge of the Court of Small Causes, Trichinopoly, set aside the decree of the Village Munsif under Sec. 73, Village Courts Act, holding that the appellant in spite of the notice of the stay order went on with the suit and passed the decree. He also came to the conclusion that the Village Munsif was guilty of misconduct and reported the matter to the District Judge of Trichinopoly under S. 74, Village Courts Act. On 4th April 1938 the learned District Judge wrote a letter to the Collector of Trichinopoly observing that he saw no reason to differ from the Judge of the Court of Small Causes and requesting him to take necessary action against the Village Munsif under S. 8 of the Act. On receipt of that letter the

Collector gave notice to the appellant to show cause why he should not be removed for misconduct. Before the Collector the appellant tried to argue that the finding of the Court of Small Causes was wrong. The Collector, having regard to the provisions of S. 8 of the Act, thought that he could not go behind that finding and all that he was required to do under the Act was to assess the punishment and the proper punishment he could award was removal of the appellant from his office. It is against this order that the appellant has preferred this appeal. It is contended by Mr. Muthukrishna Iyer on his behalf that the order of the Collector was wrong and that in any event the appellant should have been heard either by the Collector or by the District Judge and an opportunity should have been given to him to vindicate his innocence. Section 8 of the Village Courts Act runs thus :

> The Collector of the district may suspend or remove a Village Munsif for incapacity, neglect of duty, misconduct or other just and sufficient cause, and shall do so, on a requisition passed by the District Judge for like cause appearing in the judicial proceedings of a village Court.
>
> From every order (of suspension or removal) an appeal may be made within three months to the Board of Revenue, if the order was passed by the Collector without orders from the District Judge, or to the High Court if passed upon such orders. The decision of the Board of Revenue or High Court, as the case may be, on all such appeals shall be final.

Giving the language of the section its plain and grammatical meaning, the view taken by the Collector is correct. Once the Collector receives a requisition from the District Judge calling upon him to act under the section, the power vested in him under the section is only in regard to the punishment whether in the circumstances of the case he should pass an order of suspension or removal. This view is strengthened by the use of the words "orders from the District Judge" occurring in cl. (2) of the section. The use of the word 'may' in regard to an action taken by the Collector himself as contrasted with the use of the word 'shall' in regard to an action taken on a requisition from the District Judge clearly indicates that in the one case he has got a discretion, whereas in the other, he has not. But it seems to us nevertheless that the order of the Collector cannot be sustained. When a report is made by a District Munsif under S. 74 to the District Judge, the Act does not provide what the District Judge should do before making a requisition to the Collector to act under S. 8 of the Act. In the absence of such a procedure, having regard to the nature of the requisition, he must act according to principles of natural justice. They require that no person shall be subject to a final judgment or punishment without an opportunity of being heard unless the Legislature has either expressly or impliedly given authority to act without that necessary preliminary. There is nothing in the provisions of the Act which dispenses with that necessary preliminary. Before the District Judge makes up his mind to send a requisition, it is his duty to give notice to the Village Munsif to show cause why he should not recommend to the Collector that an action should be taken against him under S. 8 of the Act and hear him, and if he offers any evidence, receive and consider it. In this case there was no doubt a petition submitted to him by the Village Munsif to the effect that the finding of the Court of Small Causes was not proper. The learned District Judge also says that he considered the grounds alleged in the petition. But that is not enough. Having come to the conclusion that he must take action, he must have given notice to the Village Munsif and called upon him to urge what he could against the finding of the Court of Small Causes. The fact that an appeal is provided against the order of the suspension or dismissal shows that there should be a judicial determination of the question of misconduct to which the appellant must be a party. The finding in this case of the Judge of the Court of Small Causes with which the District Judge agreed was arrived at in a proceeding to which the appellant was not a party.

We are, therefore, of the opinion that the order of the Collector must be set aside and that the learned District Judge should be directed to give notice to the Village Munsif, Bikshandar Koil, to show cause why he should not recommend to the Collector to take action against him under S. 8 of the Act. The learned District Judge will hear and examine witnesses whom the appellant, if he thinks necessary, may produce. We accordingly set aside the order of the Collector, send the papers back to him directing him to forward the same to the learned District Judge for necessary action in the light of the observations contained in this judgment; we make no order as to costs.

C.R.K./K.S. *Order set aside.*

(28) A. I. R. 1941 Madras 865

KING J.

Prativadi Bhayamharam Singarachar-yulu and another — Appellants

v.

Addala Sesharao and others — Respondents.

Appeal No. 259 of 1939, Decided on 22nd August 1940, against order of Sub-Judge, Coconada, D/- 24th October 1938.

Landlord and tenant — Suit for ejectment and arrears of rent — Defendant pleading that Civil Court has no jurisdiction — Onus is on him to prove it and not on plaintiff to prove his title to evict.

Where the plea of defendants in a suit is a plea that the civil Court has no jurisdiction to try the suit the burden of proof lies upon the defendants. [P 865 C 2]

In a suit for ejectment and arrears of rent, the defendant pleaded that the grant was an inam and as such the civil Court had no jurisdiction :

Held **that the onus of proof lay on the defendant to prove his allegation and that it was not on the plaintiff to establish his title to evict : ('34) 21 A I R 1934 P C 84, *Applied*.** [P 865 C 2]

V. Govindarajachari and M. Rangachari — for Appellants.

Judgment. —This appeal arises out of a suit filed by the plaintiff to eject the defendants and recover arrears of rent from them, and the subject-matter is a certain land in the village of Dontamuru, measuring 5 acres in extent. That land was admittedly granted by the zamindar of Kirlampudi in or shortly before 1862 to the predecessor-in-title of the plaintiff and the question at issue in this appeal is whether the transaction between the zamindar and the plaintiff's predecessor-in-title amounted to the grant of an inam or to the grant of a permanent lease. If the land is an inam, the defendants have admittedly occupancy rights and cannot be ejected. If the grant was a permanent lease, it is equally clear that it is the plaintiff who can lay claim to occupancy rights and the defendants cannot resist the suit for eviction. The learned District Munsif of Peddapuram decreed the suit. In appeal, the learned Subordinate Judge held that the defendants had occupancy rights and therefore they could not be ejected, and that the suit for recovery of rent lay only in the revenue Court. He accordingly directed the plaint to be returned for presentation to the proper Court. It is against this order that the plaintiff now appeals before me.

There are a number of documents which are of importance in deciding the appeal, but it may be mentioned at the outset that there is one point of law upon which the appeal has been decided and wrongly decided by the learned Subordinate Judge. After a discussion of the documents, he comes to the conclusion that they are ambiguous and afford no certain indications either way. He then holds that in the absence of any proof that there was a permanent lease granted to the plaintiff, it must be found that the grant was of an inam, in other words, that the burden of proof lay upon the plaintiff as the one who has instituted the suit and if he has not succeeded in establishing his title to evict, the suit must be dismissed. This is contrary to the law as laid down in a decision of the Privy Council reported in 57 Mad 443.[1] At p. 451, it is pointed out that the plea of defendants is a plea that the civil Court has no jurisdiction to try the suit and in a plea of that nature, the burden of proof lies upon the defendants. It seems to me clear that if the learned Subordinate Judge had followed the proposition of law as laid down by the Privy Council in this decision, he would have decided the appeal differently.

I think also that the present appeal should be allowed on the interpretation of the documents. The learned Subordinate Judge was quite right in my opinion—and indeed in this matter he agrees with the learned District Munsif — in holding that EX. F, which though not the title deed in itself recites what must have been the terms of the title deed, is inconclusive. It uses the expression, 'Nimebadi Kattubadi,' which suggests that the land is an inam; it also uses the expression 'permanent patta,' which suggests that the land was granted on lease. But when we come to an examination of certain accounts of recent years, which have been filed, to show in what way this land was regarded by the successor of the zamindar of Kirlampudi, we find clear indications that the estate regarded it not as an inam at all but as a lease. The documents in question are EXS. H, J and K. In all these documents, the land in question is no doubt described as land with favourable rate of cist (rayiti cist bhumulu) and this is also undoubtedly a third classification of land—the first kind of land is jeroyithi land in which the ryot pays full cist on the estate; the second is dharmilla inam and we find in this village in the case of darmilla inam, no kattubadi at all is payable; and this expression, 'land with favourable rate of cist' forms, as I have said, a

1. ('34) 21 AIR 1934 PC 84 : 148 IC 327 : 57 Mad 443 : 61 I A 177 (P C), Ramayya v. Lakshminarayana.

third classification. The learned Subordinate Judge thinks that as it is distinct from both jeroyithi and dharmilla inams, the ambiguity created by EX. F still remains. The learned Subordinate Judge has overlooked certain columns in these documents which seem to me to be conclusive. In EX. H for instance, which is the 'amarakam register' or rent-roll for the village, we find Columns 8 and 9 deal with the amount of money which must be annually paid to the estate. Column 8 is headed kattubadi and Col. 9 jeroyithi cist, and it is under this Col. 9 that the amount due on the land in dispute has been entered. Having regard therefore to the payment of the annual dues, the estate does not recognize three kinds of payment but only two kinds, and although this land may be called 'with favourable rates of cist,' when it comes to a decision as to whether it is kattubadi or cist which is payable, the documents make it clear that it is cist and not kattubadi. Similarly, in EXS. J and K, the amount due for this land, Rs. 8, is recorded in the column headed 'jeroyithi cist.' It seems to me therefore that the learned Subordinate Judge might well have held that EXS. H, J and K were clear on the question of the treatment of this land by the estate, and might have rejected the contention that because as a matter of fact there was no payment on any of the lands specifically described as dharmilla inams, there might be dharmilla inams on which kattubadi was payable included by the estate under the heading of lands with favourable rates of cist.

I am of opinion, therefore, that both on the question of law regarding the burden of proof and on the issue of fact depending upon the interpretation of important documents, the learned Subordinate Judge was in error in allowing the appeal before him. This appeal is allowed and the decree of the learned District Munsif restored with costs throughout.

C.R.K./K.S. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 866

ABDUR RAHMAN J.

Kuppuswami Naidu and others — *Appellants*

v.

Kuppuswami Naidu and others — *Respondents.*

Second Appeal No. 92 of 1938, Decided on 17th January 1941, against decree of Sub-Judge, Vellore, in A. S. No. 54 of 1936.

Adverse possession — Possession open and capable of being known by parties interested in property — Possession need not be known to owner to be adverse — Absence of owner from India whether voluntary or involuntary is immaterial.

Possession to be adverse need not be known by the owner to be adverse as long as it is open and capable of being known by the parties who are interested in the property : ('34) 21 A I R 1934 P C 23, *Rel. on.* [P 866 C 2]

The absence of the owner from India whether voluntary or involuntary is not a ground for exemption from the starting of adverse possession against the owner under the Limitation Act. [P 866 C 2]

C. R. Rajagopalachari and K. S. Sankara Iyer — for Appellants.

V. Ramaswami Iyer — for Respondents.

Judgment. — This appeal arises out of a suit for possession of two items of property which were sold by the plaintiff's stepmother in April 1915 to defendant 1 while the plaintiff was undergoing imprisonment in the Andamans under a sentence of transportation for life. The plaintiff came back in 1926 and brought the present suit in 1934. The properties changed hands in the meantime defendant 1 having sold one item to defendant 2 on 27th April 1928 and item 2 to defendant 3 on 27th June 1928. The present suit was brought in January 1934. It was decreed in the first instance by the District Munsif of Ranipet. On appeal, however, the learned Subordinate Judge of Vellore dismissed it on the ground of limitation.

The question to decide in this appeal is whether the decision of the learned Subordinate Judge on that question is right. After hearing learned counsel for the plaintiff, I have no hesitation in coming to the conclusion that it is so. It was contended on behalf of the plaintiff that adverse possession should not be held to start against him when he was not in India and his absence was not voluntary but enforced. This is not, however, a ground of exemption under the Limitation Act. Whether the plaintiff was voluntarily out of India or involuntarily so is entirely immaterial. The fact that he was not actually aware of the fact that other persons were in adverse possession of the property left by his father is also irrelevant. As pointed out by the learned Subordinate Judge, possession need not be known by the plaintiff to be adverse as long as it is open and capable of being known by the parties who are interested in the property. It was so held by their Lordships of the Privy Council in 66 M L J 134.[1] It must therefore

1. ('34) 21 A I R 1934 P C 23 : 147 I C 545 : 61 Cal 262 : 61 I A 78 : 66 M L J 134 (P C), Secretary of State v. Devendralal Khan.

be held that the decision of the lower appellate Court was correct. The appeal, therefore, fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 867

KING J.

Arunagiri Goundan and another — *Petitioners*

v.

Ramaswami Pillai — *Respondent.*

Civil Revn. Petn. No. 1300 of 1939 and Civil Misc. Petn. No. 3951 of 1941, Decided on 29th July 1941, to revise judgment and decree of Dist. Court, South Arcot, in A. S. No. 101 of 1937.

(a) Provincial Small Cause Courts Act (1887), S. 35 — Suit filed as small cause suit and disposed of by Judge having small cause powers —No appeal lies even if suit has been numbered as original suit.

When a suit is filed as a small cause suit and is disposed of by a Judge who possessed the necessary powers to try it as a small cause suit, it must be deemed to have been disposed of as a small cause suit and therefore there can be no right of appeal. This legal principle must be applied even though the suit be numbered as an original suit : ('35) 22 A I R 1935 Mad 919, *Foll.*; ('41) 28 A I R 1941 Mad 103 and ('32) 19 A I R 1932 Mad 683, *Disting.* [P 867 C 2]

(b) Civil P. C. (1908), S. 115 — Court having no jurisdiction to entertain appeal doing so — Interference is necessary if decision is wrong.

Where a Court which has no jurisdiction to entertain an appeal does entertain the same, the High Court should interfere in revision unless there are clear indications that the appellate Court is obviously right and the trial Court obviously wrong upon other points in the case. [P 868 C 1]

T. E. Ramabhadrachariar — for Petitioners.

I. K. Deva Rao — for Respondent.

Order.—The subject-matter of this petition is a promissory note executed by defendant 1 in a suit in the Court of the District Munsif of Tindivanam numbered as O. S. No. 193 of 1936. The plaintiffs are the nephews of one Shunmugha Goundan in whose favour the promissory note had been assigned. Shanmugha Goundan is now dead and the plaintiffs have filed this suit as members of the joint family to which Shanmugha Goundan had belonged and who therefore continue to own the joint family property. The suit was decreed by the learned District Munsif in somewhat unusual circumstances. It was originally filed as a small cause suit in Tindivanam, its valuation being below Rs. 300 and the Judge who was then in charge of the Court having extended small cause powers. This Judge was succeeded by another Judge who was not so empowered and so the suit was transferred to the original side. A third District Munsif then presided over the Court and he was empowered to try all suits up to the valuation of Rs. 300 as small cause suits. This third District Munsif has clubbed together three suits and disposed of them in a single judgment. The third of these suits is the one which was numbered as O. S. No. 193 of 1936. Defendant 1 in O. S. No. 193 of 1936 after the decree had been given against him, appealed to the learned District Judge of South Arcot. The learned Judge set aside the decree on the ground that the plaintiffs were not entitled to sue as they had not obtained a succession certificate. This is now a revision petition by the plaintiff against the decree of the learned District Judge dismissing their suit.

The first point taken in revision is that the learned District Judge had no jurisdiction to entertain the appeal. It is contended that when a suit is filed as a small cause suit and is disposed of by a Judge who possessed the necessary powers to try it as a small cause suit, it must be deemed to have been disposed of as a small cause suit and therefore there can be no right of appeal. It is contended further that this legal principle must be applied even though the suit be numbered as an original suit. In support of this contention I have been referred to a decision of Stone J. reported in 69 M L J 443.[1] The facts there are almost precisely similar to those in the present case and with respect I do not see any reason why I should not follow the reasoning of the learned Judge. By the respondent (defendant 1) I have been referred to two rulings of this Court, one of Patanjali Sastri J. in (1940) 2 M L J 700[2] and the other in 55 Mad 960.[3] Both of these cases dealt with facts which can be easily distinguished. They are cases of suits which began their existence as small cause suits in the Court of a Subordinate Judge and were subsequently transferred for trial to a District Munsif. It was held in both of them that the District Munsif was not debarred from trying the suits from the mere fact that they had first been instituted as small cause suits in the Court of a Subordinate Judge. It is of course impossible for any Court to have held in

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1. ('35) 22 A I R 1935 Mad 919 : 159 I C 958 : 69 M L J 443, Ramaswami Muthirian v. Arunachalam Chettiar.
2. ('41) 28 A I R 1941 Mad 103 : (1940) 2 M L J 700, Kamalathammal v. Harihara Iyer.
3. ('32) 19 A I R 1932 Mad 683 : 139 I C 477 : 55 Mad 960 : 63 M L J 689, Chockalingam v. Palaniappa.

the case of suits valued at more than Rs. 300 that when a District Munsif did in fact come to try them, he must be deemed to have tried them as small cause suits. These rulings therefore afford no assistance to the learned advocate for the respondent in attempting to challenge the authority of 69 M L J 443.[1] The argument for the petitioner must be accepted that the learned District Judge had no jurisdiction to hear this appeal.

The only question that remains is whether in these circumstances I should interfere under S. 115, Civil P. C. Such interference is of course permitted, and, in my opinion, should be practised unless there are clear indications that the learned District Judge is obviously right and the learned District Munsif obviously wrong upon other points in the case. I have not gone fully into the question whether the plaintiffs had the right to sue in this matter. It seems to me however, prima facie, that if they are entitled to act for the members of the family, no succession certificate would be necessary for them. See the decision of Beasley J. in 24 M L W 659.[4] I do not propose now to consider the objections sought to be raised on behalf of the respondent that it was in reality the other members of the joint family who had the right to sue, and not the plaintiffs. The situation is simply this: on the finding of fact the respondent owes money upon this promissory note to the joint family. A decree has been passed against him by the District Munsif at the instance of the plaintiffs on the clear understanding that the property in the decree belongs to the joint family. Defendant 1 therefore suffers no prejudice from being compelled to discharge his obligations under this decree. There can be no question of any other plaintiffs suing him for this debt on the allegation that the present plaintiffs have wrongly appropriated it to themselves. There, therefore, remains no obstacle to my taking action under S. 115, Civil P. C., and this being a clear case in which the learned District Judge has acted without jurisdiction I set aside his decree and restore the decree of the learned District Munsif.

During the pendency of the appeal defendant 1 filed an application claiming relief under Act 4 of 1938. This application was of course not dealt with by the learned District Judge because he had dismissed the plaintiffs' suit and its consideration therefore became unnecessary. Defendant 1 has now repeated his application claiming relief under the Act in this Court; and my decision confirming the decree of the learned District Munsif will be subject to the disposal of that application which is herewith sent for disposal to the learned District Munsif. The respondent must pay the costs throughout of the petitioners.

C.R.K./K.S. *Petition allowed.*

4. ('26) 13 A I R 1926 Mad 1188 : 98 I C 872 : 24 M L W 659, Arunachalam Chetti v. Jagannatha Pillai.

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* (28) A. I. R. 1941 Madras 868

MOCKETT J.

Sivasubramania Thevan — Petitioner

v.

Kalankarayan Konar — Respondent.

Civil Revn. Petn. No. 221 of 1939, Decided on 24th January 1941, to revise decree of District Munsif, Tinnevelly, in S. C. S. No. 1453 of 1936.

*** Stamp Act (1899), S. 19 — Assignment of pro-note executed outside British India— First holder in British India must affix proper stamp and cancel it before transfer or indorsement — Act is not concerned with whether pro-note has or has not been stamped outside British India —Pro-note stamped outside British India must be stamped again before indorsement — Pro-note executed outside British India not stamped — Suit can be brought on pro-note as between promisor and promisee.**

The important words in S. 19 are the opening words, "the first holder in British India." The Act is not concerned with the possession of the bill or promissory note before then and consequently a suit can be brought on a promissory note made outside British India as between promisor and promisee even though unstamped : ('19) 6 A I R 1919 Mad 104, *Approved.* [P 869 C 1]

But the first holder in British India must affix a proper stamp and cancel the note before he presents the same for acceptance or payment or endorses or transfers or otherwise negotiates the same in British India. So far as a promissory note is concerned stamping and cancellation is required only before transfer or indorsement. The Act commences to operate on promissory notes and bills from the moment they are endorsed, transferred or otherwise negotiated or presented for payment and it is at a moment of time before those processes began in British India that the affixing of the stamp and cancellation must be done. The Act is not concerned with whether a promissory note has or has not been stamped outside British India with the result that a note stamped outside British India must be stamped again before indorsement : 22 Mad 337 ; (1869) 3 Q B 753 and 8 M L J 182, *Rel. on.* [P 869 C 1, 2; P 870 C 1]

P. N. Marthandam Pillai and C. Rangaswami Iyengar — for Petitioner.

M. S. Varadacharya — for Respondent.

Order. — This is a civil revision petition to revise an order of the learned District Munsif, Tinnevelly, and it relates to the

Stamp Act. The defendant made a promissory note in Colombo on 11th March 1934 in favour of one Arunachala Thevar. The promissory note was at the time stamped with one anna adhesive stamp, the correct stamp for a note in British India and was duly cancelled. That must be taken to have happened on 11th March 1934. On or before 11th March 1935, the promissory note came into British India and was assigned to the plaintiff. The relevant portions of the Stamp Act are :

Section 3. Subject to the provisions of this Act and the exemptions contained in Sch. 1, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say — (b) every promissory note made out of British India on or after that day and accepted or paid, or presented for acceptance or payment, or indorsed, transferred or otherwise negotiated in British India.

Section 19 provides that :

The first holder in British India of any promissory note drawn or made out of British India shall before he presents the same for acceptance or payment or endorses, transfers or otherwise negotiates the same in British india, affix thereto the proper stamp and cancel the same.

There is a proviso that :

If, at any time any such bill of exchange or note comes into the hands of any holder thereof in British India, the proper adhesive stamp is affixed thereto and cancelled in manner prescribed by S. 12 and such holder has no reason to believe that such stamp was affixed or cancelled otherwise than by the person and at the time required by this Act, such stamp shall, so far as relates to such holder, be deemed to have been duly affixed or cancelled.

The important words in S. 19 are the opening words, "the first holder in British India." The Act does not seem to be concerned with the possession of the bill or promissory note before then and indeed Seshagiri Iyer J. in 36 M L J 188[1] has held that a suit can be brought on a promissory note made outside British India as between promisor and promisee even though unstamped. But the first holder in British India must affix a proper stamp and cancel the note before he presents the same for acceptance or payment or endorses or transfers or otherwise negotiates the same in British India. So far as a promissory note is concerned stamping and cancellation seems to be required only before transfer or indorsement. It has been held in 22 Mad 337[2] that this provision (S. 19) is only applicable to a holder where there is one of those acts set out in the section and that it need not be stamped in the manner provided when it was not dealt with in any of the ways set out : *see also* (1869) 3 Q B 753.[3] Shephard J. in 8 M L J 182[4] following (1869) 3 Q B 753[3] also took the view that the first holder who was the plaintiff had, before presenting it for acceptance or payment or before endorsing, transferring or otherwise negotiating it, to affix the proper stamp but none of these things had happened and, therefore, there was no obligation to affix any stamp. But in this case, it is common ground that the note has been endorsed to the proper plaintiff. I think that the first holder whether he is the promisee himself or his endorsee should have affixed the stamp and that the time for affixing the stamp must necessarily be some time in British India because it is the first holder in British India who is affected.

I would again refer to Seshagiri Ayyar J.'s decision that a promissory note made abroad can be sued on without a stamp at all. There is a proviso to S. 19 as quoted above and the learned counsel for the petitioner claims the benefit of that proviso. I do not think it can assist him because it must be manifest that on a perusal of the promissory note, it is clear and he must have known that it was made at Colombo and, therefore, that the stamp had been affixed and cancelled before it came into British India and therefore before it came into the hands of the holder in British India, and I have already indicated and that is only then and previous to any of the acts set out in S. 19 that the time for affixing the proper stamp and cancelling it arises. The rules under the Act are consistent with this view. Rule 17 reads:

The following instruments when stamped with adhesive stamp shall be stamped with the following descriptions of such stamps, namely, (a) promissory notes drawn or made out of British India and chargeable with a duty of more than one anna, with stamps bearing the words "foreign bill."

It is evidently the policy of the Legislature that the Act commences to operate on promissory notes and bills from the moment they are endorsed, transferred or otherwise negotiated or presented for payment and it is at a moment of time before those processes began in British India that the affixing of the stamp and cancellation must be done. Strangely enough the Legislature

1. ('19) 6 A I R 1919 Mad 104 : 52 I C 477 : 36 M L J 188, Kunhi Koya Haji v. Asan Bava Haji.
2. ('99) 22 Mad 337 : 9 M L J 135, Mohamed Rowthan v. Mohamed Hussain Rowthan.
3. (1869) 3 Q B 753 : 37 L J Q B 280 : 9 B & S 726: 18 L T 881: 17 W R 8, Griffin v. Weatherby.
4. ('98) 8 M L J 182, Ebrahim Rowthan v. Abdul Rahiman.

does not appear to be interested in whether a promissory note has or has not been stamped outside British India — with the equally strange result that a note stamped outside British India has to be stamped again before indorsement. Under the circumstances I am constrained to hold that the ruling of the learned District Munsif was right.

It is further argued that there is an admission in the pleadings that Rs. 50 is due. The pleadings have not been printed or typed and no objection seems to have been taken before the learned District Munsif. I have read the written statement but I am not satisfied that the admission is so clear as to justify a decree for that amount now and I am influenced in this decision by the fact that no such application was made to the lower Court. This civil revision petition will, therefore, be dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 870

BURN AND MOCKETT JJ.

In re Kuruva Nagamma and another — Accused — Appellants.

Referred Trial No. 184 of 1940 and Criminal Appeals Nos. 772 and 769 of 1940, Decided on 4th December 1940, referred by Court of Session, Kurnool Division, D/- 10th October 1940.

(a) Criminal trial — Chemical evidence — Aconitine poisoning—Chemical examiner should be clear about category of aconitine — Also point of time of appearance of symptom of poisoning in relation to time of alleged poisoning should be considered.

In cases where the accused are charged with "aconitine" poisoning and the "aconitine" is found in the matter vomited by the deceased just before his death, it is necessary that the chemical examiner's report should be clear about the category of aconitine because there are many varieties of aconitine, some of which are poisonous and some non-poisonous and known as "pseudo aconitine," the two types varying in chemical composition but having toxicological resemblances and producing similar pharmacological results. It is also necessary to take into consideration the point of time of the appearance of the symptoms of poisoning in relation to time of the alleged poisoning because according to medical jurisprudence and toxicology in cases of aconite poisoning symptoms appear in three to five minutes. [P 871 C 1; P 872 C 2]

(b) Criminal trial—Benefit of doubt—Room for suspicion against accused but no reliable evidence—He is entitled to benefit of doubt.

Where there is only room for suspicion against the accused but there is not reliable evidence, the accused is entitled to the benefit of the doubt. [P 872 C 2; P 873 C 1]

N. T. Raghunathan and A. Gopalacharlu — for Accused.

Public Prosecutor — for the Crown.

Burn J. — The appellant in Cr. Ap. No. 769 was accused 2 and the appellant in Cr. Ap. No. 772 was accused 1 in S. C. No. 39 of 1940 tried by the learned Sessions Judge of Kurnool. The charge against the accused was that accused 1 at the instigation of accused 2 had murdered Pedda Rangadu, the husband of accused 1, by means of poisoning. The prosecution theory was that the two accused were on terms of illicit intimacy, and that Pedda Rangadu was also incensed against accused 2 because accused 2 was keeping as his concubine the aunt of accused 1. In these circumstances the case was that accused 2 had supplied accused 1 with powdered root of aconite which accused 1 had mixed with the food prepared and served by her to her husband on the evening of 3rd July last.

Pedda Rangadu died at about 10 P. M. on 3rd July and there is no reasonable doubt about the fact that he died of poisoning. The chemical examiner certified that "aconitine" was found in some vomited matter sent to him for inspection. This was matter which Pedda Rangadu had vomited some time after he took his evening meal. "Aconitine" was also found by the chemical examiner on some bits of rag which were produced by accused 1 when the Police Inspector (P. W. 10) questioned her on 5th July. We experienced some difficulty over this "aconitine," because the works of Medical Jurisprudence and Toxicology to which we have access, state quite clearly that "aconitine" is an alkaloid extracted from the root of aconitum napellus. The root which accused 2 is said to have alleged that he had had in his possession and supplied to accused 1 was called in the vernacular "Vasanabhi" (Telugu) and this is undoubtedly aconitum ferox. Aconitum napellus is apparently rare in this country but aconitum ferox is said to be very common on the slopes of the Himalayas and in other hilly places. Aconitum ferox, according to the books, contains no "aconitine" but is the source of an alkaloid known as "pseudo aconitine." The treatises also show that these two alkaloids have different chemical compositions. If therefore the chemical examiner's certificate that 'aconitine' had been found in the vomit and on the rags were accurate, it seemed to us that there could be no case of any kind against either of the accused involved.

We thought it necessary therefore to take the evidence of the chemical examiner under S. 420, Criminal P. C. He appeared before

us today and gave evidence; and from his evidence it appears that by 'aconitine' he only meant any alkaloid of the aconitine type derived from any of the poisonous varieties of 'aconite.' The books show that there are many varieties of the plant aconite, that a large number of them are poisonous and that some are not. The evidence of the chemical examiner is that from the roots of the poisonous varieties, alkaloids can be extracted which vary in their chemical composition but have certain toxicological resemblances and which produce similar pharmacological results. The chemical examiner told us that the tests he is able to apply do not enable him to distinguish between the various alkaloids. They do enable him to say whether the matter submitted to him contains any of the alkaloids of the "aconitine" type, but the quantities available are so small that it is not possible to distinguish between, for instance, "aconitine" and "pseudo-aconitine." The chemical examiner, we are glad to say, has undertaken for the future to word his certificates more accurately, so that there may be no danger of misunderstanding.

There was evidence given by the father and sister of the deceased (P. Ws. 5 and 6) that on 3rd July accused 1 served food to her husband. P. W. 5 says that his son complained of the taste of the food and then accused 1 said that the dholl had been burnt in cooking. She then, it is said, added milk to the food that she had offered to her husband and told him to get on with his meal. Her husband finished his meal and afterwards went out to listen to a story-teller who was reciting near a well about 70 or 80 yards away from his house. Some time later (the interval is not accurately given—one witness says about half-an-hour, and P. W. 5 says 'the time taken to cook jonna food') Pedda Rengadu came back complaining that his stomach was burning, that his tongue was numb and that he was perspiring all over. After some time he began to vomit and the vomited matter, as already mentioned, was preserved. He died a little later, according to P. W. 5. Before he died, he is said by P. W. 5 to have accused his wife of having given him some drug.

For some unexplained reason the Village Munsif was not informed until 6 o'clock the next morning when P. W. 5 made a statement to him which has been recorded in Ex. C. The Village Munsif sent off his reports and the Circle Inspector (P. W. 10) received information of the case at 2 P. M. on 4th July when he was at Kunkanur. He reached the village at 5 P. M. and held an inquest. The Inspector also seized the vomited matter and the remains of the cooked food in the house of the accused and had them sent to the chemical examiner.

On 5th July the Inspector arrested and questioned accused 2 and afterwards arrested and questioned accused 1; and the main items of circumstantial evidence against both the appellants are derived from the evidence given by the Inspector. He says that accused 2 admitted that he had bought 'aconite' about a year before, that he had powdered it and sent it to accused 1 on the morning of Tuesday, the 2nd July, by the hand of his concubine's son Viranna. He said that he had wrapped up that poison in a bit of paper and had then wrapped up that paper packet in a bit of rag which he had torn off a cloth in his house. He offered to show the cloth and he took the Inspector to his house and produced an old bedsheet which he said was the cloth. He showed also a well on the brink of which he stated he had pounded the aconite to powder, but nothing was to be found there. Accused 1 when questioned told the Inspector that she had torn up into bits the cloth in which the packet of poison had been wrapped and threw the bits in the lane to the south of the house. She took him to the place indicated and produced three bits of rag, M. Os. 1, 1-a and 1-b. She also showed the piece of paper in which she said that the poison had been wrapped. These were the bits of rag upon which the chemical examiner found 'aconitine.' P. W. 4, the son of accused 2's concubine Obalamma said that he had given accused 1 a packet which accused 2 had given. Some corroboration of his evidence was provided by P. W. 8, Basamma, a little shopkeeper, who says that on that day P. W. 4 spent three pies at her shop. The three pies was P. W. 4's reward from accused 2 for conveying this packet to accused 1. P. W. 5, the father of the deceased, spoke to the illicit intimacy of the two appellants, but his was the only evidence on that point; and it was clear that he was very hostile to his daughter-in-law. He made a statement under S. 164, Criminal P. C., on 14th July in which he said to the Sub-Magistrate :

> About two or three months prior to this offence we came to know that Nagamma was in illicit intimacy with Ediga Chinna Muneppa (accused 2).

In chief examination in the Sessions Court he said :

> There is a rumour that accused 2 is on terms of intimacy with accused 1. Twice I found accused 1 and 2 in a compromising situation in the straw yard.

But when cross-examined, P. W. 5 said that he had actually seen accused 2 and 1 in the act of illicit intercourse once six months before the death of his son and once two months before. It is clear that the evidence of this witness is not to be safely relied upon. It is noticeable, we think, that in Ex. C, a statement made by P. W. 5 to the village munsif at least 8 hours after his son had died, there is no mention of accused 2 or of any intimacy between accused 1 and 2. It is difficult therefore to say with the learned Sessions Judge that a motive for this crime had been established by this evidence. It appears from Exs. E and F that both the accused made confessions to the Inspector of Police. Accused 2 admitted that he had instigated accused 1 to poison her husband and accused 1 admitted that she had consented to do so. But the contents of these panchayatnamas are of course not evidence and no evidence was given by the Inspector (P. W. 10) or the village munsif (P. W. 9) of any such confessions. All that was proved by P. W. 9 and P. W. 10 was that accused 2 said that he had sent aconite to accused 1 and accused 1 admitted that she had received it and had thrown the paper and the rags away.

The chemical examiner said after examining M. Os. 1, 1 a and 1-b and the bedsheet from which they were supposed to have been torn, that the fabrics were different. The learned Sessions Judge was inclined to disregard this testimony of the chemical examiner on the ground that the chemical examiner is not a textile expert. But before us the chemical examiner has explained that he examined the fragments of these two cloths side by side under a miscroscope and was thereby enabled to see them simultaneously, highly magnified, and to see quite clearly that they were not torn of the same cloth. This is a remarkable thing. Accused 2 appears to have told the Circle Inspector that he had torn the bit of rag in which he wrapped the poison from the bedsheet which he produced from his house; but the chemical examiner in his evidence shows quite conclusively that the bits of rag had not been torn from that sheet. It is difficult to understand what could have been the motive of accused 2 for telling a falsehood on this point; and it is also of course difficult to understand why anybody should have fabricated false evidence on such a point. It is however clear that the statement of the accused to the Inspector of Police was not wholly true with regard to the cloth.

The most important point that the learned counsel for the appellants have been able to bring out is that, on the evidence given by the prosecution witnesses, there was a considerable interval between the taking of the food by the deceased and the appearance of the symptoms of poisoning. All the witnesses P. Ws. 5, 6 and 7, are agreed that after he had taken his meal, Rangadu went to the well to listen to the story-teller. As to the time of the appearance of the symptoms, the only evidence is that given by P. W. 7. He says that he had to pass the house of Rangadu on his way to the story-teller and Rangadu joined him. He goes on:

> We sat down by the well and listended to the story-teller for a while. Rangadu then complained that his tongue was getting numb and that his stomach was uneasy and that his head felt heavy. He wanted to go home. I accompanied him.

He says in cross-examination that they were at the well for half an hour. There was apparently some interval between the taking of the food and the going of Rangadu to the well; for, P. W. 5 told the Inspector that after he had had his food, his son smoked a beedi and then went to the well; and the evidence of P. Ws. 5 and 6 also shows that, after Rangadu had gone out, the rest of the family had their meals and had finished before Rangadu came back. P. W. 6 says that Rangadu and P. W. 7 came home while they were washing the vessels. Learned counsel for the appellants have shown us by references to the treatises that, in cases of aconite poisoning, the symptoms of numbness of the tongue and so forth in the mouth come on very quickly, according to Taylor's Medical Jurisprudence (Edn. 9, Vol. 2, p. 735) within three to five minutes. Learned counsel for the appellants are therefore able to argue that Rangadu could not have got this poison in his food but must have got it later. Since there was no poison found in the vessels or in the remains of the food but only in the vomit, this argument has considerable force. On the whole we think that, though there is (as the inquest panchayatdars found) room for suspicion against the wife of the deceased, there is not such reliable evidence against these appellants that we can feel

safe in confirming their conviction for murder.

The evidence of P. W. 5, as we have already said, is tinged with hatred against his daughter-in-law and he has undoubtedly shown everything that she did in the darkest colours. He was however obliged to admit in cross-examination that when his son was complaining of nausea, his son's wife (accused 1) was holding his head. This is in agreement with the statement made by accused 1 herself in the Sessions Court. The learned Sessions Judge has said that this conduct of accused 1 does not positively indicate either that she had murdered her husband or that she had not. It is consistent with her innocence, but it might also be a piece of clever acting, but it is important, because it has a bearing upon the conduct of Rangadu himself. After he came back from the well, convinced that his wife had given him some deleterious drug (as his father says), it is hardly conceivable that he should have allowed his wife to take his head on her lap. This throws more suspicion upon the version given by P. W. 5. We think there are elements of reasonable doubt in this case and we must therefore set aside the conviction of these appellants for the offence of murder and the sentences of death and direct that they be set at liberty forthwith.

C.R.K./K.S. *Conviction set aside.*

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(28) A. I. R. 1941 Madras 873

LEACH C. J. AND SOMAYYA J.

Bayyana Veeraraghava Rao and others — *Petitioners*

v.

Debt Conciliation Board, Bezwada and another — *Respondents.*

Civil Misc. Petn. No. 297 of 1941, Decided on 3rd April 1941, to issue a writ of certiorari.

(a) Madras Debt Conciliation Act (11 of 1936), S. 10 (1)—Failure by creditor to file statement is no ground for depriving him of debts admitted by debtor.

When a creditor fails to file a statement under S. 10 (1) he should be precluded from disputing the debtor's figures, but there can be no justification for depriving him of what the debtor has acknowledged to be due to him. [P 874 C 1]

(b) Madras Debt Conciliation Act (11 of 1936), S. 10 (1)—Order "debtor examined . . . . Issue notice under S. 10 (1)" held did not amount to adjudication that petitioner is debtor.

An objection as to the maintainability of the petition on the ground that the petitioner was not a 'debtor' under the Act was considered and decided. The order passed on that date was "debtor present and examined . . . . . Issue S. 10 (1) notices." There was nothing to indicate that any inquiry was made whether the petitioner was a debtor under the Act:

***Held* that it could not be said that the order was an implied adjudication that the petitioner was a debtor under the Act.** [P 876 C 1, 2]

(c) Madras Debt Conciliation Act (11 of 1936), Ss. 10 (1), 2 (g) — Objection that petitioner is not debtor — Board should give its finding on this question before proceeding further.

In a case where the jurisdiction of the Board to entertain the petition is challenged on the ground that the petitioner is not a 'debtor' under the Act, it is the obvious duty of the Board to inquire into the objection and give its finding. Without a finding on that question the Board would have no jurisdiction to proceed further. [P 876 C 2]

Ch. Raghava Rao for N. Vasudeva Rao — for Petitioners.

P. Satyanarayana Rao — for Respondents.

Leach C. J. — I am in entire agreement with the judgment which my learned brother is about to deliver. If administered in accordance with its spirit, the Debt Conciliation Act should, in spite of its defects, prove beneficial, but my experience, gained from the hearing of petitions for the quashing of orders of Debt Conciliation Boards convinces me that the Act has not been administered by some Boards in the way it ought to be administered. I have noticed a tendency to use the powers conferred by S. 10 (2) of the Act arbitrarily and at times there has been flagrant misuse of the section. When a debtor applies to the Board for settlement of his debts, he has to embody in his application detailed information. One requirement is that he shall state the amount and particulars of all claims against him, together with the names and residences of his creditors so far as they are known to him or can by the exercise of reasonable care and diligence be ascertained by him. The particulars required are set out in S. 6. Section 10 (1) says that if, after examining the debtor, it is in the opinion of the Board desirable to effect a settlement between him and his creditors, a notice shall be issued calling upon every creditor to submit a statement of the debts owed to him by the debtor. Sub-section (2) of that section states that, subject to the provisions of sub-s. (3) every debt of which a statement is not submitted to the Board in compliance with the provisions of sub-s. (1) shall be deemed for all purposes and all occasions to have been duly discharged. Sub-section (3) gives the Board power to recall such an order under certain circumstances.

Recalcitrant creditors are not deserving of sympathy, but it is difficult to see why a Debt Conciliation Board should be given the power to cancel a debt which the debtor himself admits to be due simply because the creditor has not filed a statement confirming the particulars set out in the debtor's application. I can well understand that when a creditor fails to file a statement under S. 10 (1) he should be precluded from disputing the debtor's figures, but there can be no justification for depriving him of what the debtor has acknowledged to be due to him. But assuming that there is justification for sub-s. (2) the power of cancellation conferred by it has been used without the slightest justification. For instance, some Boards have passed orders cancelling debts for failure to comply with the provisions of S. 11, but whatever happens to be the nature of the failure to comply with S. 11, the Board has no power to act under S. 10 (2). The cause for the mal-administration of the Act in some cases may be that the members of the tribunals concerned have not the time to devote to the proper investigation of claims. The arbitrary nature of some of the orders which I have seen would suggest this. But if the legislative authority enacts a statute of this nature, it should make certain that there is proper machinery for working it. If there is not the proper machinery, grave injustice is bound to follow.

The present case is an example of gross maladministration of the Act. The disregard of the principles of elementary justice which has taken place here is to be gathered from the details which my learned brother gives. From beginning to end there has been no attempt made to investigate the grave charges of fraud which have been brought against the debtor in the course of the proceedings. It would be difficult to imagine a more regrettable disregard of duty on the part of a tribunal possessing wide statutory powers than we have here, and there is no other course open to the Court but to quash the orders of the Board with costs against all the respondents; advocates fee Rs. 200.

Somayya J.—This is an application for the issue of a writ of certiorari calling for the records in Application No. 61 of 1939 on the file of the Debt Conciliation Board, Bezwada, and quashing all the proceedings therein including the orders passed on 31st October 1940. Respondent 1 is the Debt Conciliation Board and respondent 2 is the debtor, Kasi Viswanadham of Bezwada. In his petition to the Board, respondent 2 disclosed debts to the extent of Rs. 70,000, outstandings of the value of Rs. 35,000, immovable properties including houses at Bezwada valued at Rs. 23,450 and moveables worth Rs. 690. He gave a list of the creditors to whom the debts were alleged to be due and requested a settlement of the debts under the Act.

The application was taken on the file and found to be in order. The Board then directed issue of notice for 20th November 1939 under S. 8 (1) of the Act. Objections were filed by various creditors on that day. In particular, creditors 3, 46, 52 and 53 raised two objections: (1) that the petitioner was not a "debtor" as defined by the Act, and (2) that he included several false debts in his petition in order to defraud the real creditors. The Board adjourned the matter to the 30th of that month as some of the parties represented that they wanted to effect a settlement. On the 30th, creditors 52 and 53 filed further statements in which they elaborated their previous objections. In particular they pointed out that the debts alleged to be owing to creditors 78, 80, 84, 85, 90, 91 and 94 were fictitious debts and that the creditors were the debtor's kith and kin. On the statement filed by creditor 52 the Board passed the order: "Notice to debtor; hearing 14th December. (Signed) N. S. M. 30th November." This is followed by another order dated 1st December 1939 in these terms:

> This is a reply to section 8 notice. Section 10 (1) notices have been ordered to be issued. File with papers. (Signed) N. S. M., 1st December 1939.

On 30th November 1939 we find another order passed on the debtor's petition in which, after stating that the debtor was examined and that some creditors were served and some not, the Board straightway directed notices under S. 10 (1) to issue for 20th February 1940. In the meantime creditor 81 filed a statement on 16th February 1940 in the form prescribed by S. 10 (1) in which he stated that the petition was not maintainable as the petitioner was not a "debtor" as contemplated by the Act. In para. 4 it was pointed out that creditors 84 and 85 are the mother and wife of the petitioner, that the creditor representing items 90 and 91 is his uncle, that creditor 94 is his brother-in-law, that the debt alleged to be due to the brother-in-law amounted to over a third of the total liability and that the brother-in-law was not in a position to advance such a large sum. Then it was stated:

It is all bogus and it is to be deleted out of the list of creditors ; and also the debts of the creditors 84, 85, 90 and 91 are bogus and they are also to be deleted.

In para. 5 it was pointed out that the debtor secreted valuable properties and that if a true account of the assets and liabilities of the debtor was taken, it would be clear that the petition was a false and vexatious one. No enquiry was made regarding the truth of the various allegations made in this statement. On 13th March 1940 the Board passed the order :

32 of the creditors have transferred their dues in favour of Rallapalli Subramanyam . . . . The debtor wants time to settle the dues in respect of others. Adjourned to 20th March 1940.

On 11th April 1940, the debtor and about 50 creditors filed a petition requesting permission to sell the debtor's property and to settle the debts of all creditors. The order on that is : "Permission granted to do the needful. Notice will issue to the absent creditors." As regards some creditors who had not filed their statements within time, their debts were directed to be discharged under S. 10 (2) of the Act. On 21st May 1940 the proceedings of the Board show that creditor 1 filed a counter-affidavit, objecting to the proposal of 11th April and notices were directed to issue under S. 21 of the Act to the creditors. This notice was apparently to hear objections, if any, to the proposal of 11th April 1940 to sell or assign some properties for payment of the debts. On 7th June 1940 creditor 20 filed a statement that the petitioner was not a debtor under the Act and that an inquiry should be held to see if some of the debts were not fictitious ones. It was urged that 50 per cent. of the creditors who were alleged to have agreed to the proposal of 11th April 1940 must represent genuine creditors. It was said that the Board had not up to that date passed final orders on the various miscellaneous and the interlocutory petitions pending before it and that it was premature to consider at that stage the legality or otherwise of the proposal of 11th April 1940. It was also stated that the proposed sale price was out of all proportion to the value of the properties, that the amount was not arrived at bona fide and that if the properties were sold in public auction there was every likelihood of the properties realizing a much higher price. Then this statement winds up by pointing out that five questions had to be decided by the Board before they could proceed further and they are stated thus :

(1) The maintainability of the petition itself on the ground that the petitioner was not a landholder or a debtor as contemplated by the Act ; (2) the sieving out of real and false debts ; (3) the correctness of 50 per cent. of the creditors, (i. e., real creditors) ; (4) the transfer or assignment of some debts in favour of two persons ; (5) the omission of some real creditors and the inclusion of some false creditors.

The order passed on the same day is :

Counter filed by creditor 20 impeaching the genuineness of the debtor in filing the petition. This ought to have been done long ago. Put up on 10th June 1940 at the next hearing day.

It is curious that the Board should have said this seeing that a number of other creditors had said the same thing on 20th and 30th November 1939. On the debtor's application we find the following order on 5th July 1940 : "For passing orders on the several petitions in the case, the case is adjourned to 12th July 1940." On 12th July 1940 a number of creditors filed a joint petition again pointing out that the petitioner was not a "debtor" under the Act. This petition contains an elaborate statement regarding each of the three items of properties put forward by the debtor as enabling him to file a petition under the Act. These are items 5, 10 and 11. As regards item 11 it was pointed out that the debtor had only a leasehold interest and that under the Act a lessee is not a "debtor" ; the lease itself was attacked as a bogus one. As regards item 10 it was pointed out that the land, though purchased in the names of the father and uncle of the debtor, had been recognized as belonging to a deity under a registered partition deed dated 25th March 1934 and a public copy of it was also filed to support the statement. As regards item 5 it was pointed out that it was a house site in the Bezwada Municipality and that the tax upon it was being levied and collected by the municipality. On 20th July 1940 after stating that a number of creditors filed a petition objecting to the filing of the application by the debtor, the Board ordered notice to the debtor for 30th July 1940. On that day some more creditors filed counter affidavits and the matter was adjourned from time to time for want of quorum as the Chairman of the Board was otherwise engaged. The debtor filed on 28th August 1940 what may be called his reply to the objections of the creditors. After several adjournments the Board passed on 16th October 1940 this order :

Creditors 1 and 82, a Marwadi present and they accept to take item 3 of the property if sold and proceeds paid to them. As the sub-Collector has

not joined, the case is adjourned to 31st October 1940.

On 31st October 1940 the proceedings were closed by the following order :

Debtor-creditors present. The debts of creditors 2, 5, 10, 14, 18, 32, 43, 53, 61, 63, 72, 64, and 76 are ordered to be discharged under S. 10 (2) for failure to file claims. Orders are passed dismissing objection petitions to the legality of the petitions at this stage. Settlement arrived at between 55 creditors. Agreement will be drawn up accordingly. The remainder will be excluded from the agreement and a certificate under S. 18 (i) granted.

This is the history of the proceedings. It will be observed that at no stage was the objection regarding the maintainability of the petition on the ground that the petitioner was not a "debtor" under the Act inquired into or decided by the board. The only order we find is the one just set out that orders were passed dismissing the objection petitions raising the legality of the petition at that stage. Evidently, the board meant that the objections ought to have been filed much earlier and that they could not be considered at that stage. This is an extraordinary position for the board to take. Again and again the creditors filed counter affidavits and objection petitions drawing the attention of the board to the fact that the petitioner was not a "debtor," that certain creditors to whom debts were not really owing had been included, that one of them, the brother-in-law of the petitioner, was shown as a creditor for nearly a third of the total indebtedness and that the petitioner's wife, mother and uncle were shown as creditors. We are unable to find any order of the board dealing with these objections on the merits. It is contended that on 30th November 1939 the objection as to the maintainability of the petition on the ground that the petitioner was not a "debtor" under the Act was considered and decided. The order passed on that date is, "Debtor present and examined . . . Issue S. 10 (1) notices." There is nothing to indicate that any inquiry was made whether the petitioner was a debtor under the Act and we cannot take this order as implying a rejection of the objection that the petitioner was not a debtor. If really the objection was considered and disposed of by the board on 30th November 1939 as Mr. Satyanarayana Rao the learned advocate for the respondent contends, it is curious that when later on objection petitions were filed by the creditors raising this very question, they were not disposed of on the ground that the matter had already been decided on 30th November 1939. Several of the creditors had not been even served by that time and some of them took the objection later on after service of notice on them. It is therefore impossible to accede to the contention that the expression "debtor examined . . . Issue notice under S. 10 (1)" is an implied adjudication that the petitioner was a debtor under the Act.

It is further admitted that no schedule of creditors was ever drawn up as required under S. 12 (1) of the Act. This is a very important matter and the omission is a very serious one. This matter was again and again brought to the notice of the board in the various objection petitions. It is incomprehensible how, in spite of these objections being repeatedly brought to its notice, the board failed to adjudicate upon them and to prepare a schedule of creditors. Prima facie there are very strong grounds for closely scrutinizing the claims of the wife, mother, uncle and brother-in-law of the debtor. The debts alleged to be due to these creditors come to over Rs. 32,000. The total indebtedness was Rs. 65,000 odd and so the debts alleged to be due to the mother, wife, uncle and brother-in-law came to nearly a half and the attack that these were not real creditors was a very serious one which the board was bound to inquire into and give a decision thereon. The board failed to do its duty. In a case where the jurisdiction of the board to entertain the petition is challenged on the ground that the petitioner was not a "debtor" under the Act, it was the obvious duty of the board to inquire into the objection and give its finding. Without a finding on that question the board would have no jurisdiction to proceed further. Then, one of the most important duties laid upon the board is the preparation of the schedule of assets and liabilities. Here again, the board has lamentably failed to do its duty. The board never inquired into the genuineness of the debts which were challenged as false debts and there is no indication anywhere that the board inquired into the allegation of the creditors that the debtor had secreted valuable moveables. It is impossible to sustain the order of the board when even a schedule of the assets and liabilities was not prepared.

This is a case of gross dereliction of duty on the part of the board. At every stage we find utter indifference to the provisions of the Act even though the attention of the board was drawn repeatedly to them. If the allegations of the creditors are true, then this is a case in which gross fraud has been perpetrated on the real creditors. Section 9

(c) provides that if the application included a claim which in the opinion of the board is collusive and intended to defeat a creditor, the application should be dismissed. Therefore when it was repeatedly urged by the creditors that the petitioner included various false debts with a view to defraud the real creditors, it was the duty of the board to inquire into the matter and pass orders under S. 9 (c). Nothing was done. Then again, the creditors alleged that in the scheme of 11th April 1940 valuable properties were proposed to be assigned at a very low value. This has not received the attention of the board. Throughout, there has not been one occasion on which the objections of the creditors were inquired into on their merits. As the Preamble shows, the Act is intended for relief of agriculturists; and in practice the Act is grossly abused by a trader as in this case, trying to use the provisions of the Act and the board, to defraud his genuine creditors by including fictitious debts, by suppressing assets and by assignments of the bulk of the property to his nominees at an inadequate price. It is impossible in these circumstances to maintain the order of the board. We, therefore, issue a writ as prayed for and quash all the proceedings in D. C. B. No. 61 of 1939 on the file of the Bezwada Debt Conciliation Board including the orders under Ss. 10 (2), 14 and 18 of the Act. I agree to the order passed by the learned Chief Justice as regards costs.

C.R.K./K.S. *Proceedings quashed.*

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(28) A. I. R. 1941 Madras 877

KRISHNASWAMI AYYANGAR J.

Pyda Suryanarayanamurti — *Petitioner*

v.

Municipal Council, Coconada — *Respondent.*

Civil Revn. Petn. No. 1259 of 1937, Decided on 6th August 1940, to revise decree of Sub-Judge, Coconada, in S. C. No. 620 of 1936.

Madras District Municipalities Act (5 of 1920), S. 83—Building to come under exemption must be used by person primarily liable for tax, i. e., the owner.

The word "used" in S. 83 is used in the sense "used by the person who is primarily liable for the tax," or in other words, the owner. Hence a person who has leased a house cannot claim exemption from tax under this section even though the building leased is used for educational purposes. [P 877 C 2; P 878 C 1]

P. Somasundaram — for Petitioner.

B. V. Subramanyam — for Respondent.

Order. — This revision petition arises out of a suit instituted by the petitioner for the recovery of a sum of Rs. 569-12-0 of which Rs. 112 8-0 is claimed as the balance of rent due and the remaining sum of Rs. 451-4-0 as representing a sum of money wrongfully appropriated by the respondents towards the property tax claimed to be due from the petitioner to the respondent. The respondent is the Municipal Council, Coconada. The petitioner's advocate did not contend that if the Municipal Council were entitled to recover the property tax from the petitioner, the former could not adjust the arrears against the rents claimed by the petitioner. But what he contended was that no property tax at all was leviable in respect of the house in suit. The plaintiff purchased the suit house on 23rd March 1933. A portion of the house was rented by the Municipal Council from the previous owner and was—and is even now—being used for the purpose of accommodating a school run by the Municipal Council. The petitioner is apparently in possession of the portion not let to the Municipality. Exemption from liability to property tax in respect of the suit house is claimed under S. 83, Madras District Municipalities Act, 5 of 1920. The section says:

> The following buildings and lands shall be exempt from the property tax : (a) places set apart for public worship and either actually so used or used for no other purposes, choultries, buildings used for educational purposes and libraries and play grounds which are open to the public and from which no income is derived.

Mr. Somasundaram, the learned advocate for the petitioner, contends that the suit house was a house used for educational purposes, at any rate partially and therefore must be held exempt from liability to tax on the wording of the section. According to him, it makes no difference whether the house is used for educational purposes by the owner himself or by the Municipal Council which had taken a lease of the house. By whomsoever the house was used, provided it was used for educational purposes, the house is exempt from liability to property tax. This was the contention. Now, to allow the plaintiff to lease out the house, collect the full rent and still give him exemption from liability to property tax is to permit him to enjoy a privilege which strikes me as entirely unwarranted and even senseless. To my mind, it is quite clear that this could not have been the intention of the Legislature. Mr. Somasundaram is of course right when he says that if there is a lacuna in the statute, it is not the function of the Court to remedy it. The Court has simply to ascertain the grammatical meaning of the

expression used and give effect to it. But it does appear to me that there is no such lacuna at all in the section. The word "used" necessarily connotes the further idea that the user was by some human agency. Who else could be the human agency unless it be the owner of the property or the person primarily liable for the tax. I am prepared to read the word "used" in the sense "used by the person who is primarily liable for the tax" or in other words, the owner. The meaning suggested by the petitioner's advocate would lead to a palpable absurdity and there is nothing in the section which compels me to adopt it.

There was another point to which reference was made, namely the correctness of the opinion expressed by the Judge as to the suit being barred in respect of the rent for May 1933. There is no substance in this point either. In the result, the revision petition is accordingly dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 878

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Smt. Deivasikamani Ponnambala Desikar — Petitioner

v.

Board of Commissioners for Hindu Religious Endowments, Madras — Respondent.

Civil Misc. Petn. No. 2538 of 1939, Decided on 5th December 1939, to issue a writ of certiorari.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 65-A—Board's order improper—Court can quash it and prohibit Board or its officers from taking any action under notification — S. 306, Government of India Act, is no bar.

Merely because the Government is by the Act required to issue the notification under S. 65-A the Court is not precluded by reason of S. 306, Government of India Act, from quashing the Board's orders if they have been improperly passed and from prohibiting the Board or any of its officers from taking any action in pursuance of the notification. The Court can issue a writ of certiorari to the Board in respect of an improper order passed by it. [P 880 C 2; P 881 C 1]

(b) Madras Hindu Religious Endowments Act (2 of 1927), Chap. 6-A, S. 65-A and S. 65-E — Object of S. 65-E — Chap. 6-A does not exempt temple in respect of which scheme has been framed under S. 92, Civil P. C., from being notified — In exercising powers under Chap. 6-A Board must act judicially — Temple managed under scheme framed by Court should not be notified without grave reasons — Provisions for appeal under Chap. 6-A being illusory there is all the greater need for care on part of Board.

Section 65-E is obviously inserted to make it quite clear that when the Board notifies a temple or an endowment under Chap. 6-A no steps can be taken to frame a scheme for a non-excepted temple under S. 57 or for an excepted temple under Ss. 62 and 63 of the Act. There is nothing in S. 65-A or in any other section in Chap. 6-A which exempts a temple in respect of which a scheme has been settled by the Court under S. 92, Civil P. C., from being notified. Consequently Chap. 6-A must be held to apply to a temple which is managed under a scheme framed under S. 92, Civil P. C. The powers given to the Board under Chap. 6-A are very wide and their exercise in the case of a temple managed under a scheme framed by the Court sets the scheme at nought, and therefore the power of notification should not be exercised without grave reason. In exercising its powers under Chap. 6-A the Board must act judicially, after a full and proper inquiry, and as the provisions of Chap. 6-A, with regard to appeal are illusory the need for care in this respect is all the greater : (1911) A C 179, *Ref.* [P 881 C 2]

(c) Madras Hindu Religious Endowments Act (2 of 1927), Chap. 6-A — Scheme framed by Court held did not interfere with provisions of Act or with powers of Board constituted under Act — Provisions of scheme held did not provide ground for notifying temple under Chap. 6-A.

The material provisions of the scheme framed by the Court were as follows : Clause (3) of the scheme provided for a Board of Supervision. Clause (6) laid down that the trustee shall submit to the Board of Supervision before 30th June in each year a budget showing the probable receipts and disbursements. Clause (7) required the accounts of the institution to be audited by a Government certified auditor and an abstract stating the result of the audit to be published in such manner as the Board of Supervision might direct. Clause (8) provided that without the sanction of the Board of Supervision, the trustees shall not lease for a longer period than five years, sell or mortgage any of the properties belonging to the temples. Clause (9) provided that in case of a conflict of interest between the math and the devasthanams, the trustee shall always place the matter before the Board of Supervision and it shall be jointly considered by the trustee and the Board of Supervision. In the event of their failing to agree, either of them shall be at liberty to refer the matter to the District Court of Ramnad for decision. Clause (13) stated that the trustee, the Board of Supervision or the Advocate-General shall have liberty to apply to the District Court of Ramnad for directions generally, including directions for the utilization of surplus moneys, if any. They shall also have liberty to apply for any modification of the scheme :

Held that none of the provisions of the scheme interfered with the provisions of the Act or with the powers of the Board constituted by the Act. The provisions could only be regarded as additional safeguards and the existence of the same could not provide ground for notifying the temples under Chapter 6-A. [P 883 C 1]

(d) Madras Hindu Religious Endowments Act (2 of 1927), Chap. 6-A — Trustee repairing temples from time to time when funds available — Board notifying temple under chapter on ground that in case of insufficiency of funds for repairs trustee ought to have appealed to general public

for donations — Order notifying temple could not be justified.

The repairs of the temples were being carried out by the trustee from time to time as funds became available. But the Board notified the temples under Chap. 6-A on the ground that if sufficient funds were not available for repairs the trustee was bound to appeal to the general public for donations:

***Held* that the order notifying the temples could not be justified.** [P 884 C 1]

(e) Madras Hindu Religious Endowments Act (2 of 1927), Chap. 6-A—Provisions of Chap. 6-A as regards appeal are illusory — Need for real and not merely nominal appellate tribunal emphasised.

The Religious Endowment Board as constituted under the Act consists of only four members of which the President is one. Therefore, the appellate tribunal is in reality the tribunal of first instance. The powers given by Chap. 6-A are so great that they cannot safely be conferred, whether on a statutory body like the Religious Endowments Board or on the Court without provision for an appeal to an independent tribunal. Hence the need for an appellate tribunal, which is in reality, and not merely in name, an appellate tribunal.

[P 881 C 2; P 882 C 1]

T. R. Venkatarama Sastri for V. Ramaswami Ayyar — for Petitioner.

Advocate-General for Y. Govindarajulu, K. V. L. Narasimham and N. Subramaniam — for Respondent.

Leach C. J.—The petitioner is the head of an ancient and well-known math, the Tiruvannamalai Math at Kunnakudi. As head of the math he is the trustee of a group of five temples, known as the Anjukovil Devasthanams, Kunnakudi. The Madras Hindu Religious Endowments Board, the respondent (hereinafter referred to as "the Board") has notified these temples under Chap. 6-A, Madras Hindu Religious Endowments Act, 1926, with the object of taking the management of them out of the hands of the petitioner and placing it in the hands of an officer of its own choosing. The petitioner complains that in taking action under Chap. 6-A, the Board has not acted bona fide, but in abuse of its powers, and asks the Court in certiorari proceedings to quash the orders of the Board which have resulted in the notification of the temples. A rule nisi has been issued and the Court has now to consider whether the rule should be made absolute.

From time immemorial the head of the Tiruvannamalai math has been the trustee of the five temples and that the head of this math should be the trustee has been recognized by this Court. A scheme for the administration and management of the temples was framed by this Court in Civil Misc. Appeals Nos. 216, 218 and 219 of 1925. The date of the judgment settling the scheme was 23rd October 1925. The scheme provided that the then head of the Tiruvannamalai math should be the trustee of the temples and that on a vacancy occurring the head of the math for the time being should be appointed the trustee, unless the District Court of Ramnad "for any valid reason" should deem him to be unfit. By an order dated 25th May 1931 the Board recognized the temples as excepted temples within the meaning of the Act and the head of the math as the hereditary trustee. The petitioner became the head of the math on 10th June 1928, but the District Court refused to recognize him as the trustee of the temples and by an order dated 16th March 1932 appointed a receiver to take charge of them. By an order of a Bench of this Court, dated 5th April 1934, which was passed by consent of all parties, the District Judge's order refusing to recognize the petitioner was set aside and the petitioner was appointed the trustee. The order of appointment imposed inter alia the following conditions: (1) Within four months after the close of each fasli and subject to the approval of the Court the trustee should appoint a Government certified auditor to audit the accounts of the temples; (2) he should keep the accounts in such form as might be proposed by the auditor; (3) he should submit the budget within the time fixed by the scheme and (4) he should pay on or before the 15th of the succeeding month the salaries due to the staff of the Board of supervision constituted by the scheme. It is not suggested that the petitioner has not complied with all the conditions imposed by the Court's order. The petitioner took up the duties as trustee on 9th April 1934.

On 3rd May 1938 the Board issued a notice to the petitioner calling upon him to show cause why the temples should not be notified under Chap. 6A of the Act. The Board made the following allegations: (1) Certain clauses of the scheme framed by this Court were inconsistent with the provisions of the Act; (2) the temples required urgent repairs; (3) the salaries of temple servants had not been paid regularly; (4) the rent collections showed heavy arrears and (5) the register of properties which S. 38 of the Act, required to be kept had not been submitted to the Board. The petitioner appeared and showed cause, but a committee of the Board, consisting of the President and two members, refused to accept the petitioner's

explanations, except that given with regard to the fifth allegation and by an order dated 12th January 1939 notified the temples. The petitioner appealed to the Board under S. 65A of the Act, but his appeal was rejected. The Board consists of only four members including the President. Therefore, the appeal had to be heard by the three members of the Board who formed the committee which considered the petitioner's objections and the fourth member. The petitioner contends that as this Court has framed a scheme for the management of the temples the Board has no power to notify them under Chap. 6A, and says that the allegations of mismanagement are entirely baseless. The Board denies that it has acted arbitrarily and says that in any event the Court has no right to quash its orders as the notification of the temples amounts to an order of the Government which cannot be questioned by reason of S. 306, Government of India Act, 1935, when read with section 49.

It will be convenient to deal first with the contention advanced on behalf of the Board that the Court is prohibited by the Government of India Act, 1935 from issuing a writ of certiorari in this case. Section 65A, Madras Hindu Religious Endowments Act, provides that the Board may by notice published in the prescribed manner call upon the trustee and all other persons having interest in a temple to show cause why the temple should not be notified under the provisions of Chap. 6A. The section says that the notice shall state the reasons for the action proposed and specify a reasonable time, not being less than one month, for showing cause against the proposed action. Where no objection has been received the Local Government may by notification published in the Fort Saint George Gazette declare the temple to be subject to the provisions of the chapter. Where objections are received the Board shall hold an inquiry and decide whether the temple shall be notified to be subject to the provisions of Chap. 6A or not. The inquiry is to be held by a committee of the board consisting of not less than three commissioners of whom the President shall be one. If the committee decides that the temple should be notified the board is required to publish its decision in the Gazette. If there is no appeal or if there is an appeal to the full board and the appeal is dismissed the Government may declare the temple or endowment to be subject to the provisions of the chapter. Section 306, Government of India Act, 1935, states that no proceedings whatsoever shall lie in and no process whatsoever shall issue from any Court in India against the Governor-General or the Governor of a Province whether in a personal capacity or otherwise. Section 49 says that the executive authority of a Province shall be exercised on behalf of His Majesty by the Governor. The argument is that by virtue of S. 49 the notification of a temple under Chap. 6A, Madras Religious Endowments Act, must be deemed to be an act of the Governor and therefore it cannot be challenged.

This argument cannot be accepted. In the first place, the petitioner does not ask for the issue of a writ against the Government, but against the Board, which is no part of the Government. In the second place if the Board has abused its powers the Court has power to quash the Board's orders on which the notification is based and if the basis of the notification is illegal the notification is illegal. But even if the notification in such circumstances remained a lawful notification, the Court would still be in a position to take effective action. When a temple is notified under Chap. 6A the duties of the trustee of the temple pass to an executive officer appointed by the Board under S. 65C. Where the circumstances demanded it the Court could always prohibit the board taking action under S. 65C and if action were taken by the board before the Court had time to interfere it could prevent the executive officer taking over charge of the trust properties, or remove them from his charge. Lord Maugham in delivering the judgment of the Privy Council in (1937) A C 898[1] pointed out that a proceeding is none the less a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval by some other authority, and quoted with approval the observations of R. S. Wright J. in (1893) 63 L J Q B 112[2] where the learned Judge said "an application for prohibition is never too late so long as there is something left for it to operate upon." I have no hesitation in saying that because the Government is by the Act required to issue the notification the Court is not precluded from quashing the

1. ('37) 24 AIR 1937 P C 265 : 170 I C 425 : 1937 A C 898 : 106 L J P C 152 : 157 L T 358 : 81 S J 783 : 53 T L R 829 : (1937) 3 All E R 324 (PC), Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust.
2. (1893) 63 L J Q B 112 : 42 W R 464, In re London Scottish Permanent Building Society.

board's orders if they have been improperly passed and from prohibiting the Board or any of its officers from taking any action in pursuance of the notification. Therefore the contention advanced on behalf of the Board that these proceedings do not lie by reason of the provisions of the Government of India Act must be rejected.

The contention of the petitioner that Chap. 6-A does not permit of the notification of a temple in respect of which a scheme has been framed by the Court involves an examination of Ss. 57, 62, 63, 65, 65-E and 75. It will be convenient to refer first to S. 75. This section provides that where the administration of a religious endowment is governed by any scheme settled under S. 92, Civil P. C., the scheme shall be deemed to be a scheme settled under the Madras Hindu Religious Endowments Act and may be modified or cancelled in the manner provided by the Act. Section 57 falls in Chap. 5 (which relates only to non-excepted temples) and says that when the Board is satisfied that in the interests of the proper administration of the endowments of a temple, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee, the committee constituted under Chap. 3 of the Act, if any, and the persons having interest, by order settle a scheme of administration for the endowments of the temple. Sub-section (3) provides that the trustee or any person having interest may institute a suit to modify or set aside the order of the Board under this section. Sub-section (4) declares that a scheme of administration which has been settled by the Court under S. 57 or which under S. 75 is deemed to be a scheme settled under the Act may at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest, but not otherwise. Section 62 falls under Chapter 6 which deals with maths and excepted temples. This section provides that when the Board has reason to believe that the trustee of a math or excepted temple has been mismanaging the endowments or has been spending or alienating them for improper purposes, or when not less than twenty persons having interest make an application to the Board stating that in the interests of proper administration a scheme of administration should be settled, the Board may hold an inquiry, and if as the result of the inquiry it is satisfied that a scheme should be settled it has the power under S. 63 to settle a scheme. Section 65 says that a scheme of administration which has been settled by the Court under S. 63 or which under S. 75 is deemed to be a scheme settled under the Act may, at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest, but not otherwise. Section 65-E which is the last section in Chap. 6-A, says that Ss. 57, 62 and 63 cease to apply to temples and endowments which are notified under S. 65-A. It is argued that inasmuch as this section does not make any reference to S. 75 it must be held that the intention of the Legislature was to leave untouched temples in respect of which the Court has settled a scheme under S. 92, Civil P. C. This argument must also be rejected. Section 65-E is obviously inserted to make it quite clear that when the Board notifies a temple or an endowment under Chap. 6-A no steps can be taken to frame a scheme for a non-excepted temple under S. 57 or for an excepted temple under Ss. 62 and 63. There is nothing in S. 65-A or in any other section in Chap. 6-A which exempts a temple in respect of which a scheme has been settled by the Court under S. 92, and this being the case the chapter must be held to apply to a temple which is managed under such a scheme.

The powers given to the Board under Chap. 6-A are very wide and their exercise in the case of a temple managed under a scheme framed by the Court sets the scheme at nought. It could never have been intended that the power of notification should be exercised without grave reason. In exercising its powers under Chap. 6-A, the Board must act judicially, after a full and proper inquiry, and as the provisions of Chap. 6-A with regard to appeal are illusory the need for care in this respect is all the greater. My reasons for describing the provisions of the chapter with regard to appeal as being illusory are these. Section 65-A, as I have already indicated, requires the inquiry where there is objection to a proposed notification under Chap. 6-A to be held by a committee of the Board consisting of not less than three commissioners of whom the President shall be one. Section 11 limits the maximum number of commissioners to five including the President. As I have already pointed, the Board as at present constituted consists of only four members of which the President is one. Therefore the appellate tribunal is in reality the tribunal of first instance. The

powers given by Chap. 6-A are so great that they cannot safely be conferred, whether on a statutory body like the Religious Endowments Board or on the Court without provision for an appeal to an independent tribunal and it is to be hoped that this case will have the effect of drawing attention to the need for an appellate tribunal, which is in reality, and not merely in name, an appellate tribunal.

In (1911) A C 179[3] the House of Lords affirmed a decision quashing the proceedings of a statutory Board where the Board has failed to deal fairly with the matters in issue. A local education authority refused to pay salaries to teachers in a non-provided school at the same rate as it paid the teachers in provided schools. A complaint was made by the managers of non-provided schools, and the Board of Education directed an inquiry which resulted in the report that the local education authority had failed to maintain the school and keep it efficient. The Board of Education was required to determine : (1) whether the local education authority had in fixing and paying the salaries of the teachers fulfilled its duty under S. 7, sub-cl. (1), Education Act, 1902; and (2) whether the salaries inserted in the teachers' agreements were reasonable in amount and ought to be paid by the authority, or what salaries the authority ought to pay. The Board of Education gave a decision in writing, but failed to deal with the matters in issue. Its decision was quashed by certiorari by a Divisional Court (Lord Alverstone C. J., Darling and Lawrence JJ.) and the decision was affirmed by the Court of appeal and by the House of Lords. In the appeal to the House of Lords, Lord Loreburn, the Lord Chancellor said :

In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything .... The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine then there is a remedy by mandamus and certiorari.

Now, has the Board in this case acted in good faith? Has it listened fairly to the petitioner and acted judicially in applying Chap. 6-A? An examination of the facts and of the reasons given by the Board for its action leaves no doubt in my mind that the Board has not acted fairly, but to use the words of Cozens-Hardy M. R. in his judgment in the case which I have just cited when it was before the Court of appeal the decision is "so perverse as really to amount to a non-exercise of the jurisdiction entrusted to the Board." I will deal in the order in which they are set out, the four reasons given by the Board for the notification of the temples. It was alleged by the Board that cls. 3, 6, 7, 8, 9 and 13 of the scheme framed by this Court in 1925 were inconsistent with the provisions of the Madras Hindu Religious Endowments Act. What the Board says here is this :

It is not denied that the provisions of the scheme in question are inconsistent with the Act. The scheme provides for a Board of Supervision. The control is shared by the Board of Supervision and the Court. The act contemplates superintendence and control by the Board. The first reason therefore is held to be proved. What is argued, however, is that a suit might be filed for the amendment of the scheme. But, as has been pointed out, the said remedy is a tardy and ineffective one.

This is undoubtedly an incorrect statement of the position. It is in fact denied that the provisions of the scheme are inconsistent with the Act and when the scheme and the Act are examined the denial is found to be fully justified. The statement that the remedy by suit is "tardy and ineffective" is also open to grave objection. A suit, of course, must always take its turn for hearing unless there are special reasons for expediting it, but the Court for proper reasons shown will expedite the hearing and as the statement that schemes settled or amended by the Court are ineffective is not supported by reasons and is contrary to my experience of many years. I am not prepared to accept it. A scheme framed by the Court speaks for itself. If its provisions are not followed and the trustee abuses his powers or neglects his duties the Court will take effective steps, but of course, those interested in the trust must be sufficiently interested to bring matters to the notice of the Court and this the Board can always do.

What are the provisions of the scheme which have been framed in this case?

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3. (1911) 1911 A C 179 : 80 L J K B 796 : 104 L T 689 : 75 J P 393 : 9 L G R 652 : 55 S J 440 : 27 T L R 378, Board of Education v. Rice.

Clause (3) of the scheme provides for a Board of Supervision. Clause (6) says that the trustee shall submit to the Board of Supervision before 30th June in each year a budget showing the probable receipts and disbursements. Clause (7) requires the accounts of the institution to be audited by a Government Certified Auditor and an abstract stating the result of the audit to be published in such manner as the Board of Supervision may direct. Clause (8) says that without the sanction of the Board of Supervision, the trustees shall not lease for a longer period than five years, sell or mortgage any of the properties belonging to the temples. Clause (9) provides that where there is or arises a conflict of interest between the math and the devasthanams, the trustee shall always place the matter before the Board of Supervision and it shall be jointly considered by the trustee and the Board of Supervision. In the event of their failing to agree, either of them shall be at liberty to refer the matter to the District Court of Ramnad for decision. Clause (13) states that the trustee, the Board of Supervision or the Advocate-General shall have liberty to apply to the District Court of Ramnad for directions generally, including directions for the utilization of surplus moneys, if any. They shall also have liberty to apply for any modification of the scheme. None of these provisions interferes with the provisions of the Act or with the powers of the Board constituted by the Act. These provisions can only be regarded as additional safeguards. Certainly the existence of these clauses does not provide ground for notifying the temples under Chap. 6-A of the Act.

The allegation that the petitioner was not attending to urgent repairs is strenuously denied by him. That certain repairs are required is accepted, but the repairs are being executed from time to time as funds are available. The remarks of the Board on the objection indicate that the Board considered that if the petitioner had not sufficient funds available for carrying out all the repairs he was bound to appeal to the general public for donations. The learned Advocate-General very properly made no attempt to justify this ground for the Board's order. With regard to the allegation that the salaries of the temple servants are not paid regularly, the Board says :

> It is admitted that the trustee enters upon an elaborate defence of this on the ground that there are seasonal variations, and uncertainty of incomes which renders the regular payment impossible. It is the obvious duty of the trustee to make satisfactory financial arrangements for the payment of the salaries of temple servants. This is very essential in any administration. The plea put forward by him is untenable. This reason also is held to be proved.

There is here no examination of the facts disclosed by the petitioner and the facts as stated by him have not been challenged. They are these. All the lands belonging to the temples yield only one crop a year and the success of this crop depends upon the rainfall, as there is no system of irrigation. When the salaries can be paid depends upon the crop and the collections. In difficult times the salaries are bound to fall in arrear. It is not suggested that the temple servants have complained that they are kept waiting longer than in other institutions. In the neighbouring estate of Sivaganga, which is administered by a member of the Indian Civil Service and where there are larger resources, servants are not paid regularly. When the petitioner took over charge of the temples the salaries were nine months in arrear, but at the time he was called upon to show cause why the temples should not be notified the arrears had been reduced to three months. It is not disputed that the position with regard to salaries is far better than when the temples were in the hands of the receiver appointed by the Court and there is no reason to think that the trustee has not done all that was reasonably possible for him to do in the matter of the regular payment of salaries.

The Board's rejection of the petitioner's explanation with regard to the collection of arrears is also open to grave objection. Here again no attempt was made to examine the evidence. When the petitioner took over charge of the temples the arrears of rent amounted to Rs. 1,39,291-2-11, a considerable portion of which was irrecoverable as the result of the law of limitation. By the year 1937-38 the arrears had been reduced to Rs. 83,781-11-5. If the sums which had become time barred had been written off when the petitioner took over charge, the arrears would have been very small, but it has never been the practice to write off amounts which have become time barred, because many tenants do pay if they can, notwithstanding that the law of limitation has operated in their favour. Of the arrears of Rs. 83,781-11-5, Rs. 20,000 represents debts below Rs. 4 and the cost of filing and conducting suits for the recovery of these sums would be prohibitive. The statements which

the petitioner has filed showing the collections have also not been challenged and not only do they show that he has not allowed the arrears to increase, but they show that he has greatly improved the position. Mr. E. V. Sundara Reddi, one of the commissioners forming the committee of the Board which rejected the petitioner's representations, visited the temples in April 1936. The visit was without notice and had not been included in the commissioner's programme. As the result of this surprise inspection he certified that the temple was well kept, clean and tidy. He added that the trustee and treasurer, assisted by the staff, had been evincing keen interest in the upkeep of the institution. It is impossible to reconcile the order of the Board notifying these temples with this certificate.

Further indication of the improper attitude of the Board is to be gathered from what happened when the petitioner appealed. Mr. V. Ramaswami Ayyar who was engaged to support the appeal could not attend at the precise hour fixed for the hearing. The reason was that a Division Bench of this Court composed of Venkataramana Rao and Newsam JJ., had intimated that they wished him to be present personally in Court at that hour to speak to a certain matter. On receiving this information he wrote to the Secretary of the Board explaining his position, adding that he would attend at the office of the Board as soon as he was able to do so. The delay was only a matter of fifteen minutes, but the Board would not wait for him and when he got there he found that the appeal had been dismissed. It is obvious from the course of events that even if Mr. Ramaswami Ayyar had appeared before the Board the result would have been the same, but in refusing to wait for a short time under the circumstances the Board has only emphasized the arbitrary nature of its action. Entirely without reason, the Board has taken away from the petitioner the management of the temples of which he was given charge by an order of this Court, passed with the consent of all parties. I consider that the only conclusion which can reasonably be drawn after the examination of the record is that the Board has acted in abuse of its powers. The order of the committee and that of the Board on appeal will be quashed and the Board prohibited from taking steps to appoint an officer under S. 65C of the Act. The petitioner is entitled to his costs and we fix the advocate's fee at Rs. 250.

Krishnaswami Ayyangar J.—I agree.

C.R.K./G.N. *Order quashed.*

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(28) A. I. R. 1941 Madras 884

LAKSHMANA RAO J.

Peta Venkayya — Petitioner

v.

S. Seethayya and another —

Respondents.

Criminal Revn. Case No. 637 and Criminal Revn. Petn. No. 598 of 1940, Decided on 12th December 1940, to revise order of Sub-Divisional Magistrate, Tenali, D/- 28th February 1940.

Criminal P. C. (1898), S. 250 — Complainant filing complaint under Ss. 426 and 447, Penal Code, against accused for cutting leaves of certain trees—Cutting of leaves not disputed—Fact that accused were found entitled to leaves held could not make complaint false or vexatious so as to justify order under S. 250, Criminal P. C.

The complainant filed a complaint against the accused under Ss. 426 and 447, Penal Code, for cutting leaves of certain trees alleging that the right to the same was enjoyed by the ryots owning adjoining fields. The cutting of leaves by the accused was not disputed :

***Held* that the fact that the accused were found entitled to leaves did not make the complaint false and frivolous or vexatious so as to justify an order under S. 250, Criminal P. C. [P 885 C 1]**

A. Bhujanga Rao — for Petitioner.

V. Subrahmanyam — for Respondents.

Public Prosecutor — for the Crown.

FACTS. — The petitioner complained against the respondents for cutting the leaves of palmyra trees standing on the canal bund. It was found on evidence that A-2 and some others were the persons that actually cut leaves and that A-1 was not present when the alleged offence was committed. A-1 was included without any reasonable cause. It was also found that the trees on the canal bund belonged to Government and that the accused were auction purchasers of the right to cut leaves and that they cut them in their own right. The complainant stated that they were being enjoyed by the ryots who owned the adjoining fields and to establish that right they filed the complaint. The Stationary Sub-Magistrate took the case on file under S. 426, Penal Code, and finding that the facts disclosed an offence under S. 379, tried it as a warrant case. On the evidence he discharged the accused (respondents) and ordered the petitioner to pay compensation under S. 250, Criminal P. C., to the accused. The Sub-divisional Magistrate on appeal confirmed the order of the Stationary Sub-Magistrate. Against this order the revision petition is filed.

Order.—The complaint was under Ss. 426 and 447, Penal Code, and the cutting of the leaves was not disputed. That the accused were found to be entitled to the leaves would not make the complaint false and frivolous or vexatious and the order under S. 250, Criminal P. C., cannot be sustained. It is therefore set aside and the amount of compensation if levied will be refunded.

C.R.K./G.N. *Order set aside.*

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(28) A. I. R. 1941 Madras 885

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

P. R. M. P. L. R. M. Palaniappa Chettiar — Appellant

v.

K. Periaswami Konar and another — Respondents.

Letters Patent Appeal No. 76 of 1939, Decided on 14th November 1940, against judgment and decree of Wadsworth J., in S. A. No. 640 of 1935, D/- 27th September 1939.

Deed—Construction—Usufructuary mortgage—Personal covenant—Mortgagee in possession to enjoy property for seven years—Mortgagor not entitled to redeem during aforesaid period—After expiry of seven years mortgagor entitled, if he chose, to redeem in any subsequent year by giving notice in Panguni and paying money in Chittrai—Deed held contained no personal covenant—Onus held on person alleging covenant to prove same from language used in document.

The deed of alleged usufructuary mortgage ran as follows : "Therefore, in lieu of interest for the said amount, you shall enter upon the undermentioned properties and enjoy the same for a period of seven years from this date, under the right of usufructuary mortgage with possession being entitled to both the varams. In any year after the expiry of the stipulated period I shall redeem by giving notice in Panguni and paying money in Chittrai:

***Held* that the deed did not contain a personal covenant to pay and that the onus was on the party alleging the covenant to exist to prove the same from the language used in the document.**

[P 886 C 1]

A. C. Sampath Ayyangar and T. K. Sundararaman — for Appellant.

T. E. Ramabhadrachariar — for Respondents.

Krishnaswami Ayyangar J.—The only question that arises for consideration in this appeal is whether the mortgage deed sued upon contains a personal covenant on the part of the mortgagor enforceable by the mortgagee. On 9th October 1926, respondent 1 executed in favour of the appellant a deed of othi (usufructuary mortgage) for a consideration of Rs. 1000 received by the mortgagor. Respondent 2 is the purchaser of the suit property subject to the mortgage. The document contains the following covenants :

> Therefore, in lieu of interest for the said amount, you shall enter upon the undermentioned properties and enjoy the same for a period of seven years from this date, under the right of usufructuary mortgage with possession being entitled to both the varams. In any year after the expiry of the stipulated period I shall redeem by giving notice in Panguni, and paying money in Chittrai.

The appellant instituted the suit out of which this appeal has arisen for enforcing the mortgage by sale of the mortgage property. In the absence of a personal covenant, a usufructuary mortgagee as such has no right to ask for such a relief. The District Munsif of Devakottai, who tried the suit, was of opinion that the mortgage deed did contain a personal covenant and accordingly decreed the suit. The respondents preferred an appeal to the Subordinate Judge of Devakottai. The Subordinate Judge differed from the District Munsif and held that the mortgage did not import a personal covenant. In this view he reversed the decision of the District Munsif and dismissed the suit. The appellant then filed a second appeal to this Court, and it was heard by Wadsworth J. The learned Judge concurred in the decision of the Subordinate Judge and accordingly dismissed the second appeal. On leave granted under Cl. 15 of the Letters Patent, this appeal has been preferred by the appellant. On his behalf, his counsel has once again urged that on a true construction of the deed it must be held to include a personal covenant. This, as we said, is the only question that has to be decided.

The deed is in Tamil and the words which are alleged to contain the personal covenant are set out in the opening paragraph of the judgment under appeal. Its effect may be expressed as follows: The mortgagee was to have the right of enjoying the property undisturbed for a period of seven years certain. During that period, the mortgagor was not to have the right to redeem. After the expiry of the period the mortgagor could, if he chose, redeem in any subsequent year. But this option cannot be exercised except by giving notice of redemption in the Panguni previous and paying the mortgage money in the Chittrai following. There are no words in the deed casting an obligation on the mortgagor to pay and redeem, capable of being enforced at the instance of the mortgagee. The language employed only reserves an option to the

mortgagor but if he desires to exercise it, he can do so only by following the procedure indicated, and not otherwise. If he does not however choose to exercise the option the deed will remain an ordinary usufructuary mortgage, and the mortgagee must be content with retaining possession of the mortgage property until redemption by payment of the mortgage money. In this type of mortgage there is ordinarily no personal covenant imported and the mortgagee has no right to sue for sale. If therefore in any case it is contended that there is such a covenant, it lies upon the party so contending to make it out from the language used in the document. That is not the case here. We are, therefore, of opinion that the judgment of Wadsworth J. is correct. In the result the appeal fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 886

WADSWORTH AND PATANJALI SASTRI JJ.

Km. K. R. Km. Kuppan Chettiar by agent S. Krishnamachariar — Appellant

v.

Kaliammal — Respondent.

Appeal No. 77 of 1941 (A. A. O. No. 91 of 1940, converted into), Decided on 24th March 1941, against decree of Sub-Judge, Coimbatore in O. S. No. 121 of 1935.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 7, 8 and 9—*T* holding two mortgages from *M*—*T* purchasing property from *R* and as part of sale price assigning his rights under mortgages valued at Rs. 5290 to *R*—Suit by *R* on mortgages dismissed against *M* as he was found to have no title to mortgaged lands but decree for Rs. 5290 passed against *T* on basis of damages for breach of covenant for title—No question of scaling down liability under decree with reference to mortgage debts held could arise.

T purchased certain properties from *R* for Rs. 20,000 and by way of making up part of the sale price he assigned to his vendor his rights under two mortgages executed in his favour by *M* the value thereof being estimated at the time as Rs. 5290. In the suit by *R* on the mortgage documents the Court found that *M* had no title to the lands mortgaged and therefore dismissed the suit against *M* but decreed the suit against *T* for Rs. 5290 on the basis that he was liable for breach of the covenant of title :

Held that there could be no question of scaling down the liability under the decree with reference to the principal of the mortgage debts for which *T* himself was never liable. [P 887 C 1]

R. Desikan — for Appellant.

S. V. Venugopalachari for N. Sivaramakrishna Iyer — for Respondent.

Wadsworth J. — The facts which led upto this appeal are the following : One Madar Sahib executed two mortgages to Thangammal, one for Rs. 2000 in 1921 and the other for Rs. 1000 in 1922. In 1928 Thangammal purchased certain properties from one Ramanatha Ayyar for Rs. 20,000 and by way of making up part of the sale price she assigned to her vendor her rights under the two mortgages from Madar Sahib, the value thereof being estimated at the time as Rs. 5290. In 1931 Ramanatha Iyer assigned his rights under these mortgages to the plaintiff who is the appellant here. In 1935 the plaintiff brought a suit claiming as against defendants 1 to 6 (the heirs of Madar Sahib) a decree on these two mortgages and as against defendants 7 to 9 (the heirs of Thangammal) a decree on the basis of the covenants of title contained in the deeds of assignment. The trial Court found that Madar Sahib had no title to the lands mortgaged and dismissed the suit on the mortgage documents as against his heirs. He gave a decree against defendants 7 to 9 for Rs. 5290 with interest on the basis that they were liable for damages for the breach of the covenant of title. After Madras Act 4 of 1938 came into force, defendant 9 filed an application under S. 19 to scale down this decree and the learned Subordinate Judge of Coimbatore has scaled down the decree with reference to the original principal of the two mortgages allowing only Rs. 3000 with interest at $6\frac{1}{4}$ per cent from 1st October 1937. He repelled the contention that the liability was exempt under S. 10 (2) of the Act.

It seems to us that the learned Subordinate Judge has misunderstood the nature of the transaction. Thangammal was never liable under these mortgages. She was the mortgagee and not the mortgagor. Her liability to the plaintiff is the liability of a vendee who instead of cash hands over a commodity as part of the purchase price, guaranteeing that the commodity will fetch the amount at which it is valued. When eventually that commodity is found to be worthless, an action lies against the vendee for the breach of the covenant regarding its value. The mortgages which Thangammal assigned were mere securities made over in lieu of cash with a guarantee as to the amount which they would fetch. The decree of the lower Court finally decided these securities to be worthless and declared Thangammal's heirs liable to pay the amount which they should have realized.

It seems therefore to follow that there can be no question of scaling down this liability with reference to the principal of the mortgage debts for which Thangammal herself was never liable. The appellant is satisfied with a decree for Rs. 5290, the amount at which the securities were valued, with interest thereon at 6 per cent from 1st October 1937 to the date of the lower Court's order and costs. Subsequent interest will be at six per cent. In these circumstances it is unnecessary to go into the further question whether the appellant is entitled to the protection of S. 10 (2) of the Act. The appeal is allowed with proportionate costs on the application and on the appeal and the decree of the lower Court will be amended as indicated above.

C.R.K./G.N. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 887

HORWILL J.

D. Vanjeeswara Ayyar —
Plaintiff — Petitioner

v.

District Board, South Arcot and others
— Defendants — Respondents.

Civil Revn. Petn. No. 1492 of 1937, Decided on 6th September 1940, to revise decree of Dist. Munsif, Vridhachalam, in S. C. S. No. 487 of 1936.

Contract — Principle of quantum meruit — Applicability — Principle does not apply when there is express contract in existence.

The principle of quantum meruit is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person for whom the work is to be done contracts to pay the person who does work reasonably for the work done. There is no room however for an implied contract where there is an express contract in existence. Where, by the terms of the contract, the person who does the work agrees that he is not entitled to any remuneration unless the work has been checkmeasured, then, he cannot claim for any work that has not been checkmeasured.

[P 887 C 2 ; P 888 C 1]

P. Sridhara Rao — for Petitioner.

P. Panchapakesa Sastri and K. R. Krishnaswami — for Respondents.

Order.—The petitioner brought this suit against the President, District Board, Cuddalore (defendant 3) the District Board being the successor to the Taluk Board, Vridhachalam, to enforce payment for certain work done by him in pursuance of a contract to remove prickly pear, to do certain earth work, and to plant mile and furlong stones. The suit was dismissed on the ground that according to the terms of the contract, he was not entitled to be paid for work done if it was not checkmeasured or did not give satisfaction. This petition has been filed by the plaintiff, who contends that even if he is not entitled to the money under the contract, the principle of quantum meruit should be applied and he should therefore be paid for such work as he has done. With regard to the earthwork, it appears that Rs. 15 remained unpaid and was carried over to the plaintiff's deposit account. Why actually it was transferred to the deposit account is not very clear; but the learned Munsif considers its carrying over to be a sufficient answer to the plaintiff's claim. The learned advocate for the District Board says that the money has probably been paid to the plaintiff by now; but if it has not been paid, the District Board is willing to do so. He says that the money was transferred to the deposit account because of some shortage of the deposit. I do not think that this matter calls for any interference in revision.

With regard to the prickly pear, the difficulty arose because after measurement (called advance measurement) by the overseer, the prickly pear was burnt by the plaintiff before it was checkmeasured. The plaintiff stated that he was told by the overseer that as the value of the work was below Rs. 50 checkmeasurement was unnecessary. Although this seems to be so under the Public Works Department rules, there is no such rule in the Local Board rules or in the contract by which the plaintiff and the District Board were bound. The object of checkmeasurement is a salutary one, it clearly being that the Local Board thinks it necessary that the work of the overseer should be checked and controlled by some engineer of higher standing, upon whose word it can rely. By the contract, the local body expressly stated that it would not be bound by any measurement that was not checkmeasured. A provision was no doubt made for advance payments as the work proceeded, upon measurements made by the overseer, subject to a deduction of 10 per cent.; but that payment was provisional and was in no sense binding on the parties. It was subject to proper accounting after checkmeasurement and after the work had been completed.

The principle of quantum meruit is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed, by which the person for whom the

work is to be done contracts to pay the person who does work reasonably for the work done. There is no room however for an implied contract where there is an express contract in existence. Where, by the terms of the contract, the person who does the work agrees that he is not entitled to any remuneration unless the work has been checkmeasured, then, clearly, he cannot claim for any work that has not been checkmeasured. The work done by the plaintiff in redressing and replanting mile and furlong stones never met with the final approval of the local body, represented by the engineer authorized to pass the work. According to the terms of the contract therefore the plaintiff was not entitled to receive payment. How far the work of the plaintiff was of value to the District Board, in view of the circumstances that it failed to meet with the approval of the engineer, is not clear from the evidence. We cannot assume a benefit; but if there was, the terms of the contract gave rise to no claim by the plaintiff unless the conditions therein were fulfilled. In this case too, the principle of quantum meruit cannot be applied for the reasons given in the preceding paragraph.

While it is necessary to dismiss this petition, I cannot but observe that the conduct of the Local Board has been very reprehensible. The destruction of the prickly pear was probably due to a misapprehension on account of the rules of the Public Works Department which seem to permit payment without checkmeasurement. It is true that the Local Board could not be expected to pay for work unless it was satisfied that the work was done; but it is clear that work was done in connexion with the prickly pear and I feel that the Local Board acted dishonestly in making no payment at all. Even with regard to the planting of mile stones and furlong stones, the local body could have and should have paid the plaintiff for any work from which it derived some benefit. Under the circumstances, there will be no order as to costs in this Court.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 888

WADSWORTH J.

Nellore Permanent Fund, Ltd. by President, C. Malakondaiya — Petitioner

v.

Kondapi Subba Rao and another — Respondents.

Civil Revn. Petn. No. 1409 of 1938, Decided on 30th July 1940, to revise order of District Munsif, Kavali, D/- 15th July 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 10 (2) (iii) — S. 10 (2) (iii) refers to interest on basic debt and not subsequent interest on decree amount — Mortgage decree providing interest under 8 per cent. with default rate at 12½ per cent.—Default rate actually adopted in decree — 12½ per cent. must be regarded as rate of "interest payable" within S. 10 (2) (iii).

It is the interest on the basic debt and not the subsequent interest on the decree amount to which S. 10 (2) (iii) refers. Consequently where a mortgage decree provides interest at something under 8 per cent., with a default rate of 12½ per cent. which has actually been adopted in the decree, it cannot be said that the 12½ per cent. is not a rate of "interest payable" within the meaning S. 10 (2) (iii) but a penal rate which could not be recovered. Consequently, the provisions of Ss. 8 and 9 of Act apply to the decree. [P 888 C 2]

K. Kuppuswami — for Petitioner.

P. S. Raghavarama Sastri — for Respondents.

Order. — Petitioner is a public company which has got a decree on a mortgage providing interest at something under 8 per cent., with a default rate of 12½ per cent. The latter rate has actually been adopted in the decree, so that it is not open to the petitioner to base an argument on the theory that the 12½ per cent. is not a rate of interest payable but a penal rate which could not be recovered. Nor can it be argued that the rate of interest "payable in respect of the liability" in S. 10 (2) (iii) of Act 4 of 1938 means the rate of subsequent interest on the decree amount. Clearly the sub-clause is dealing with an exemption from the operation of Ss. 8 and 9, which are concerned with the scaling down of the debt whether or not it has ripened into a decree. It must, therefore, be interest on the basic debt to which this rather cumbrously worded clause refers. The order of the lower Court is correct and there are no grounds for interference in revision. The petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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(28) A. I. R. 1941 Madras 889 (1)

WADSWORTH AND PATANJALI SASTRI JJ.

Palanivel Gounden — Petitioner

v.

Subbaroya Gounden — Respondent.

Civil Revn. Petn. No. 388 of 1939, Decided on 26th August 1940, to revise order of Sub-Judge, Salem, D/- 17th August 1938.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 19 and 10 (2) (ii) — Vendee of hypotheca impleaded in mortgage suit — Vendee is judgment-debtor within S. 19—Mortgagor vendor's lien subsisting under S. 55 (4) (b), T. P. Act — Liability of vendee to decree-holder can still be scaled down—S. 10 (2) (ii) is no bar.

The vendee of the hypotheca impleaded in a mortgage suit is a judgment-debtor within the meaning of S. 19 : ('39) 26 AIR 1939 Mad 186, *Foll.* [P 889 C 1]

In such a case even if the mortgagor vendor's lien under S. 55 (4) (b), T. P. Act, is subsisting, the liability of the vendee to the decree-holder can be scaled down under the Act since that liability is not the same as his liability to the mortgagor in respect of which the lien subsists : ('41) 28 AIR 1941 Mad 59, *Rel. on.* [P 889 C 1]

V. T. Rangaswami Ayyangar and K. Ramaswami Ayyangar — for Petitioner.

R. S. Srinivasacharya and K. V. Rajagopalan — for Respondent.

Wadsworth J. — The petitioner applied under S. 19 of Act 4 of 1938, to scale down the decree and his application was rejected. The grounds for this rejection were two-fold. Firstly it was held that the petitioner could not be regarded as a judgment-debtor, he being impleaded as the vendee of the hypotheca in a mortgage suit. This decision cannot be upheld having regard to the decision of the bench in I L R (1939) Mad 218.[1] The second ground on which the application was rejected is that the liability which the petitioner seeks to scale down is one in respect of which there is a charge under S. 55 (4) (b), T. P. Act, and that therefore by S. 10 (2) (ii) of Madras Act 4 of 1938, the debt cannot be scaled down. This contention must be negatived, having regard to our decision in C. R. P. No. 602 of 1939.[2] The liability to the decree-holder is not the same as the liability to the mortgagor in respect of which the vendor's lien subsists. In the result therefore the civil revision petition must be allowed with costs and the application remitted to the trial Court for disposal in the light of this judgment.

C.R.K./G.N. *Petition allowed.*

1. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : I L R (1939) Mad 218 : (1938) 2 M L J 1068, Perianna v. Sellappa.
2. *Reported in* ('41) 28 AIR 1941 Mad 59 : 196 I C 276 : (1940) 2 M L J 651, Doroikannu Odayar v. Veeraswami Padayachi.

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(28) A. I. R. 1941 Madras 889 (2)

HORWILL J.

Rex — Petitioner

v.

Jaggopal Prasad and others—Respondents.

Criminal Revn. Case No. 373 and Criminal Revn. Petn. No. 354 of 1941, Decided on 30th July 1941, to revise judgment of the Special Honorary Presidency Magistrate, Egmore, Madras, D/- 4th February 1941.

Madras City Police Act (3 of 1888), S. 47 — Accused convicted under Act—Whether money found on persons of accused should be forfeited —Test is whether money is likely to have been used in connexion with gaming—Money found on persons of accused held was used for gaming.

The general principle to be adopted by a Magistrate in considering the question whether the money found on the persons of the accused convicted under the Act should be forfeited is whether the money is likely to have been used in connexion with gaming. If so, its forfeiture should be ordered. The question whether the money was used for gaming is a question of fact. [P 889 C 2; P 890 C 1]

From the person of accused 1 was recovered a sum of Rs. 443-11-0. The value of the betting slips on his person amounted to Rs. 460-14-0. On the person of accused 2 was cash to the value of Rupees 19-4-0 and betting slips of the value of Rs. 24-8-0. On the person of accused 3 cash was found to the value of Rs. 35-8-0 and betting slips of the value of Rs. 52-6-0 :

Held that the money found on the persons of the three accused was money used by them for gaming and therefore should be forfeited. [P 890 C 1]

The Crown Prosecutor — for Petitioner.

A. S. Veeraraghavan — for Respondents.

Order. — Respondent 1 has been found guilty of running a gaming house and the other respondents of gaming within the house. The only question that arises in this petition is whether the money found in the pockets of the three respondents should be confiscated. Under S. 47, City Police Act, the Magistrate may order all or any of the articles seized or the proceeds thereof to be forfeited. Various articles were found about the premises, and the police also seized the money that was in the pockets of the three respondents. The Magistrate has declined to forfeit the money that was on their person; and the question that arises in this revision petition—which has been filed by the Crown — is whether the Magistrate's order was a right one.

There can be no doubt that the general principle to be adopted by a Magistrate in considering the question of this kind is whether the money is likely to have been used in connexion with the gaming. If so, he should order its forfeiture. If not, he should refrain from doing so. The Magistrate has not really considered this question

at all, but has said that he intends following the practice of his Court to declare forfeited such money as may be found on the floor, and no more. The gaming of which the respondents were guilty was betting on horse races. When bets are made money is taken and betting slips written in duplicate, one kept by the owner and one by the client. The point on which the Crown rely is that the sum of money found on the persons of the accused roughly corresponds with the value of the betting slips. It is not to be expected, the learned Crown Prosecutor says, that money should be lying about on the floor. One would expect, when a bet is made, that the person conducting the betting would put the money in his pocket — not elsewhere. From respondent 1 was recovered a sum of Rs. 443-11-0. The value of the betting slips on his person amounted to Rs. 188. In a tin box belonging to him were found betting slips amounting to Rs. 272. Thus total value of betting slips found in his possession was Rs. 460-14-0, a little over Rs. 17 more than the value of the money found in his pockets. On the person of accused 2 was cash to the value of Rs. 19-4-0 and betting slips of the value of Rs. 24-8-0. On the person of accused 3 cash was found to the value of Rs. 35-8-0, and betting slips of the value of Rs. 52-6-0. It is a question of fact in each case whether money found on the person of a person convicted under this Act was used for gaming.

The close similarity between the sums found and the sums noted on the betting slips seems to be more than a coincidence, and I have little doubt in mind that the money found on the persons of the three accused was money used by them for gaming. The learned Magistrate's rule of thumb may do well enough in the average case, where there is no evidence one way or the other to indicate whether the money found on the person has been used for gaming or not; but where there is evidence pointing one way or the other, the Magistrate is bound to take that evidence into consideration and not to rely entirely on his rough rule of practice. The petition is therefore allowed and the money seized by the police ordered to be forfeited.

C.R.K./G.N. *Petition allowed.*

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(28) A. I. R. 1941 Madras 890

WADSWORTH J.

K. M. Rangiah Chettiar — Petitioner

v.

Syed Karim Sahib — Respondent.

Civil Revn. Petn. No. 2044 of 1939, Decided on 16th April 1941, to revise decree of Dist. Munsif, Tirupattur, D/- 27th March 1939.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 10 (2) (ii), 8 and 9 — S. 10 (2) (ii) protects liability for which at its inception charge was provided irrespective of whether charge could have been enforced in particular suit — *A* holding pronote executed in his favour by *B* endorsing it to *C* in partial payment of price of immovable property — At inception of *A's* liability to *C* for debt under pronote there being charge under S. 55 (4) (b), T. P. Act, *A's* liability held was excluded by S. 10 (2) (ii) from operation of Ss. 8 and 9.

The liability of the endorser of a promissory note is a personal liability incurred on the date of the endorsement : ('40) 27 A I R 1940 Mad 943, *Rel. on.* [P 890 C 2]

Section 10 (2) (ii) protects any liability for which at its inception a charge was provided regardless of whether the charge could actually have been enforced in the particular suit. [P 891 C 1]

***A* holding a pro-note executed in his favour by *B* endorsed the pro-note to *C* in partial payment of the price of the sale of immovable property and thus made himself liable at the date of the endorsement for the debt under the pro-note in respect of which upto that date he was under no liability at all :**

***Held* that since at the inception of the liability of *A* to *C* there was a charge provided under Sec. 55 (4) (b), T. P. Act, Section 10 (2) (ii) excluded *A's* liability from the operation of Ss. 8 and 9. [P 891 C 1]**

A. Ramakrishna Iyer — for Petitioner.

W. S. Krishnaswami Naidu — for Respondent.

Order. — This civil revision petition arises out of a small cause suit on a promissory note executed by defendant 1 in favour of defendant 2 who endorsed the note to the plaintiff. The present petitioner, who is the plaintiff, does not object to the decree passed against defendant 1 who has been given the benefit of Act 4 of 1938. But as against defendant 2 he contends that by reason of S. 10 (2) (ii) of Act 4 of 1938, the liability of defendant 2 — the endorser — is one in respect of which a charge is provided under S. 55 (4) (b), T. P. Act, and that therefore cannot be reduced. It was held in (1940) 2 M L J 575[1] that the liability of the endorser of a promissory note is a personal liability incurred on the date of the endorsement. This Court has also held in a number of

1. ('40) 27 A I R 1940 Mad 943 : 191 I C 846 : (1940) 2 M L J 575, Poovalingam Pillai v. Nagaratnam Pillai.

cases that S. 10 (2) (ii) of Act 4 of 1938 protects any liability for which at its inception a charge was provided regardless of whether the charge could actually have been enforced in the particular suit. It is contended for the respondent that when the promissory note was executed, it had nothing to do with a sale of immovable property and therefore it was not a liability in respect of which at its inception a charge was provided. This contention seems to me to rest on a confusion of ideas. When this promissory note was executed, defendant 2 was not the debtor but the creditor. His liability arose when in partial payment of the price of the sale of immovable property he endorsed the promissory note to the plaintiff. The effect of this endorsement was that he made himself liable for a promissory note debt in respect of which upto that date he was under no liability at all; that is to say, on the date of the endorsement, defendant 2 promised to pay the amount of the promissory note to the plaintiff and at the inception of this liability, i. e., the liability of defendant 2, there was a charge provided under S. 55 (4) (b), T. P. Act. It follows therefore that S. 10 (2) (ii) of Act 4 of 1938 excludes the liability of defendant 2 from the operation of Ss. 8 and 9 of that Act. The petition is therefore allowed with costs and the plaintiff will be given a decree as against defendant 2 for the full amount claimed and full costs in the Court below. The decree as against defendant 1 is not modified.

C.R.K./G.N. *Petition allowed.*

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(28) A. I. R. 1941 Madras 891 (1)

LEACH C. J. AND HAPPELL J.

M. Varadaraja Pillai and another — *Appellants*

v.

Rukmani Ammal — *Respondent.*

Original Side Appeal No. 52 of 1940, Decided on 13th February 1941, against order of Somayya J., in Appln. No. 1435 of 1940, D/- 29th August 1940.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 7, 8 and 9 — "Decree" includes preliminary mortgage decree.

The word "decree" in Ss. 7, 8 and 9 includes preliminary mortgage decree and therefore a preliminary mortgage decree passed before the commencement of the Act can be scaled down : ('40) 27 A I R 1940 Mad 910, *Rel. on.* [P 891 C 2]

K. P. Ramakrishna Iyer — for Appellants.

N. Panchanatha Iyer — for Respondent.

Leach C. J.—We agree with Somayya J., from whose decision this appeal has been preferred that the case is governed by the decision of this Court in (1940) 2 M L J 202.[1] That case was decided by a Division Bench and its decision is binding on us. The learned advocate for the appellant has suggested that the decision should be reconsidered and has asked us to refer the question to a Full Bench. We see no reason why we should adopt this course. It has been suggested that there is a difference here because in the present case there has not been a final decree, only a preliminary decree. The learned Judge has rightly pointed out that it is the preliminary decree in a mortgage suit which fixes the rights and liabilities of the parties. When a preliminary decree has been passed time is given to the mortgagor to pay off the decretal amount and redeem the mortgage. The final decree does not change the position except that it gives the mortgagee the right to sell the property for the amount declared to be due in the preliminary decree. For these reasons we concur in the decision of the learned Judge, and the appeal will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

1. ('40) 27 A I R 1940 Mad 910 : 194 I C 753 : I L R (1940) Mad 1023 : (1940) 2 M L J 202, Kottayya v. Venkatapunayya.

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(28) A. I. R. 1941 Madras 891 (2)

WADSWORTH J.

Examiner of Local Fund Accounts, Madras — Petitioner

v.

Sp. Rm. Rm. Ramaswami Chettiar — *Respondent.*

Civil Revn. Petns. Nos. 1634 and 1635 of 1937, Decided on 14th August 1940, to revise orders of Dist. Court, Ramnad, D/- 29th September 1937.

(a) Madras Local Boards Act (14 of 1920), S. 199, Rules under, R. 5—R. 5 permits auditor to surchage person making payment or authorizing it.

Rule 5 permits the auditor to surcharge either the person who makes the payment or the person who authorizes the payment to be made. Consequently where the President of a Panchayat Board makes a payment under S. 22 of the Act in excess of what the board itself could sanction and the payment is subsequently ratified by the board though it was beyond its sanctioning power a surcharge made by the auditor on the President cannot be said to be illegal : ('36) 23 A I R 1936 Mad 412, *Disting.* [P 892 C 1]

But the proper course in such a case is to surcharge the President to the extent of his proportionate share as a member of the board, and to make the members of the board who voted in ratification also liable for the surcharge. [P 892 C 2]

(b) Madras Local Boards Act (14 of 1920), S. 199, Rules under, R. 6—Under R. 6 Court can remit surcharge which though legally recoverable should equitably have been made upon others than person surcharged — But this is no reason for interference in revision.

There is no limitation put upon the powers of the Court in dealing with an application under R. 6. The civil Court has in a proper case jurisdiction to remit a surcharge, which, though legally recoverable, should equitably have been made upon others than the person surcharged. But this is no ground for interference in revision. [P 892 C 2]

Government Pleader — for Petitioner.

A. C. Sampath Ayyangar and T. K. Subramania Pillai — for Respondent.

Order. — These two revision petitions arise against an order of the District Judge setting aside two surcharge orders passed by the auditor under rules framed under S. 199, Madras Local Boards Act, against the President of a Union Panchayat Board. The facts are not in dispute. In two criminal cases in which subordinates of the board were concerned, the President made payments to advocates in excess of the scale which the board itself could sanction. The fees were paid by the President in anticipation of the board's sanction under the emergency powers conferred upon the President by S. 22, Madras Local Boards Act. The payments were reported to the Panchayat board which duly ratified them though they were beyond its sanctioning power. Objection was taken by the auditor because of the failure to obtain the Government's sanction as required under the rules. Thereupon, an application was made to the Government to sanction these payments but it was rejected. The auditor therefore surcharges the President who had made the payments.

Rule 5 of the Surcharge Rules framed by the Local Government empowers the auditor to disallow an item of expenditure which is contrary to law and to surcharge it upon "the person making or authorizing the making of the illegal payment." Clearly this rule permits the auditor to surcharge either the person who makes the payment or the person who authorizes the payment to be made. It seems to follow therefore that the surcharge made by the auditor upon the President in this case is not illegal and the decision in 59 Mad 876,[1] which proceeds upon the second portion of Rule 5 (1) and deals with an act causing loss for which the board is corporately responsible has no clear relevance. At the same time it is certainly arguable on the facts of the present case that though the President who made this payment can be legally surcharged for it, the members of the board who voted in ratification of the President's action are equally responsible and it is somewhat inequitable to place the whole burden upon the President alone. This seems to be the view taken by the learned District Judge and I doubt whether in revision the correctness of that view can be canvassed. Rule 6 of the Surcharge Rules empowers the person aggrieved to apply to the civil Court to set aside the surcharge and a Court is empowered after taking such evidence as is necessary to confirm, modify or remit the surcharge. There is no limitation put upon the powers of the Court in dealing with such an application and I am not prepared to say that the civil Court has no jurisdiction in a proper case to remit a surcharge, which, though legally recoverable, should equitably have been made upon others than the person surcharged. It would of course have been better had the learned District Judge in view of his conclusion upheld the surcharge to the extent of the President's proportionate share as a member of the board. But I do not think it is desirable in revision to interfere with the decision on this ground. If it was the intention of the framers of the rules to limit the judisdiction of the civil Court merely to ascertaining whether a surcharge is in accordance with law or not and to give the civil Court no power to go into the merits of the surcharge and its equity, that should have been clearly expressed in the rules. In the result therefore the petitions are dismissed with costs. (Advocate's fee one set).

C.R.K./G.N. *Petitions dismissed.*

1. ('36) 23 A I R 1936 Mad 412 : 163 I C 107 : 59 Mad 876 : 70 M L J 404, Secretary of State v. Sivasankaran Pillai.

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(28) A. I. R. 1941 Madras 892

LEACH C. J. AND HORWILL J.

Official Assignee, Madras — *Appellant*

v.

S. Natesa Achari and others — *Respondents.*

Appeal No. 58 of 1939, Decided on 4th September 1940, from judgment of Somayya J., D/- 8th August and 6th September 1939, in C. S. No. 209 of 1936.

Limitation Act (1908), S. 19 — Acknowledgment — Words used must clearly indicate acknowledgment of liability of particular debt — In 1921 and 1923 *S* executing mortgages in favour of *M*—In 1924 *S* executing usufructuary mortgage in *R's* favour and stating in mortgage deed that in default of conditions of mortgage usufructuary mortgagee should sell property and out of sale proceeds pay himself and then *M* and hand over

balance to *S* — Statement held was not acknowledgment within S. 19 since there was no evidence to identify word "debts" used therein to mortgage deeds of 1921 and 1923.

Before S. 19 can apply the words used must clearly indicate an acknowledgment of liability of the particular debt. It is wrong to say that unless the words used amount to a total repudiation of liability they should be read as an acknowledgment of liability. [P 893 C 2]

In 1921 and 1923 *S* executed two mortgages in favour of *M*. In the usufructuary mortgage deed executed in favour of *R* in 1924 *S* stated that in default of any condition of the mortgage the usufructuary mortgagee should sell the property, and out of the proceeds first pay himself and then pay *M* if any debts incurred for the benefit of his family had to be paid to him in respect of the said property and hand over the balance to the mortgagor :

Held that the statement did not amount to an acknowledgment within the meaning of S. 19 since there was no evidence which identified the word 'debts' used in the statement to the mortgage deeds of 1921 and 1923. [P 893 C 2]

T. V. Srinivasan — for Appellant.

K. S. Rajagopala Iyengar, K. Govindan and V. S. Rangachari — for Respondents.

Leach C. J. — The sole question in this appeal is whether certain words used in a deed of mortgage dated 4th July 1924 amount to an acknowledgment of liability in respect of two earlier mortgages within the meaning of S. 19, Limitation Act. One Sundaravela Achari mortgaged the property in the suit to one Manicka Chetty on 9th August 1921 to secure a sum of Rs. 5000. On 6th January 1923, he executed a second mortgage of the property in favour of Manicka Chetty to secure a further advance of Rs. 1000. On 4th July 1924 Sunderavela Achari executed a usufructuary mortgage of the property in favour of one Rajagopala Chetty for the sum of Rs. 1000. The first two mortgages fell to the share of one Kuppuswami on a partition. Kuppuswami is now an insolvent and is represented by the appellant, the Official Assignee. The creditors will be entitled to the benefit of the first two mortgages if they are still enforceable. The suit out of which this appeal arises was not, however, filed until 13th July 1936, more than twelve years after the second of the two mortgages was executed, but the appellant says that the following passage in the usufructuary mortgage deed of 4th July 1924 saves the earlier mortgages from being time barred.

If we commit default in respect of any condition, you shall bring the said property to a public or private sale, take the principal and interest and also the auction expenses as per account, pay Kilanur Manicka Chetty if any debts incurred for the benefit of our family had to be paid to him in respect of the said property, and pay the balance, if any, to us.

Somayya J. who decided the case, held that this passage could not be read as an acknowledgment within the meaning of section 19, Limitation Act. The learned Judge considered that the words might be read as indicating that some money was due on previous mortgages but it had not been shown that there were no other debts secured on the property and therefore the passage did not necessarily apply to the mortgages of 9th August 1921 and of 6th January 1923. We are not disposed to agree with the learned Judge that the passage relied on to save limitation ought to be read as indicating that the property was subject to earlier mortgages. The clause provides that in default of the condition of the mortgage, the usufructuary mortgagee is to sell the property, and out of the proceeds first pay himself and then pay Manicka Chetty, handing the balance to the mortgagor. Manicka Chetty's mortgages were earlier and therefore ought to come first, but Manicka Chetty comes second. Read alone the clause might be taken to refer to the possibility of subsequent advances by Manicka Chetty. We are, however, in agreement with the learned Judge that there is no evidence on record which identifies the word 'debts' used in this passage to the mortgage deeds of 9th August 1921 and 6th January 1923 and that in the words used there is no acknowledgment of these debts.

Section 19 will save limitation where before the expiration of the prescribed period, an acknowledgment of liability has been made in writing. Therefore, before that section can apply, the words used must be words which clearly indicate an acknowledgment of liability of the particular debt. The Legislature has decided that time shall be a bar to a mortgage claim and has fixed the period. It may seem hard that a person shall be deprived of his money because he has not filed a suit within a certain time, but that is the law and it is not for the Court to help him out of his difficulty by overstraining the meaning of the words used. And that is what we have been asked to do in this case. Mr. Rajah Aiyar, in support of this appeal, has gone so far as to say that unless the words used amount to a total repudiation of liability they should be read as an acknowledgment of liability. This is an astonishing proposition and we are certainly not prepared to accept it. The appeal will be dismissed with costs, one set.

C.R.K./G.N. *Appeal dismissed.*

(28) A. I. R. 1941 Madras 894

BURN OFFG. C. J. AND HAPPELL J.

In re Sorimuthu Pillai — Accused.

Referred Trial No. 211 and Criminal Appeal No. 859 of 1940, Decided on 3rd February 1941, referred by Court of Session, Tinnevelly Division, D/- 15th November 1940.

(a) Penal Code (1860), S. 302 — Accused's daughter *V* married to his sister's son *R* — Accused's sister making will and gifting her property in equal shares to her sons — On death of *R* accused requesting his sister to make gift of *R's* share to *V* — Sister refusing—One morning accused beating women of house with short but heavy rice pounder — Accused hitting his daughter, his sister's daughter and then his wife—Accused's sister crying out from kitchen whereupon accused striking her on head and fracturing her skull—Accused held guilty under S. 302—But in circumstances of case transportation held proper sentence.

The accused's daughter *V* was married to his sister's son *R*. The accused's sister had by a will gifted her property to her sons, in equal shares. On the death of *R* the accused requested his sister to make a gift of *R's* share to *V*, but the sister refused. In these circumstances one morning the accused began to beat the women of the house with a short but heavy rice pounder or pestle. He hit his daughter, his sister's daughter and his wife. Then his sister cried out from the kitchen. The accused then went there and hit her on the head fracturing her skull. His sister succumbed to her injuries:

Held that the accused was rightly convicted under S. 302. [P 894 C 2]

Held further that in view of the facts that the murder was not premeditated and that there were reasons for disagreement which might very well have provoked a quarrel on the morning of the murder and that the unfortunate plight of his daughter *V* must have caused the accused a considerable amount of pain the sentence of transportation for life was a proper one. [P 895 C 1]

(b) Penal Code (1860), S. 302 — Murder — Circumstances justifying lesser penalty present — Sessions Judge can himself impose it — He need not make recommendation to Government for same.

In a murder case if there are circumstances which justify the imposition of the lesser penalty the Sessions Judge can himself impose it. It is not necessary for him in such a case to make a recommendation to the Government for the same. [P 895 C 1]

V. T. Rangaswami Ayyangar — for Accused.

Public Prosecutor — for the Crown.

Burn Offg. C. J. — The appellant has been convicted by the learned Sessions Judge of Tinnevelly for the murder of his sister Parvathi and for attempting to murder his sister's daughter Gomathi. He has been sentenced to death for the offence of murder and the learned Sessions Judge has quite properly not passed any separate sentence for the offence of attempting to murder. The case was a simple one and there was a large number of eye-witnesses. The appellant's daughter Valli (P. W. 10) had been married to Rangayya, a son of the appellant's sister Parwathi. Rangayya died on 25th June 1940 and his body was cremated before the appellant and his daughter Valli could reach the village. The appellant's brother Avadiappa Pillai (not examined as a witness) appears to have said that since Rangayya's body had been cremated, Valli's tali ought to be taken off at once. Valli and her father both objected to this. There were further troubles caused by the fact that Parvathi who was a woman of some means had made a will in which she had expressed her intention of leaving her property in equal shares to her three sons. After the death of Rangayya the accused wanted his sister to make a gift to Valli of the share that would have been given to her husband under the will. Parvathi herself, according to the evidence of P. W. 3, refused to comply with this request. In these circumstances very early in the morning of 1st July the appellant began to beat the women of the house with a short but heavy rice pounder or pestle (M. O. 1). He struck his sister Lakshmi (P. W. 11). He hit his daughter, P. W. 10. He hit P. W. 5, the daughter of the deceased Gomathi. He hit his wife Kali (P. W. 9). Then his sister (the deceased) cried out from the kitchen and he went into the kitchen and struck her on the head fracturing her skull. Parvathi died at about 6 P. M. the same night. There were five eye-witnesses (P. W.s 3, 4, 5, 7 and 8) and the learned Sessions Judge has left out of account the evidence of P. W.s 3 and 5, thinking it doubtful whether they could have seen exactly what happened. But he has found no reason to disbelieve the evidence of P. W.s 4, 7 and 8. Relying upon their evidence the learned Sessions Judge convicted the appellant for the murder of his sister and for attempting to murder Gomathi.

We think that the conclusion arrived at by the learned Sessions Judge in which he agreed with two of the assessors and disagreed with the other two was correct. But this we think is a case in which we can accede to the plea finally made by learned counsel for the appellant in the matter of sentence. The learned Sessions Judge in para. 18 of his judgment has stated circumstances which, we think, do afford sufficient ground for mitigating the punishment in this case. He has pointed out that the murder was not premeditated, that there

were reasons for disagreement which might very well have provoked a quarrel on the morning of 1st July and that the unfortunate plight of his daughter Valli must have caused the appellant a considerable amount of pain. These circumstances have moved the learned Sessions Judge to recommend that in this case the Government might commute the death penalty. It is not necessary in such a case to make a recommendation to the Government. If there are circumstances which justify the imposition of the lesser penalty, the Sessions Judge can do so. Confirming the conviction of the appellant for murder, we set aside the sentence of death and sentence him instead to transportation for life. The conviction for attempt to murder also is confirmed.

C.R.K./G.N. *Sentence commuted.*

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(28) A. I. R. 1941 Madras 895

BURN AND HAPPELL JJ.

Mundla Gangi Reddi — Appellant

v.

Golla Narasimha Reddi — Respondent.

Appeal No. 179 of 1939, Decided on 17th July 1941, against order of Dist. Court, Cuddapah D/- 20th September 1938.

Provincial Insolvency Act (1920), Ss. 4 (3) and 25—Insolvency Court cannot dismiss insolvency petition on ground of its raising questions too difficult for it to decide—Question whether relation of debtor and creditor exists is one for insolvency Court to decide—Insolvency Court has no discretion to refuse to decide that question and refer parties to regular suit.

There is nothing in S. 4 (3) which permits the insolvency Court to dismiss an insolvency petition on the ground that the questions raised in it are too difficult or complicated for the insolvency Court to decide. The question whether the relation of debtor and creditor exists between the petitioning creditor and the debtor sought to be adjudged insolvent is a question expressly and explicitly for the decision of the insolvency Court. The insolvency Court has no discretion to refuse to decide that question and to refer the parties for the decision of it to a different tribunal: ('35) 22 A I R 1935 Bom 80, *Dissent.* [P 896 C 1, 2]

Kasturi Seshagiri Rao — for Appellant.

V. Govindarajachari and R. Ramalinga Reddi — for Respondent.

Burn J.—This appeal is from the order passed by the learned District Judge of Cuddapah dismissing I. P. No. 90 of 1936. This petition was filed by a creditor named Alladu Nagiah against one Golla Narasimha Reddi. The present appellant Mundla Gangi Reddi was substituted as the petitioning creditor in 1937. The learned District Judge has dismissed the petition on the ground that the case involves the decision of complicated questions of law and fact before it can be held that a subsisting relationship of creditor and debtor has been satisfactorily established. The debtor objected to adjudication at the instance of the present appellant, alleging that this creditor had agreed to a composition scheme which had been accepted by other creditors also. The appellant, as appears from the order of the learned Judge, did not file any counter affidavit to this statement and the agreement set up by the debtor was sent for examination to the Government Examiner of Questioned Documents. After that official expressed the opinion that the signature on the alleged agreement was the signature of the appellant, the appellant put in a statement in which he alleged that the signatures of the creditors in the alleged agreement had been obtained by fraud, and that he, even if his signature also were found to be genuine, would not be bound by it. It is the raising of these pleas that has caused the learned Judge to say that complicated questions of law and fact have to be gone into before it can be decided that the petitioner and the respondent stand to each other in the relation of creditor and debtor. The learned Judge has said that these questions ought to be decided in a regular suit and he has referred the petitioner to a regular suit and dismissed his petition.

Mr. Seshagiri Rao for the appellant has contended that in so doing the learned District Judge has acted wrongly. Mr. Seshagiri Rao argues that the sole question of importance to be decided by the insolvency Court in this case was whether the relation of creditor and debtor still existed between the petitioner and the respondent or not. He says that the insolvency Court has no right to say that it will not decide this question merely because difficult questions of law and fact arise. The learned District Judge has relied upon a decision of a single Judge of the Bombay High Court, 59 Bom 161.[1] That was a case somewhat similar to this. The petitioning creditor was confronted with a receipt signed by herself. She was obliged to admit that she had passed a receipt to the debtor, but she alleged that it had been obtained from her by means of fraud and misrepresentation. The insol-

1. ('35) 22 A I R 1935 Bom 80: 154 I C 566: 59 Bom 161: 36 Bom L R 1236, Gopikabai Mahadev v. Chapsi Purshottam.

vency Court which was hearing the petition thought that these allegations on the part of the petitioning creditor ought to be inquired into, but the District Court on appeal held that it was not necessary for the insolvency Court to inquire into these questions and said that the receipt passed by the petitioner could not be impeached in insolvency proceedings. It was on second appeal that the matter came before the Bombay High Court. The learned Judge held that a second appeal did not, properly speaking, lie, but he observed that it was competent for the insolvency Court to refer the petitioning creditor to a regular suit on the facts of that case. At p. 169 the learned Judge is reported to have said :

> Therefore, prima facie, not only is she not a creditor for an amount of Rs. 500 but she is no creditor at all of the opponents on the date of the petition and if she replies in answer to the opponents' petition that the receipt was fraudulently obtained, it is for her to establish that allegation and if the insolvency Court thinks that the question is of such a nature as can be properly adjudicated upon by a civil Court in a regular suit, I do not think that the discretion of the insolvency Court to refer parties to a regular suit is taken away by any of the provisions cited above.

The provisions cited above were Ss. 4, 9 and 24 of the Act. The learned Judge does not state the source of the discretion which, in his opinion, the insolvency Court has to refer parties to a regular suit. It is clear that no such discretion can be derived from S. 4, Provincial Insolvency Act. Section 4 (3) authorises the Court in certain circumstances after the insolvency proceedings have been set on foot to order the sale of the debtor's interest in property without deciding the precise nature or extent of that interest. But there is nothing in this provision to warrant the statement that the insolvency Court can dismiss an insolvency petition on the ground that the questions raised in it are too difficult or complicated for the insolvency Court to decide.

Mr. Govindarajachari for the respondent has referred us to S. 25, Provincial Insolvency Act. In sub-s. (1) it is provided that, in the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition or of the alleged act of insolvency or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition. Mr. Govindarajachari contends that the present case can be brought within the clause "for any other sufficient cause no order ought to be made." This contention I find myself unable to accept. It is provided in S. 13 (6), Presidency Towns Insolvency Act, that, when the debtor appears in response to a creditor's petition and denies that he is indebted to the petitioner, the Court on taking security may, instead of dismissing the petition, stay the proceedings for such time as may be required for trial of the question relating to the debt. This means that the insolvency Court in the Presidency Town is not obliged to go into disputed questions of debt but can refer the creditor to the ordinary civil Court to get a decree for the amount which he claims postponing insolvency proceedings meanwhile. But this is a very different thing from saying that the insolvency Court, if it considers the question of the debt between the petitioner and the respondent to be difficult, can dismiss the creditor's petition. There is no provision in S. 13 (6), Presidency Towns Insolvency Act, for dismissal of the petition. The only provision is for adjournment of the insolvency petition until the civil suit is tried. Moreover, in the present case the decision of the learned District Judge is not a decision that for some sufficient cause no order ought to be made; but it is a decision that the petitioning creditor must go to the civil Court to establish his case. It is obvious that the dismissal of the insolvency petition outright is wrong, because, even if the petitioning creditor goes to the civil Court and gets a decree against the respondent for the amount claimed, it will be by that time too late for him to bring any insolvency petition. The act of insolvency in this case is alleged to have been committed in 1936; and any insolvency petition based upon that Act of insolvency must be summarily rejected if filed hereafter.

I regret therefore I am unable to agree with the decision of the Bombay High Court referred to above. I find myself in agreement with the contention of Mr. Seshagiri Rao that the question which has arisen in this case between the petitioner and the respondent is a question expressly and explicitly for the decision of the insolvency Court. I do not see how the insolvency Court can have a discretion to refuse to decide this question and to refer the parties for the decision of it to a different tribunal. I would therefore allow this appeal and set aside the order of the District Court and direct that the insolvency petition be

restored to file and disposed of according to law. The appellant, I think, should have the costs of the appeal from the respondent.

Happell J.—I agree.

C.R.K./G.N. *Appeal allowed.*

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* (28) A. I. R. 1941 Madras 897

BURN J.

Syed Ismail Sahib alias Syed Tahsildar Sahib and another — Petitioners

v.

Ethikasha Sarguru alias Syed Chandu Sahib and another — Respondents.

Civil Revn. Petn. No. 1804 of 1939, Decided on 13th August 1941, to revise order of Dist. Court, Madura, D/- 4th April 1939.

*** (a) Mussalman Wakf Act (1923), S. 10 — Court of District Judge has no power to try offence under S. 10 — Only Criminal Court can do so.**

Section 10, Wakf Act, creates an offence, and indeed it says in so many words that the omission described is an offence. There is no mention in the Wakf Act of any Court as a Court which shall impose the punishment provided in S. 10. In other words, there is no Court mentioned as the Court which shall try offences under S. 10. It follows therefore that the Court which can try those offences is the Court indicated in the Criminal P. C. Therefore the Court of the District Judge has no power to punish offences under S. 10, Wakf Act, with fine : ('32) 19 A I R 1932 All 362; ('35) 22 A I R 1935 Bom 207 and ('37) 24 A I R 1937 Nag 135, *Dissent.*; ('41) 28 A I R 1941 Lah 145 (F B), *Foll.* [P 897 C 2, P 898 C 1]

(b) Mussalman Wakf Act (1923), S. 10 — Wakf itself denied—District Judge has no jurisdiction to hold enquiry into matter. *(Obiter.)*

The District Judge has no jurisdiction to hold an enquiry into the nature of the property where the alleged mutwalli denies the existence of the wakf : ('41) 28 A I R 1941 Lah 145 (FB), *Rel. on.* [P 898 C 1]

K. Bhashyam and T. R. Srinivasan — for Petitioners.

S. Panchapagesa Sastri and G. Srinivasa Ayyangar — for Respondents.

Order. — This is an application to revise the order passed by the learned District Judge of Madura in O. P. No. 60 of 1938. That original petition was filed under S. 10, Mussalman Wakf Act, 42 of 1923, desiring the lower Court to punish the respondents by way of fine for failure to discharge their duties under the Wakf Act in connexion with a darga called Hazrat Mohaiat Shaw darga at Anuppanady village, near Madura. The respondents denied that any such wakf existed, and pleaded that it was only a Criminal Court that could impose the fine indicated under S. 10 of the Act. The learned District Judge thought that it was the District Court that had the jurisdiction to impose the fine, but held that since the wakf itself was denied, it was not competent for him to hold an enquiry into that matter. With regard to the first point, I am of opinion that the learned District Judge has not come to the correct conclusion. He relied upon the decisions in 54 ALL 475,[1] 37 Bom L R 207[2] and A I R 1937 Nag 135.[3] But, in all these decisions, it is noticeable that the learned Judges have pronounced their decisions rather with reference to what they consider to be "the scheme of the Act" than with reference to the wording of its provisions. In S. 2, Mussalman Wakf Act, 42 of 1923, "Court" is defined as

> the Court of the District Judge or, within the limits of the ordinary original civil jurisdiction of a High Court, such Court, subordinate to the High Court, as the local Government may, by notification in the local official Gazette, designate in this behalf.

The arguments which weighed with the learned Judges in the cases referred to was that the District Court is burdened with all the duties under this Act, and therefore the District Court must be the Court which can impose the fine provided in S. 10. This however, with all respect, is in my opinion not sound. Section 10 of the Act simply says that any person who is required to perform certain duties shall, if without reasonable cause he fails to perform those duties, be punishable with fine which may extend to Rs. 500 or in the case of a second or a subsequent offence with fine which may extend to Rs. 2000. Now under Sec. 4, Criminal P. C., "offence" means any act or omission made punishable by any law for the time being in force. It is clear therefore that S. 10 of the Wakf Act creates an offence and indeed it says in so many words that the omission described is an offence. Section 29, Criminal P. C., runs as follows :

> (1) Subject to the other provisions of this Code any offence under any other law (that is any law other than the Indian Penal Code) shall when any Court is mentioned in this behalf in such law, be tried by such Court. (2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offence is shown in col. 8, of Sch. 2, to be triable.

There is no mention in the Wakf Act of any Court as a Court which shall impose the punishment provided in S. 10. In other words, there is no Court mentioned as the

1. ('32) 19 A I R 1932 All 362 : 136 I C 812 : 54 All 475 : 1932 A L J 262, Nasrullah v. Wajid Ali.
2. ('35) 22 A I R 1935 Bom 207 : 156 I C 263 : 37 Bom L R 207, Kalekhan v. Karim.
3. ('37) 24 AIR 1937 Nag 135 : 169 I C 648 : ILR (1937) Nag 532, Abdul Hadi v. Abdul Latif.

Court which shall try offences under S. 10. It follows therefore that the Court which can try those offences is the Court indicated in the Criminal Procedure Code. I may say that in my opinion, it would be contrary to all principle that the Court of the District Judge should have the power to punish offences under S. 10 of the Wakf Act with fine. In any such case the Court of the District Judge would be virtually in the position of prosecutor and Judge at the same time. I find myself, therefore, with all respect, unable to agree with the learned Judges who decided the cases already quoted. I would prefer to follow, with respect, the decision of the Full Bench of the Lahore High Court in I L R (1941) Lah 395.[4] The Full Bench there answered in the negative the question whether, in case the mutwalli has not complied with the provisions of the Act, the District Judge is empowered himself to impose a fine on him. In the same judgment the Full Bench of the Lahore High Court decided that in proceedings under S. 10 of Act 42 of 1923, the District Judge has no jurisdiction to hold an enquiry into the nature of the property where the alleged mutwalli denies the existence of the waqf. This is important support for the view taken by the learned District Judge in the order which I am asked to revise. But it is not necessary for me to discuss that question at length since learned counsel for the petitioners agrees that if a decision on the other point is against the petitioners, the application to the District Court must be considered to have been rightly dismissed. This application to revise the order of the learned District Judge therefore fails and is dismissed with costs.

C.R K./K.S. *Application dismissed.*

4. ('41) 28 AIR 1941 Lah 145 : 194 I C 351 : ILR (1941) Lah 395 : 43 P L R 208 (F B), Shia Youngmen's Association, Punjab v. Fateh Ali Shah.

* (28) A. I. R. 1941 Madras 898

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND CHANDRASEKHARA AYYAR JJ.

Hamidgani Ammal — Appellant

v.

Ammasahib Ammal and others — Respondents.

Second Appeal No. 305 of 1938, Decided on 25th August 1941, against decree of Sub-Judge, Tiruvarur, in A. S. No. 55 of 1936.

(a) Civil P. C. (1908), O. 22, Rr. 4 and 12 and S. 47 — Person not entitled to raise defence in suit is not debarred from raising same in execution if he is bound to do so under S. 47 (Per *Abdur Rahman J., in Order of Reference*).

Order 22, Rule 4 does not apply to execution proceedings by reason of O. 22, R. 12. Consequently, a person who was not entitled to raise a defence in a suit cannot be held to be debarred from raising the same defence in execution if he is bound to do so under S. 47. Whether he is bound so to do or not would depend upon the terms of S. 47. [P 899 C 2]

*** (b) Civil P. C. (1908), S. 47 — Mortgage decree or decree for specific performance by execution of sale deed — Execution proceedings — Person impleaded as legal representative of deceased party cannot question decree — He is not bound to have his own claims to property in suit decided in execution proceedings — He can file separate suit to establish his claims: 7 Mad 255, *OVERRULED*.**

When a person comes into Court in execution proceedings as the legal representative of a deceased party he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or had been dismissed from the suit, his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose. The claim of a stranger to the suit who claims as his immovable property which has been the subject-matter of a decree cannot in law be regarded as being a question relating to the execution, discharge or satisfaction of the decree. Consequently a person who has been brought into Court in proceedings in execution of a mortgage decree or a decree for specific performance of contract of sale by execution of a sale deed merely as the legal representative of the judgment-debtor is not compelled to have his own claims to the property in suit decided in the execution proceedings. He can establish his rights by a separate suit . 7 Mad 255, *OVERRULED;* 30 Mad 26; 32 Mad 429; ('17) 4 A I R 1917 Mad 168 and ('39) 26 A I R 1939 Mad 867, *Approved; Case law referred.* [P 902 C 2; P 903 C 1]

In execution proceedings arising out of money decrees questions relating to the property attached stand on an entirely different footing as they do not call into question the correctness of the decree. [P 902 C 2; P 903 C 1]

K. V. Ramachandra Ayyar — for Appellant.

P. V. Rajamannar for R. Sundaralingam — for Respondents.

ORDER OF REFERENCE

Abdur Rahman J. — The suit out of which the present appeal arises was one for possession of 7/72 share in the suit properties on the ground that the plaintiff and defendants 1 to 3 are the heirs of one Zainabu Nachial. The suit lands were originally sold by one Habib Muhammad Maracair on 15th August 1879 under Ex. A to his step-mother Bathuma Gani (Fatima Ghani) but the vendor got a power of attorney

Ex. C on 21st May 1885 from his stepmother and looked after them in that capacity. Fatima Ghani bequeathed these properties to her brother Manjur Sah's (Manzur Shah) daughter's children Zainabu Nachial (Zainab Bi) and Amma Sahib Ammal who were girls of 7 and 5 respectively at the time when the bequest was made. These minors' names appear to have been brought on the revenue records in pursuance of the gift and they were shown to be in possession as owners (Exs. D and E). Habib Mohammad Maracair, the original vendor of these lands, as will be seen from the pedigree table in the District Munsif's judgment, was no other than the father of these minors. Having got the property as the agent of his step-mother, he began to manage them on behalf of his own children subsequently. Zainabu Nachial died in 1921 after she had been married to defendant 2 leaving her surviving a son (defendant 3), a daughter (the plaintiff), Habib Muhammad Maracair (father) and defendant 2 (husband). Habib Muhammad Maracair appears to have exceeded his rights and entered into a contract with defendant 4 to sell the whole of the property that he had once sold to Bathuma Ghani in 1879 and in which he had become a sharer on account of his daughter Zainabu Nachial's death. A suit for specific performance of the contract on the basis of that agreement to sell was brought against him (O. S. No 12 of 1931) in the Court of the Subordinate Judge of Negapatam The plaintiff disputed her father's right to convey the whole of the property and asked to be impleaded as a party to that suit. She was impleaded in spite of the plaintiff's objection but on an issue raised on that point, she was held by the Court at the time when the judgment (Ex. II) was pronounced to be neither a necessary nor a proper party. Habib Muhammad Maracair died after this decree had been passed and the plaintiff and the other heirs were brought on the record as legal representatives in E. P. No. 79 of 1934. Apparently in view of the decision by the Subordinate Judge of Negapatam holding the plaintiff to be neither a necessary nor a proper party, the plaintiff remained ex parte and did not contend that her father had no right to alienate the whole of the property in excess of his share under the Mahomedan law which he had got as an heir to his daughter Zainabu Nachial. She brought, on the other hand, the present suit. One of the points taken in defence was that the present suit was not maintainable and was barred by the provisions of S. 47, Civil P. C. This prevailed in both the lower Courts and a second appeal has been preferred to this Court.

One of the main points urged on behalf of the appellant thus is that a separate suit was maintainable and was not barred by the provisions of S. 47, Civil P. C. It was contended in the first instance that a legal representative who was brought on the record after the passing of even a mortgage decree did not possess the right of getting his paramount title adjudicated in execution in the same way as he could not have advanced it if he had been brought on the record as a legal representative before the decree was passed. In other words, the contention was that what could not have been agitated at the instance of a legal representative if he had been brought on the record during the continuance of the proceedings in a suit was not bound to be raised by him in execution. The first reason given by learned counsel for the appellant in support of this contention was that a legal representative could, after he was made a party to the suit as such, only raise such a defence under O. 22, R. 4 (2), Civil P. C., as was appropriate to his character as a legal representative of the deceased defendant. The provisions contained in O. 22, R. 4, have not however been made applicable by R. 12 of that order to execution proceedings. It would therefore follow that a person who was not entitled to raise a defence in a suit cannot be held to be debarred from raising the same defence in execution if he is bound to do so, under S. 47, Civil P. C., whether he is bound so to do or not would depend upon the terms of that section.

The second reason advanced in support of the contention that a legal representative was not bound to plead a paramount title in execution of the mortgage decree was that since the decree directed a sale of the property, it would not be possible for a Court in execution to go behind the decree and hold on the legal representative's objection that the property was not liable to be sold either wholly or partially. Reliance was placed in support of this contention on the decisions in A I R 1936 Mad 733,[1] A I R 1939 Lah 178[2] and I L R (1940) Mad 123[3] to

1. ('36) 23 AIR 1936 Mad 733 : 169 I C 456: Venkatakrishnayya v. Venkatanarayana Rao.
2. ('39) 26 AIR 1939 Lah 178 : 186 I C 168 : ILR (1939) Lah 493: 41 P L R 533, Lloyds Bank Ltd., Lahore v. Mt. Rahimat Bibi.
3. ('39) 26 AIR 1939 Mad 867 : 187 I C 816 : ILR (1940) Mad 123, Lakshmadu v. Ramudu.

the last of which I was a party myself. I had occasion in a second appeal (S. A. No. 191 of 1938) to discuss these cases and pointed out to a divergence that existed between A I R 1936 Mad 733[1] and another Division Bench decision reported in A I R 1928 Mad 1270,[4] to which the same learned Judge, who delivered the judgment in the former case, was a party. There were two more decisions in 71 M L J 511[5] and 71 M L J 725[6] which had taken more or less the same view as was taken in A I R 1928 Mad 1270.[4] I also commented on the Lahore decision and tried to point out that a legal representative who pleaded a paramount or independent title was not challenging the validity of the decree but was putting forward his right to the property and since the sale of the property, wholly or in part, was being objected to, it would be a matter which related to the execution of decree and would have to be adjudicated at the instance of a legal representative in execution. The line that I was trying to draw between the two cases was, it must be admitted, a thin one although it was quite distinct in my opinion. If a legal representative attacked the validity of a decree, he was not entitled or bound to get the matter decided in execution; but if he did not challenge the decree but merely asserted that he had a right in the property which could not be sold in execution, this would be a matter which would relate to execution and fall within the ambit of S. 47, Civil P. C.

In the same way, if a legal representative was found to be advancing a contention that the decree to which he was not eo nominee a party did not bind him for reasons like those of immorality or illegality or the non-existence of the debt in respect of which it was passed and that his father did not represent him in the suit in which the decree was passed against him, he would not be entitled or bound to raise these questions in execution and must get them decided by a separate suit. In a case like this, the legal representative would be wishing to get the scope of the decree adjudicated and this is beyond the province of an execution Court. It may be that the effect of these contentions raised by a legal representative in a separate suit as to his not having been represented by his father in the suit or as to his not being under a pious obligation to pay a debt on account of its non-existence in fact or, even if in existence, on account of its being illegal or immoral, may ultimately result in the son's share not being held liable and may be said in a way to relate to the execution of a decree — but is it not beyond the scope of the execution Court to go behind the decree to find whether it was passed against the father in his representative capacity or otherwise or whether the nature of the debts was such that the sons could not be held to be liable to pay?

There is bound to be a certain amount of overlapping as the decree-holder wishes to make a son liable under the decree to which he was no party eo nominee and the son is trying to avoid his liability by methods legally available to him. In the same way, if an objection by a legal representative is accepted in execution and the property or any of its share is exonerated, it would, to that extent, affect the decree indirectly; but as long as in the latter case, the legal representative does not purport to attack the validity of the decree directly and in the former case, the legal representative does not raise questions which would relate to execution of the decree directly, there would be no unwarranted inroad on or evasion of the provisions of S. 47, Civil P. C.

Secondly, it was contended by learned counsel for the appellant that even if a legal representative was bound to advance his independent or paramount title in execution of a mortgage decree he was not bound so to do in the case of a decree for specific performance where his only duty as a legal representative was to execute a sale deed in favour of the decree-holder in pursuance of a contract which was alleged to have been made by his ancestor in excess of his rights and which resulted in a decree for specific performance. Learned counsel for the appellant argues that in a decree for specific performance, it is impossible for a Court in execution to give effect to an objection by a legal representative that his ancestor had exceeded his rights in entering into a contract and that the decree for specific performance passed by the Court was, for that reason, inexecutable. It is contended, on the other hand, that the decree for specific performance stands more or less on the same basis as a mortgage decree and if a legal representative is bound to raise his paramount title in execution of the mortgage

4. ('28) 15 A I R 1928 Mad 1270 : 111 I C 147, Govindarajulu Naidu v. Chinnathambi Padayachi.
5. ('36) 23 A I R 1936 Mad 675 : 163 I C 619 : 71 M L J 511, Chinnathayee v. Lakshmi Achi.
6. ('37) 24 A I R 1937 Mad 108 : 167 I C 113 : 71 M L J 725, Bothummal Beevi v. Nagur Meerammal Beevi.

decree, so would he be bound to raise his independent title in the decree for specific performance.

The point is not free from difficulty, although as at present advised, I was inclined to the view that a decree for specific performance was of a peculiar character and could not be compared to a decree based on a mortgage. But, in view of divergent views taken in regard to mortgage decrees themselves, even if a decree for specific performance is treated on the same basis as a mortgage decree and in view of a reference made by a Division Bench in Appeal No. 149 of 1938 for a decision by a larger Bench that could not materialize on account of the matter having been compromised, I am prepared to accede to the request made by the learned counsel for the parties to submit this case for a decision by a larger Bench if my Lord the Chief Justice so considers desirable. The reasons given by my learned brother King J. in Appeal No. 149 of 1938 may be considered as a part of this reference. I may add that I have given such facts as they were narrated to me by learned counsel for the appellant and have not heard the parties on other facts which may arise for decision. It was agreed by learned counsel for the parties that if the question as to the liability of a legal representative to raise the question of a paramount or independent title in execution is settled by this Court's authority, it would facilitate other matters that arise for decision in the case.

OPINION

Leach C. J.—The question which arises in this appeal is whether a person who has been brought into Court in execution proceedings merely as the legal representative of the judgment-debtor is compelled to have his own claims to the property in suit decided in the execution proceedings or whether he can establish his rights by a separate suit. On 24th November 1927 one Habib Muhammad Maracair agreed to sell certain wet lands to one Vaidhialinga Mudaliar, who was defendant 4 in the suit out of which this appeal arises and is now represented by respondents 3 and 4. The vendor failed to execute a conveyance and the purchaser instituted a suit in the District Court of Negapatam for a decree for specific performance. The suit was subsequently transferred to the Subordinate Judge's Court for hearing. The appellant was made a party to that suit because she claimed a share (7/72) in it. She was made a party on her own application, which was opposed by the plaintiff. An issue was then framed on the question whether she was a necessary party to the suit and it was decided that she was not. Consequently her name was struck off the record. On 8th August 1931, a decree for specific performance was granted to the plaintiff, but before it could be executed the vendor died. The result was that the appellant was made a party as his legal representative. The application for execution then proceeded and eventually the Court executed a conveyance in favour of the purchaser. In the course of the execution proceedings, but before the conveyance was signed the appellant instituted in the Court of the District Munsif of Tirutturaipundi the present suit. The purchaser challenged her right to institute it. He maintained that her claim should have been decided in the execution proceedings and it was now too late to raise it. The District Munsif accepted this argument and dismissed the suit. His decision was concurred in by the Subordinate Judge of Tiruvarur. The appellant then appealed to this Court and the second appeal came before Abdur Rahman J., who has made the reference which this Full Bench is now called upon to consider.

The reference became necessary because there are conflicting decisions of this Court on the question involved. The first case to which our attention has been called is that in 7 Mad 255.[7] That appeal arose out of a mortgage suit and in execution proceedings the legal representative of the mortgagor claimed an interest in the mortgaged property. The claim was investigated by the District Munsif in execution proceedings, but on appeal to the District Court it was held that the District Munsif had no power to decide the legal representative's title and that the proper course was for the decree-holder to attach the property and for the legal representative to make a claim. This course was adopted and resulted in the legal representative's claim being rejected. Thereupon he brought a suit to cancel the sales which had taken place in the course of the execution of the decree and it was held that the suit did not lie. The Court did not, however, consider a very important question, namely, whether it is open to a legal representative with a claim of his own to challenge in execution proceedings the validity of a mortgage decree which has been passed against the person he is representing.

7. ('84) 7 Mad 255, Kuriyali v. Mayan.

A decision running counter to the judgment in 7 Mad 255[7] was given by another Bench of this Court in 30 Mad 26.[8] In that case the appellant was the defendant in a mortgage suit and in an application for a final order for sale which was made in execution proceedings (the Civil Procedure Code of 1882 then being in force) the appellant sought to stop the sale on the ground that the decree which had been passed against him was not binding on the property; because since the passing of the decree he had been adopted into the family of another person to whom the property belonged. The Subordinate Judge overruled his objection and made an order for the sale of the property. This was held by Boddam and Wallis JJ. to be right. In the course of the judgment, they pointed out that the objection taken by the appellant was that, though the decree to which he was a party was a decree for the sale of specified immovable property, he was entitled to object in execution to the sale of the property; in other words, the appellant's objection was an objection to the decree itself and not to the execution, discharge or satisfaction of the decree. Reference was made to the decision in 7 Mad 255[7] and the defect in that judgment was indicated. Dissent from 7 Mad 255[7] was also expressed in 32 Mad 429[9] which was decided by White C. J. and Abdur Rahim J. There a mortgage decree was passed against the holder of an impartible estate. On the death of the mortgagor his son sought to set up in execution proceedings a contention that the mortgage was not binding upon him. It was held that this course was not open to him. After stating that there was abundant authority to support the proposition that the decree in a mortgage suit directing sale could not be impeached in execution proceedings the Court observed :

> The case in 7 Mad 255[7] no doubt supports the contention that the rights of the judgment-creditors who have obtained mortgage decrees can be determined in execution proceedings, but as Mr. Sundara Iyer pointed out in that case the Court would seem to have overlooked the fact that the decree itself contained a direction for sale and that notwithstanding the decree for sale the properties had been attached as if the proceedings had been in execution of a money decree. Apparently all the cases in which 7 Mad 255[7] is cited with approval are cases in which the decree sought to be executed was a simple money decree or, at any rate, was not a mortgage decree and the question we have to determine did not arise.

The decision in 7 Mad 255[7] was criticised by Ayling and Seshagiri Iyer JJ in 5 M L W 158.[10] On the other hand it receives support from the judgments given by Madhavan Nair and Stodart JJ. in 71 M L J 511,[5] by Cornish J. in 71 M L J 725[6] and by Ramesam and Jackson JJ. in A I R 1928 Mad 1270.[4] It is, however, significant, that in these cases no reference was made to the decisions in 30 Mad 26,[8] 32 Mad 429[9] and 5 M L W 158.[10] Cornish J did refer to certain other decisions, but the decisions related to proceedings in execution of money decrees, where the considerations are not the same as they are here or in proceedings in enforcement of a mortgage decree. The latest decision of this Court was given by Venkataramana Rao and Abdur Rahman JJ. in I L R (1940) Mad 123[3] and their judgment supports the judgments which dissent from 7 Mad 255.[7] We are firmly of the opinion that 7 Mad 255[7] was wrongly decided and that the law on the question now before the Court is correctly expressed in 30 Mad 26,[8] 32 Mad 429,[9] 5 M L W 158[10] and I L R (1940) Mad 123.[3] When a person comes into Court in execution proceedings as the legal representative of a deceased party he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or, as in this case, he had been dismissed from the suit, his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose.

Section 47, Civil P. C., only requires to be decided in execution proceedings those questions which arise between parties to the suit in which the decree has been passed or their representatives and which relate to the execution, discharge or satisfaction of the decree Where a stranger to the suit claims as his, immovable property which has been the subject matter of a decree, that claim cannot in law be regarded as being a question relating to the execution, discharge or satisfaction of the decree. There are decisions of this Court to the effect that in execution proceedings arising out of money decrees questions relating to the property attached must be decided in execution proceedings and not by a separate

8. ('07) 30 Mad 26 : 16 M L J 545, Kumaratta Servaigaran v. Sabapathi Chettiar.
9. ('09) 32 Mad 429 : 2 I C 18 : 19 M L J 401, Zamindar of Karvetnagar v. Trustee of Tirumalai Tirupati, etc. Devasthanams.
10. ('17) 4 A I R 1917 Mad 168 : 38 I C 360 : 5 M L W 158, Kelu Achan v. Parasu Pattar.

suit, but this is an entirely different matter because the correctness of the decree is not called into question. Therefore, the correctness of such decisions does not arise. We are here dealing with a case where it is said that a person who is not a party to the suit, but is brought into Court in execution proceedings as the legal representative of a deceased party, can in those proceedings be allowed to challenge the decree and if he fails to do so he has for ever lost the right claimed by him in the suit property. Obviously the answer must be that he cannot in execution say the decree is wrong, and he has his remedy by suit. It follows that we hold that the District Munsif and the District Judge erred in dismissing the appellant's suit on the ground that it did not lie. The case will be remanded to Abdur Rahman J. to decide the other questions which arise in the appeal. The costs of this reference will be made costs in the appeal.

C.R.K./G.N. *Order accordingly.*

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* * (28) A. I. R. 1941 Madras 903

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND CHANDRASEKHARA AYYAR JJ.

Chidambaram Chettiar and others — *Appellants*

v.

Sellakumara Goundan and others — *Respondents.*

Appeals Nos. 161 of 1938 and 251 of 1939, Decided on 1st September 1941, against decrees of Sub-Judge, Coimbatore, in O. S. Nos. 214 of 1936 and 176 of 1937, respectively.

* * Insolvency—Suit by creditor under S. 53, T. P. Act, to set aside alienation by debtor before his adjudication — Leave of insolvency Court is not necessary: 42 Mad 684=('19) 6 A I R 1919 Mad 167=52 I C 442, *OVERRULED.*

Where property has been transferred by a deed which falls within the mischief of S. 53 and the transferor becomes insolvent, the property does not form part of his estate. Therefore, a suit under S. 53, T. P. Act, is not a suit in respect of the property of the insolvent, but is a suit in respect of property which had been the property of the insolvent and which he had transferred in fraud of his creditors Such a suit does not fall within the prohibition of the Insolvency Act. Moreover, the very definite right given by S. 53, T. P. Act, to a creditor cannot be taken away without an express provision by the Legislature to this effect and there is nothing in the Presidency Towns Insolvency Act or the Provincial Insolvency Act which can be read as taking away his right. Once a declaration has been obtained, the property does become the property of the insolvent and automatically vests in the Official Assignee or Official Receiver as the case may be. Hence leave of insolvency Court is not necessary for the institution of such a suit: 42 Mad 684=('19) 6 A I R 1919 Mad 167=52 I C 442, *OVERRULED*; ('29) 16 A I R 1929 Mad 323, *Approved.* [P 904 C 2; P 905 C 1, 2]

K. V. Ramachandra Ayyar — for Appellants.

R. Sundaralingam for K. Periaswami Goundar — for Respondents.

ORDER OF REFERENCE

Somayya J.—The question that arises in these appeals is whether leave of the insolvency Court is required for a suit under S. 53, T. P. Act, brought by a creditor to set aside an alienation made by the debtor before he was adjudged an insolvent. On this question there is a direct decision of this Court in 42 Mad 684.[1] The lower Court dismissed the suit relying on the above decision as indeed it was bound to do. The plaintiff appeals and contends that the above decision needs re-consideration and that the entire reasoning of the learned Judges in that case has been dissented from by Wallace and Thiruvenkatachariar JJ. in 56 M L J 489.[2]

In the latter case, a decree-holder attached certain property of his judgment debtor which had been alienated to a third party. On a claim petition filed by the vendee the attachment was raised and the decree-holder filed a suit under O. 21, R. 63, Civil P. C., to set aside the order on the claim petition and to have it declared that the alienation was in fraud of creditors. Before this suit was filed, the debtor was adjudged an insolvent and the suit was filed without the leave of the Insolvency Court. Objection was taken that the suit was bad for want of leave of the Insolvency Court and relying on the decision in 42 Mad 684,[1] Phillips J. held that the suit was bad for want of requisite leave. On appeal under S. 15, Letters Patent, it was held that no leave was required. Dealing with the decision in 42 Mad 684,[1] both Wallace and Thiruvenkatachariar JJ. in separate but concurrent judgments, pointed out that the reasoning of the Judges in that case cannot be accepted. Ultimately, they held that in any event an adverse order on a claim petition gave the individual creditor a special right of action personal to him and that this right could be exercised by him without any leave from the insolvency Court. They therefore did not expressly dissent from the decision in 42 Mad 684.[1]

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1. ('19) 6 A I R 1919 Mad 167: 52 I C 442: 42 Mad 684: 36 M L J 453, Vasudeva Kamath v. Lakshminarayana Rao.
2. ('29) 16 A I R 1929 Mad 323: 119 I C 46: 56 M L J 489, Subramaniam v. Narasimham.

Though the decision is ultimately rested on this ground, we find that there is considerable force in the argument of Mr. K. V. Ramachandra Ayyar for the appellant that the reasoning of the decision in 56 M L J 489[2] is a dissent on every point from the reasoning in the earlier case. In fact, it is doubtful how far the distinction drawn by Wallace and Thiruvenkatachariar JJ. is supportable and whether the two decisions can stand alongside of each other. We therefore think that it is desirable that the question must be considered by a Full Bench.

Even apart from the dissent expressed in the later case, we think that the decision in 42 Mad 684[1] should be reconsidered. In a case where a debtor alienates his property under circumstances which render it voidable by the creditors under S. 53, T. P. Act, the alienation is binding on the debtor. If avoided by the creditors who alone can do so, and there is a surplus, it goes to the vendee. The title to the property continues to be in the vendee subject only to the rights of the creditors. When after such an alienation, the debtor is adjudged an insolvent, it is clear that the property itself does not vest in the Official Receiver. In a case where the property had ceased to be that of the insolvent and a creditor desires to fight the alienee and have it cleared that the alienation is bad against him and other creditors, it is difficult to see how such a suit requires the leave of the Insolvency Court. The right of the creditors to file suits against strangers can be taken away only by express language. Further, the decision in 42 Mad 684[1] is based mainly on the reasoning contained on page 686:

> A suit by a judgment-creditor such as I have mentioned without the leave of the Court, would, I think, be in contravention of this section and would enable the judgment-creditor to obtain satisfaction of his decree out of the property declared in the suit to be the property of the insolvent.

This reasoning appears to us to be erroneous. At any rate, after the Transfer of Property Act was amended, the benefit of success goes to all the creditors. Once the creditor's suit succeeds, the right to realize the property and to distribute the proceeds will be that of the Official Receiver. On the other side it may be suggested that the Official Receiver can file the suit under S. 53, T. P. Act, in the ordinary civil Court as the statutory representative of all the creditors, and that where there is a representative of the creditors who can and ought ordinarily to take whatever steps are necessary in their interests, an individual creditor ought not to exercise that right at any rate without the leave of the Insolvency Court which will ordinarily give the leave only if the Official Receiver declines to act. Would a suit by an individual creditor be an interference with the administration of the estate by the Official Receiver. If an individual creditor files the suit which has to be a representative one, is the Official Receiver a necessary party to it and would the decision in such a suit bind the Official Receiver even if he is not a party? In reason, it ought to, for he represents all the creditors and the suit is now at any rate, one on behalf of all the creditors.

We are not impressed by the distinction sought to be drawn by the appellant's advocate that in a case where the alienation is beyond two years before the insolvency, the Official Receiver cannot move the Insolvency Court under S. 53, Provincial Insolvency Act (55 of the Presidency Act) and that in such a case the prohibition under S. 28, Provincial Insolvency Act, does not apply. In fact in 42 Mad 684[1] the alienation was beyond two years before the insolvency but this was evidently not thought to be material. We therefore refer the following question to a Full Bench:

"Is a suit by a creditor under S. 53, T. P. Act, to set aside an alienation made by the debtor before he is adjudged an insolvent maintainable without the leave of the Insolvency Court?"

OPINION

Leach C. J. — The question which has been referred is this:

> Is a suit by a creditor under S. 53, T. P. Act, to set aside an alienation made by the debtor before he is adjudged an insolvent maintainable without the leave of the Insolvency Court?

In 42 Mad 684,[1] a Bench of this Court (Wallis C. J. and Ayling J.) held that such a suit could not be instituted without the leave of the Insolvency Court and this decision was accepted as being correct by the Rangoon High Court in 9 Rang 7[3] and by the Lahore High Court in A I R 1938 Lah 856.[4] The decision was however strongly criticised by another Bench of this Court, (Wallace and Thiruvenkatachariar JJ.) in 56 M L J 489.[2] We consider that there is full justification for the criticism.

Section 53, T. P. Act, states that every transfer of immovable property made with

3. ('30) 17 A I R 1930 Rang 317 : 128 I C 382 : 9 Rang 7, Mohamed Adjun Nacode v. V. E. M. Chettiar Firm.
4. ('38) 25 A I R 1938 Lah 856 : 181 I C 655, Din Mohamed v. Mt. Waliat Begum.

intent to defeat or delay the creditors of the transferor shall be voidable at the option of a creditor defeated or delayed. Before 1929 a creditor could bring a suit under this section in his individual capacity, but in that year the section was amended and there is now a specific direction that the suit shall be instituted on behalf of, or for the benefit of, all the creditors. Section 17, Presidency Towns Insolvency Act, and S. 28, Provincial Insolvency Act, vest the property of the insolvent in the Official Assignee or the Official Receiver as the case may be and these sections prohibit, without the leave of the Insolvency Court a creditor of the insolvent filing a suit against the insolvent during the pendency of the insolvency proceedings. All matters regarding the insolvent's estate have to be decided by the Insolvency Court in proceedings contemplated by the Act. Property which the insolvent has transferred in fraud of his creditors is not his property. The transaction is voidable, but until it has been set aside the transferee has a valid title. Therefore, where property has been transferred by a deed which falls within the mischief of S. 53 and the transferor becomes insolvent, the property does not form part of his estate and come within the purview of S. 17, Presidency Towns Insolvency Act, or S. 28, Provincial Insolvency Act. Of course, it comes within the purview of these sections when the Official Assignee or the Official Receiver or a creditor, obtains a declaration that the transaction offends against S. 53.

In 42 Mad 684,[1] certain creditors filed a suit for a declaration that an alienation of immovable property by an insolvent was void under S. 53, T. P. Act. They did not ask for the leave of the Insolvency Court, notwithstanding that the Official Receiver was made a party to the suit. The Court held that the effect of an adjudication under S. 16 (1), Provincial Insolvency Act, Act 3 of 1907 (which corresponds to S. 28 (2), of the present Provincial Insolvency Act) was to prohibit a creditor bringing a suit under S. 53, T. P. Act, without the consent of the Insolvency Court. The learned Judges who decided that case overlooked the fact that a suit under S. 53, T. P. Act, is not a suit in respect of the property of the insolvent, but is a suit in respect of property which had been the property of the insolvent and which he had transferred in fraud of his creditors. Such a suit does not fall within the prohibition of the Insolvency Act. Moreover, the very definite right given by S. 53, T. P. Act, to a creditor cannot be taken away without an express provision by the Legislature to this effect and there is nothing in the Presidency Towns Insolvency Act or in the Provincial Insolvency Act which can be read as taking away his right. This was pointed out in 56 M L J 489.[2] The learned Judges who decided that case also pointed out that a suit to set aside a transfer because it offends against the provisions of S. 53, T. P. Act, is not a suit respecting the property of the insolvent. As already indicated, once a declaration has been obtained, the property does become the property of the insolvent and automatically vests in the Official Assignee or Official Receiver as the case may be. A creditor can get no personal advantage out of it, as the section now stands.

A creditor who brings a suit under S. 53, T. P. Act, may desire to make the Official Assignee or the Official Receiver a party, but he can only do so with the consent of the Insolvency Court. This is quite a different matter from saying that the Insolvency Court must give its consent before a suit can be instituted under S. 53, T. P. Act, when the representative of the insolvent's estate is not made a party. It follows from what we have said that we are in full agreement with the decision in 56 M L J 489[2] and that 42 Mad 684[1] was wrongly decided. Consequently the answer to the question referred will be in the affirmative. The costs of this reference will be costs in the appeals.

C.R.K./K.S. *Reference answered.*

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* (28) A. I. R. 1941 Madras 905
SPECIAL BENCH

LEACH C. J., GENTLE AND SOMAYYA JJ.

In re S, a Pleader, Vellore.

Referred Case No. 20 of 1941, Decided on 8th September 1941.

* Legal Practitioner—Professional misconduct — Pleader filing fee certificate without having received fee amounts to misconduct.

It is certainly a very serious matter for a pleader or an advocate to file a false certificate with regard to fees, and, therefore, for a pleader or an advocate to file a fee certificate without having received the fee is most improper and amounts to misconduct. [P 906 C 1]

Advocate-General — In support of the Notice.

T. M. Krishnaswami Ayyar for V. Govindarajachari — for the Pleader.

Leach C. J. — The respondent is a pleader practising at Vellore. He has been charged with professional misconduct. He filed in Court three certificates to the effect that he had received from his client by way of fees Rs. 40, Rs. 60 and Rs. 20 respectively.

He had not in fact received these fees and his certificates were false. The charge against him is in connexion with the filing of these certificates.

There is no dispute with regard to the facts, but the respondent pleads that there are extenuating circumstances. He had acted for this client for many years and he had kept a running account in respect of the work done for him. He had always been paid his fees and he had no reason to suppose that these sums would not be paid. It is certainly a very serious matter for a pleader or an advocate to file a false certificate with regard to fees. This Court had to draw attention to the seriousness of such conduct in a circular issued on 13th April 1939. In that circular the Court said that for a pleader or an advocate to file a fee certificate without having received the fee was most improper and the Court would take strong disciplinary action in any case coming to its notice. This appears to be the first case which has been brought to the notice of the Court. It will be inadequate to pass a mere censure on the respondent as his offence is a very serious one but as there is something to be said for him in extenuation we consider that adequate punishment will be to suspend him from practice for a period of one month, and there will be an order accordingly. It must be clearly understood that the punishment which the Court has inflicted in this case is not to be taken as a guide with regard to the Court's action in the future. What is stated in the circular will be adhered to.

C.R.K./K.S. *Order accordingly.*

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* (28) A. I. R. 1941 Madras 906

LEACH C. J. AND CHANDRASEKHARA AYYAR J.

Official Assignee of Madras—Appellant

v.

E. V. D'Silva — Respondent.

Original Side Appeal No. 12 of 1941, Decided on 3rd September 1941, from judgment and order of Krishnaswami Ayyangar J., in Application No. 336 of 1940, D/- 3rd February 1941.

(a) Presidency Towns Insolvency Act (1909), S. 52 — Property acquired after adjudication — No obligation on insolvent to deliver it to Official Assignee unless called upon to do so.

There is no obligation on the part of an insolvent to deliver to the Official Assignee property acquired by him after his adjudication, unless called upon by the Official Assignee to do so. [P 907 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 60—Salary below 100—Official Assignee cannot get order asking insolvent to pay portion of it every month passed — When insolvent consents, such an order may be passed.

Section 60 has been inserted to enable the Official Assignee to obtain what is known as a 'prospective order," but he cannot obtain such an order when the salary of the insolvent falls below Rs. 10 per mensem. The section is clearly a bar in such a case. Of course, where an insolvent consents to an order of this nature being passed against him there is no reason why the Court should not accede to his wishes. [P 907 C 1]

***(c) Presidency Towns Insolvency Act (1909), Ss. 60 and 52—S. 60 is an enabling section and does not interfere with S. 52 — Salary received even if it be below Rs. 100 falls within S. 52 and Official Assignee can apply for portion of it being paid to him for benefit of creditors — But Court should refuse to do unless circumstances are exceptional.**

Section 60 is a section which enables the Official Assignee to get a prospective order. It is an enabling section and nothing more, and the aid which it gives to the Official Assignee is limited. The section does not, however, interfere with the provisions of S. 52 of the Act. The salary received by a public servant, though it be below Rs. 100 per mensem, becomes his property when paid to him and therefore falls within S. 52 and it would be open in law to the Official Assignee to apply after the salary has been received for an order directing a portion of it to be paid over to him for the benefit of the creditors, but by the time such an application comes on for hearing probably all the salary would have been spent. The Court might or might not pass such order, but unless the circumstances are exceptional it might very well refuse to do so in view of the principle embodied in S. 60 Insolvency Act and S 60, Civil P. C., that small salaries should not be attached. [P 907 C 2]

K. V. Ramachandra Iyer, M. A. Srinivasan and S. Swaminathan — for Appellant.

S. J. S. Fernandez — for Respondent.

Leach C. J.—Section 60, sub-s. (1), Presidency Towns Insolvency Act, states that, where an insolvent is an officer of the Army or Navy or of the Royal Indian Navy or a person in the civil service of the Crown, the Official Assignee shall receive for distribution amongst the creditors so much of the insolvent's pay or salary liable to attachment in execution of a decree as the Court may direct Section 60, Civil P. C., provides inter alia that the salary of a public officer shall not be attachable to the extent of the first Rs. 100 and one-half the remainder of his salary. It has for many years been the practice of the Official Assignee of Madras in all the cases where the assets are insufficient to meet the debts due to the creditors to ask the Court to order an insolvent who is a public servant to pay over to him part of his salary for the benefit of the creditors. The applications and the orders passed thereon have not been limited to public servants in enjoyment of salaries in excess.

of Rs. 100 per mensem and many orders have been passed by consent when the salary has been far below this figure. The Official Assignee applied to the Master for an order against the respondent (who was adjudicated insolvent on 23rd November 1939, directing him to pay out of his monthly salary Rs. 60 the sum of Rs 6 for distribution to his creditors. The respondent who is a clerk in the Public Works Department objected to the proposed order, but notwithstanding his objection, the Master directed that he should out of his salary pay to the Official Assignee monthly a sum of Rs. 5. The respondent appealed from the order of the learned Master to the learned Judge sitting in insolvency (Krishnaswami Ayyangar J.) who held that the objection was well founded and set aside the Master's order. This appeal is from the order of the learned Judge.

By virtue of S. 17, Presidency Towns Insolvency Act, on adjudication an insolvent's property vests in the Official Assignee Section 52 provides that the property owned by an insolvent at the time of his adjudication and property which he has acquired subsequently, but before his discharge, shall be divisible among his creditors. It is common ground that apart from S. 60 there is no statutory provision which enables an official assignee to acquire a right in an insolvent's future earnings by way of salary. Of course once his salary has been paid over to him the money comes within the category of after acquired property. There is, however, no obligation on the part of an insolvent to deliver to the Official Assignee property acquired by him after his adjudication, unless called upon by the Official Assignee to do so.

Section 60 has been inserted to enable the Official Assignee to obtain what is known as a "prospective order," but he cannot obtain such an order when the salary of the insolvent falls below Rs. 100 per mensem. The section is clearly a bar in such a case. In answer to a question put by the Court Mr. K. V. Ramchandra Ayyar on behalf of the Official Assignee stated that the order which was passed by the learned Master against the insolvent must be deemed to have been passed under S. 60, because there is no other section under which such an order could have been passed. Therefore, it was passed contrary to the provisions of the Act and rightly set aside by Krishnaswami Ayyangar J. Of course, where an insolvent consents to an order of this nature being passed against him there is no reason why the Court should not accede to his wishes. He is merely showing that he is an honest debtor. But when he does not consent it is an entirely different matter. While there can be no doubt about the correctness of the order which the learned Judge has passed, it is necessary to refer to a passage in his judgment to which special exception has been taken. The passage is as follows :

> If the Official Assignee cannot intercept it at the source it is difficult to see how he can intercept it afterwards unless it be that he or his emissaries waylay the insolvent when returning home after receiving the salary or seize it immediately thereafter while it still remains unspent in his pocket. Theoretically no doubt he may be able to do this but even then I doubt whether the law will permit him to do so, for it seems to me that it is against the fundamental principle underlying S. 60, Insolvency Act, and S. 60, Civil P. C., to allow him to seize any portion of an insolvent's salary which is below the attachable limit, as such a limit appears to my mind to have been fixed on public grounds to ensure the proper and efficient discharge of duty by a public servant.

In view of these remarks it is perhaps necessary to carry the matter a little further. Section 60 is a section which enables the Official Assignee to get a prospective order. It is an enabling section and nothing more, and the aid which it gives to the Official Assignee is limited. The section does not, however, interfere with the provisions of S. 52 of the Act. The salary received by a public servant, though it be below Rs. 100 per mensem, becomes, as we have already pointed out, his property when paid to him and therefore falls within S. 52. In these circumstances it would be open in law to the Official Assignee to apply after the salary has been received for an order directing a portion of it to be paid over to him for the benefit of the creditors, but by the time such an application came on for hearing probably all the salary would have been spent. The Court might or might not pass such order, but unless the circumstances were exceptional, we consider that it might very well refuse to do so in view of the principle embodied in S. 60, Insolvency Act, and S. 60, Civil P. C., that small salaries should not be attached. The appeal fails and will be dismissed, but we make no order as to costs.

C.R.K./K.S. *Appeal dismissed.*

(28) A. I. R. 1941 Madras 908

SOMAYYA J.

Pandara Sannadhi, Tiruvannamalai Adhinam by trustee Sri Deivasigamani Ponnambala Desigar and another — Appellants

v.

Corporation of Madras — Respondent.

City Civil Court Appeals Nos. 56 to 58 of 1939, Decided on 2nd May 1941, against decrees of City Civil Judge, Madras, D/- 3rd March 1939.

(a) Madras City Municipal Act (4 of 1919 as amended by Act 10 of 1936), S. 101 (b) — For exemption under S. 101 (b) building must be choultry — Choultry is resting place for travellers — Fact that rent from building not used as rest house for travellers is used exclusively for running choultry does not make such building choultry.

In order to claim exemption under S. 101 (b) as amended, the first condition to be satisfied is that the buildings must be choultries. If they are not choultries, then they are not entitled to exemption. A choultry is a well known expression involving the idea that the building called a choultry affords a resting place for travellers. Unless, therefore, the building affords accommodation for travellers, it is not a choultry and unless it is a choultry, S. 101 (b) has no application even though the rent derived from the building is used exclusively for charitable purposes. A choultry is no doubt a charitable trust. If for the purpose of running that choultry, there are other buildings which are not used as rest houses but which are used exclusively, say, for running a business, the building in which the business is being run is not a choultry even though the rent derived from it is used for the maintenance of the choultry : ('33) 20 A I R 1933 Mad 782, *Rel. on.* [P 909 C 1]

(b) Madras City Municipal Act (4 of 1919), S. 101 — Onus of proof.

It lies upon the person claiming the exemption under S. 101 to prove all the requirements. [P 910 C 1]

(c) Madras City Municipal Act (4 of 1919), S. 101 — Building used only for performance of marriages is not choultry.

Choultry involves resting place for travellers. If, therefore, a building is allowed to be used only for performance of marriages, it would not be a choultry. [P 910 C 1]

(d) Madras City Municipal Act (4 of 1919 as amended by Act 10 of 1936), S. 101 (b) — Small portion of building used as resting place for travellers — Rest of building let to tenants but rent derived not shown to be used for charitable purpose — Building is not choultry.

If only a small portion of a building is being occasionally allowed to be used by travellers and if the rest of it is being let out to tenants and the rent derived therefrom is not shown to be used for charitable purposes, it cannot be said that the building as such is a choultry. [P 910 C 1]

V. Ramaswamy Iyer — for Appellants.

A. Suryanarayaniah — for Respondent.

Judgment. — These are three appeals filed against the decrees of the additional city civil Judge in O. S. Nos. 1103, 1653 and 1662 of 1938. A common judgment was delivered by the trial Court and the decision in all the three cases depends upon the question whether the building in each suit is a choultry and therefore exempted under S. 101 (b), City Municipal Act. The exemption was claimed on the wording of the Amending Act, 10 of 1936. The provision exempts the following buildings from the property tax : (1) choultries for the occupation of which no rent is charged and (2) choultries the rent charges for occupation of which is used exclusively for charitable purposes.

The respondent municipality levied taxes on the three buildings in question rejecting the claim of the appellant that they are exempted under S. 101 (b) of the Amended Act. The tax not having been paid, the three suits out of which these appeals arise were filed by the respondent corporation for recovery of the tax. The three buildings are contiguous to each other. One has a frontage in Mint Street and bears No. 2/355 Mint Street. The other two houses have a frontage in Nattuppilliar Koil Street which is parallel to the Mint Street and bear Nos. 26 and 27 in that street. The lower Court held that the buildings are not choultries and therefore not exempted from liability to pay the tax and decreed the suits. In these appeals, the appellant challenges the finding that the houses are not choultries. The parties to the three appeals are the same ; the appellant in each case is the Pandarasannadhi of the Tiruvannamalai Adhinam and the respondent the Corporation of Madras. As pointed out by the lower Court it is common ground that 2/355 Mint Street has been in the occupation of a number of tenants and that it was never used as a lodging for pilgrims or travellers. It was also common ground that the first compartment of Nos. 26 and 27 Nattuppilliar Koil Street is generally used by the public for celebrating marriages and is also occasionally used as a place of shelter for pilgrims or travellers. Both the parties agreed before the trial Court that the first compartment of Nos. 26 and 27 is not let out for rent. The parties differed as to the way in which the back compartment of Nos. 26 and 27 was used. The case of the appellant was that even the second compartment was not let out to tenants and that it was being used for the same purposes for which the first compartment was used, namely for celebration of marriages and as a place of shelter for travellers.

His next contention was that the three buildings constituted choultries for the reason that the rent realized from the tenants is being utilized exclusively for the purpose of maintaining all the three buildings and therefore for charitable purposes. In order to claim exemption under S. 101 (b) as amended, the first condition to be satisfied is that the buildings must be choultries. If they are not choultries, then they are not entitled to exemption. A choultry is a well known expression involving the idea that the building called a choultry affords a resting place for travellers. Unless therefore the building affords accommodation for travellers, it is not a choultry and unless it is a choultry, S. 101 (b) has no application even though the rent derived from the building is used exclusively for charitable purposes. A choultry is no doubt a charitable trust. If for the purpose of running that choultry, there are other buildings which are not used as rest houses but which are used exclusively, say, for running a business, the building in which the business is being run is not a choultry even though the rent derived from it is used for the maintenance of the choultry. The choultry may be run in one building and, in another locality, there may be other buildings which are not at all used as rest houses for pilgrims and which are let out to tenants for occupation or to shop-keepers for use as shops and the rents derived from them may be used exclusively for running the choultry. In such a case the building which is used as a rest house for travellers will alone be exempted and not the other buildings the rent of which is being used for the running of the choultry; if the buildings themselves are not used as rest houses, which is the central idea underlying the expression 'choultry,' they are not exempt from payment of tax.

In 65 M L J 678,[1] Krishnan Pandalai J. pointed out that a building cannot be a choultry if it is not used as a resting place for travellers. In that case there was a provision for supplying food and drink to paradasis, i. e., to religious mendicants. But there was no provision for allowing travellers or pilgrims to stay in the building or to take shelter there. The learned Judge held that the essential requisite of a choultry is that the building should be used as a resting place for travellers. I respectfully agree. The question therefore is whether any of these buildings answers the requirements of a choultry or in other words whether it is used as a rest house for travellers. Taking No. 2/355, Mint Street, first, it is admitted that no part of it is allowed to be used by travellers. The whole building is let out to tenants and the only ground for exemption is that the rents derived from that building are used for charitable purposes which as stated before me is the maintenance of all the three buildings. This building does not therefore answer the description of the term 'choultry.'

Then coming to Nos. 26 and 27 Nattupilliar Koil Street, the front portion is no doubt being used by the public for celebrating marriages and is also occasionally used as a place of shelter by pilgrims and travellers. As regards the second compartment, the lower Court relies on the evidence of certain witnesses that they are being let out to tenants and that the case of the appellant in this respect is not true. P. Ws. 1 and 2 are the assessors of the corporation and they state that they visited the building and found tenants in the second compartment of the two houses. Two of the tenants were also examined as P. Ws. 3 and 4. The lower Court has accepted the evidence of these witnesses and I see no reason to differ from the finding of the lower Court. The appellant is admittedly maintaining a printed receipt book as shown by Ex. 4. That receipt book was not produced. Therefore it is clear that the second compartments of Nos. 26 and 27 are being let out to tenants and rents realized. Exhibit B is a copy of a rental agreement executed by the present lessee of all the three buildings, one Sambanda Naicker, in favour of the appellant. By this agreement the lessee is bound to pay a rent of Rs. 30 a month to the Pandarasannadhi, the appellant, and to bear the public charges, taxes, expenses of repairs up to Rs. 10 or Rs. 15. It also states that while the front compartments of Nos. 26 and 27 should be used for marriage purposes and for travellers, the lessee was to be at liberty to lease out the second compartment and to collect rent from the tenants. The lessee Sambanda Naicker is not likely to allow the second compartment to remain without letting them to tenants because this document expressly authorizes him to let out the second compartment. There is no evidence that the sum of Rs. 30 which was being paid to the Pandarasannadhi was utilized for the maintenance of the build-

1. ('33) 20 A I R 1933 Mad 782 : 146 I C 307 : 65 M L J 678, Kothandaram Pillai v. Municipal Council, Trichinopoly.

ings as the appellant's advocate argues. Then it was said that that sum of Rs. 30 was being used for charitable purposes. Because the Pandarasannadhi was the head of a mutt, I am asked to say that the Pandarasannadhi must have used it for the purposes of the mutt and therefore for charitable purposes. This is really asking me to presume too much. There is no evidence as to the user to which this sum of Rs. 30 was being put by the Pandarasannadhi and it lies upon the person claiming the exemption to prove all the requirements. The Pandarasannadhi might use it for his own purposes or for any other purpose which is not a charitable purpose. As regards Nos. 26 and 27, a portion of them is being let out to tenants and it is not proved that the rents derived from those buildings are used for charitable purposes.

As regards the front compartment, EX. B says that the lessee should allow it to be used by the public for performing marriages. Assuming that a building is set apart for performance of marriages by the public, it cannot, I think, be said that the building is a choultry. Choultry involves as I said a resting place for travellers. If therefore a building is allowed to be used only for performance of marriages, it would not be a choultry. Then, as regards user of the front compartment by travellers, the translation of EX. B as contained in the printed record is not correct. The original document which I have seen provides that the front compartment was to be given to travellers and for purposes of marriage and not to travellers for purposes of marriage as translated. But this does not affect the question which falls for decision. Only that portion which is set apart for travellers would be a choultry; further, it is not stated that the corporation has assessed the front portion of the building. I hold that Nos. 26 and 27 Nattupilliar Koil Street cannot be said to be choultries. If only a small portion of it is being occasionally allowed to be used by travellers and if the rest of it is being let out to tenants and the rent derived therefrom is not shown to be used for charitable purposes, it cannot, I think, be said that the building as such is a choultry. I agree with the conclusions of the lower Court and dismiss the three appeals with costs.

C.R.K./K.S. *Appeals dismissed.*

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(28) A. I. R. 1941 Madras 910

HORWILL J.

Moongan and others — Petitioners

v.

Mir Roshan Ali Sahib — Respondent.

Criminal Revn. Case No. 316 and Criminal Revn. Petn. No. 300 of 1941, Decided on 21st August 1941, to revise judgment of Joint Magistrate, Hosur, D/- 19th October 1940.

Criminal P. C. (1898), Ss. 537 and 239—From misjoinder of persons, Court should ordinarily presume prejudice until contrary is shown — Two sets of persons committing similar offence in two different places tried jointly — No common object or intention of two sets proved — There is misjoinder of persons — Conviction held should be set aside and separate trials ordered.

Where there is a misjoinder of accused, there is always a possibility that the Court will be unconsciously prejudiced by evidence that would be irrelevant if the accused were tried separately and the Court should ordinarily presume prejudice until it is quite certain that there could have been none : *Case law referred.* [P 911 C 2; P 912 C 1]

Two sets of persons cut trees in different parts of the forest which was leased to the complainant. Separate charges were framed but they were tried together. There was no evidence of any common intention or object of the two sets :

Held* that there was a misjoinder of parties ('31) 18 A I R 1931 Mad 225, *Disting. [P 910 C 2]

***Held further* that the convictions and sentences should be set aside, and the case remanded for fresh and separate trials of the two sets of accused.** [P 912 C 1]

K. S. Jayarama Iyer for G. Gopalaswami and V. V. Radhakrishnan — for Petitioners.

V. T. Rangaswami Ayyangar for K. S. Sundaram and M. R. Ramachandra Pant — for Respondent.

Public Prosecutor — for the Crown.

Order.—All the petitioners entered into a forest which had been leased to the complainant and cut certain trees. They were all tried together, although separate charges were framed with regard to two sets of the accused who were cutting trees in different parts of the same forest. They have all been convicted. In this petition it is contended on behalf of the petitioners that there was a misjoinder of persons and that the conviction is therefore illegal and should be set aside. Although the matter was taken in appeal, neither of the Courts say that there was any intention or object common to the two sets of persons cutting trees in different parts of the forest; so that I agree with the learned advocate for the petitioners—as well as with the learned public prosecutor—that there was a misjoinder of parties. Mr. V. T. Rangaswami Ayyangar for the complainant contends that there was no misjoinder and

quotes 35 M L W 98,[1] but it is clear from the judgment in that case that Pandalai J., was satisfied that the two acts complained of — although on different dates—were parts of the same transaction and that the object on the two occasions was the same.

The only other question that arises in this case is whether the fact that all the accused were tried at one trial is a sufficient ground for setting aside their conviction and ordering a re-trial. For many years after 25 Mad 61,[2] it was held that any disobedience or failure to comply with the mandatory provisions of the Criminal Procedure Code was an illegality that vitiated the conviction. That was a case in which there was a misjoinder of causes of action, and a Full Bench of this Court held that there was a misjoinder but that it was open to them to strike out the first count, to reject the evidence with regard to it, and to deal with the evidence on the remaining counts of the indictment. But their Lordships of the Privy Council held that the disregard of any express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by S. 537, Criminal P. C., and that such a phrase as "irregularity" was not appropriate to the illegality of trying an accused person for more or different offences at the same time, if those offences were spread over a longer period than a year. In 1927 a case, 5 Rang 53,[3] was considered by the Judicial Committee in which the depositions of witnesses had not been read over in the presence of the accused as required by S. 360, Criminal P. C. It was held that this was a mere irregularity curable under S. 537 of the Code. This decision showed that a mere disregard of the mandatory provisions of the Code did not necessarily vitiate a conviction; but it left it rather difficult to say whether in a particular case a disregard of a mandatory provision amounted to an illegality or was a mere irregularity Burn J. in 1936 M W N Cr 195,[4] which dealt with a misjoinder of charges, referred to the failure to obey a mandatory provision of the Code as an "irregularity," but added that it was not one of the kind indicated by their Lordships of the Privy Council in 5 Rang 53.[3] In 1936 M W N Cr 163,[5] five persons were tried together; but there should have been two trials, one for accused 1 and one for accused 2 to 5. Accused 2 to 5 were however acquitted; and it was therefore argued that there no prejudice had resulted to accused 1. Burn J. however held that:

> The joint trial was illegal and the illegality could not be cured by the acquittal of accused 2 to 5 of the offences under which they were charged.

In 1935 M W N Cr 230,[6] in which there was a misjoinder of causes of action, King J. held that it was not a mere irregularity such as was referred to in 5 Rang 53,[3] and that the trial and conviction were therefore illegal None of these cases decided by single Judges however refers to 53 Mad 937,[7] in which the effect of a misjoinder of persons was considered. There, Wallace and Jackson JJ. say:

> Ever since the pronouncement of the Judicial Committee in 25 Mad 61,[2] it has been the general practice to assume that if a mandatory provision of the Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. Section 537 affords no real ground for any such assumption, and the Judicial Committee itself, when it had occasion to refer to 28 I A 257=25 Mad 61,[2] in 5 Rang 53[3] clearly indicated that the impugned procedure must be one that is not only prohibited by the Code, but also works actual injustice to the accused. In the latter case, the Code was clearly infringed but the curative provision of S. 537 was considered a sufficient remedy.

So the position is not altogether clear even today, although 53 Mad 937[7] is not binding on me, because the above quoted remark was obiter, it being found that in fact there was no misjoinder. But the purpose of the Legislature in laying down various restrictions with regard to charges against a number of persons or against the same person of different charges was to avoid embarrassing the accused by a multiplicity of charges or by bringing together evidence with regard to a number of accused; and so in cases where mandatory provisions as to the joining of charges are disregarded, it is reasonable to presume that the accused has been prejudiced because his trial has been complicated and his defence therefore rendered more difficult. Where there is a

1. ('31) 18 A I R 1931 Mad 225 : 131 I C 459 : 32 Cr L J 753 : 35 M L W 98, Sambasiva Mudali v. Emperor.
2. ('02) 25 Mad 61 : 11 M L J 233 : 28 I A 257 : 8 Sar 160 (P C), Subrahmania Iyer v. King-Emperor.
3. ('27) 14 A I R 1927 P C 44 : 100 I C 227 : 54 I A 96 : 28 Cr L J 259 : 5 Rang 53 (P C), Abdul Rahman v. Emperor.
4. ('36) 1936 M W N Cr 195, Bomma Chetti v. Emperor.
5. ('36) 1936 M W N Cr 163, Subramania Reddi v. Emperor.
6. ('35) 1935 M W N Cr 230, Karuppa Goundan v. Emperor.
7. ('30) 17 AIR 1930 Mad 857 : 127 I C 654 : 53 Mad 937 : 59 M L J 945 : 32 Cr L J 30, Ramaraju Tevan v. Emperor.

misjoinder of accused, there is always a possibility that the Court will be unconsciously prejudiced by evidence that would be irrelevant if the accused were tried separately. It is not necessary to disagree with the above quoted opinion from 53 Mad 937[7] and to say that a misjoinder always vitiates a trial; but I think that a Court should ordinarily presume prejudice until it is quite certain that there could have been none.

In the present case, apart from the presumption of prejudice, the trial Magistrate—and even the appellate Magistrate—seemed to be of opinion that it was proper to try the two sets of accused separately and that was why the trial Magistrate framed separate charges. He however erroneously thought that in doing so and in allowing each batch of accused to recall and cross-examine the prosecution witnesses separately, he was giving them separate trials. Mr. V. T. Rangaswami Ayyangar does not deny that there was in fact only one trial and not two. It is conceded by Mr. Jayaram Ayyar that the two sets of accused were animated each with a common intention if the prosecution story is true; and so he demands only two trials and not a trial for each accused separately. The petition is therefore allowed, the convictions and sentences set aside, and the case remanded for fresh and separate trials of the two sets of accused, by the District Magistrate himself or by some other Magistrate subordinate to him other than the Magistrate who tried the case.

C.R.K./K.S. *Petition allowed.*

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(28) A. I. R. 1941 Madras 912

VENKATARAMANA RAO AND SOMAYYA JJ.

L. R. Rama Ayyar — Appellant

v.

A. S. Madhava Rao and others — Respondents.

Appeal No. 87 of 1939, Decided on 14th February 1941, against preliminary decree of Sub-Judge, Madura, D/- 24th September 1936.

Madras Agriculturists Relief Act (4 of 1938), S. 10 (2)—Usufructuary mortgage executed in renewal of prior simple mortgages—Suit on usufructuary mortgage—Mortgagor is not entitled to scale down debt even though usufructuary mortgage contains clause that simple mortgages should be kept alive.

Where a mortgagee who is in possession of the property in lieu of interest files a suit on his mortgage which has been executed in renewal of two prior simple mortgages, the mortgagor is not entitled to scale down the debt even though the subsequent mortgage deed contains a clause that the simple mortgages should be kept alive. The suit cannot be treated as being laid on the original mortgages on the basis of such a clause. This clause is put in for the benefit of the mortgagee so that he can use it as a shield against any mortgages which might have intervened between the two prior mortgages and the present usufructuary mortgage. [P 912 C 2]

R. S. Srinivasachari and K. V. Rajagopalan— for Appellant.

K. Bhashyam and A. V. Baluswami — for Respondents.

Venkataramana Rao J. — The only question for decision in this appeal is whether the mortgage debt for which the suit was laid is liable to be scaled down under Madras Act, 4 of 1938. The mortgage is dated 9th January 1926 and purports to be a deed of usufructuary mortgage in and by which the property in suit was mortgaged under a stipulation that the mortgagee should be in possession of the property in lieu of interest, no rate of interest being stipulated as being payable to the mortgagee. Therefore, on the plain language of the document, it comes directly within S. 10 (2) of the Act, which distinctly provides that nothing contained in Ss. 8 and 9 shall affect mortgages of the description of the suit mortgage. The learned Judge in the Court below took the view that this usufructuary mortgage was executed in renewal of two prior mortgages which were simple and as there is a clause in the present mortgage deed that those simple mortgages should be kept alive, the suit must be deemed to have been laid even on the original mortgages and therefore the plaintiff was not entitled to claim the benefit of the exemption under S. 10 (2). It seems to us that the learned Judge has misconstrued the clause by which it was agreed that the prior mortgages should be kept alive. That clause was put in for the benefit of the mortgagee so that he can use it as a shield against any mortgages which might have intervened between the two prior mortgages and the present usufructuary mortgage; and in fact on a reference to the plaint it will be seen that defendant 3 was setting up a claim under such an intervening mortgage. We have looked into the plaint and we think that the suit was laid upon the mortgage dated 9th January 1926. We think that the learned Judge on his mistaken view of the deed of mortgage scaled down the debt which he is not entitled to do. We therefore set aside the preliminary decree and the final decree of the lower Court dated 4th January 1939 and restore the preliminary decree as it was originally passed on 24th September 1936.

A final decree will be passed by the lower Court in terms of the said preliminary decree. The appellant is entitled to his costs of this appeal and also in the Court below.

C.R.K./K.S. *Appeal allowed.*

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(28) A. I. R. 1941 Madras 913

LEACH C. J. AND
CHANDRASEKHARA AYYAR J.

Province of Madras represented by District Collector, Vizagapatam — *Appellant*

v.

Boddu Paidanna and Sons, represented by Boddu Seetharamaswami — *Respondents.*

Appeal No. 102 of 1941, Decided on 5th September 1941, against decree of District Munsif, Vizianagaram, D/- 25th November 1940.

(a) Injunction — Provincial Act found partly ultra vires — Injunction restraining Provincial Government from enforcing it will not be granted.

Where an Act of the Provincial Legislature is declared to be partly ultra vires, the Court will not grant an injunction to restrain the Provincial Government from enforcing the ultra vires provisions as there can be no reasonable doubt that the Provincial Government will honour a decree of a Court of law. [P 914 C 2]

(b) Precedent—Federal Court — Obiter must be treated with great respect.

Even when obiter the observations of the Federal Court must be treated with great respect. [P 916 C 2]

(c) Government of India Act (1935) — Interpretation of — Court is not precluded from examining the judgments of High Court of Australia.

In interpreting the Government of India Act, the Court can only have regard to the provisions contained therein and cannot refer to the Act of the South Australian Parliament since the constitution of the Australian Commonwealth has been built on different lines from those of the Indian constitution. But this does not preclude the Court from examining the judgments of the High Court of Australia while interpreting the Government of India Act. [P 916 C 2]

(d) Government of India Act (1935), Sch. 7, Federal List, Entry No. 45 and Provincial List, Entry No. 48—Excise duty—Meaning—Tax on sale of goods by manufacturer or producer amounts to excise duty — Federal List, Entry No. 45 and Provincial List, Entry No. 48 reconciled.

A tax connected with the manufacture or production of goods within the province constitutes an excise duty : ('39) 26 A I R 1939 F C 1, *Rel. on.* [P 917 C 1]

A tax on the first sale of goods by the manufacturer or producer is so connected with their manufacture or production as to amount to an excise duty : (1927) 38 Com L R 408, *Rel. on.* [P 917 C 2]

Where an entry in the Provincial List overlaps an entry in the Federal List, the Federal List must prevail. But the entries must be reconciled where it is possible to do so. Entry No. 45 in the Federal List and Entry No. 48 in the Provincial List can be reconciled by reading into Entry No. 48 of the Provincial List, a power to tax all sales subsequent to the sale by the manufacturer or producer, that is, when the property in the goods has passed beyond the manufacturer or producer and the goods have become part of the general stock of the province. On this basis, the Provincial Legislature can levy a tax on the sale by the person, who obtains the goods from the manufacturer or producer and so on, when the goods pass from hand to hand. No doubt, there is nothing to prevent the manufacturer or producer opening a shop to sell his goods retail but it is exceptional and it is the pith and substance of the Act which is the decisive factor. [P 917 C 2]

(e) Madras General Sales Tax Act (9 of 1939), Ss. 3 and 2 (i)—Tax under Act though based on turnover is in fact tax on sales — Act is ultra vires in so far as it taxes first sale of goods manufactured or produced in province—In calculating turnover of dealer under Act sale by him of goods manufactured or produced by him must be excluded.

Although the tax imposed by the Madras General Sales Tax Act is based on turnover it is, in fact, a tax on sales and therefore in so far as it imposes a tax on the first sales of goods manufactured or produced within the province it is ultra vires the Provincial Legislature. Consequently, in calculating a dealer's turnover for the purposes of the Act, the sale by him of goods which he has manufactured or produced must be excluded. [P 918 C 2]

Advocate-General and N. Rajagopala Ayyangar — for Appellant.

T. R. Venkatarama Sastri, V. Govindarajachari and V. V. Raghavan — for Respondents.

Leach C. J.—This appeal arises out of a suit filed by the respondents in the Court of the District Munsif of Vizianagaram for a declaration that the Madras General Sales Tax Act, 1939, and the Turnover and Assessment Rules framed thereunder are ultra vires the Provincial Legislature, a permanent injunction restraining the Provincial Government from collecting any tax from the respondents on the sales by them of groundnut oil and groundnut cake and an order directing the refund of Rs. 163-11-0, the amount which the respondents alleged they had been unlawfully compelled to pay in respect of sales of groundnut oil and groundnut cake during the month of October 1939. The respondents are members of a joint Hindu trading family carrying on business at Vizianagaram. They purchase groundnuts in the shell, and having decorticated the nuts they proceed to extract the oil from the kernels for the purpose of sale. Out of the residue they make groundnut cake, which they also sell. The assessing authority constituted by the Madras

General Sales Tax Act assessed the respondents to the tax imposed by the Act, both in respect of their purchases of groundnuts and their sales of groundnut oil and groundnut cake. The assessing authority regarded the business of manufacturing groundnut oil and groundnut cake as distinct from their business as buyers of groundnuts.

The Government of India Act, 1935, vests in the Central Legislature the power of imposing duties of excise on goods manufactured or produced in India, subject to certain exceptions which do not include the goods dealt in by the respondents. The power of imposing taxation on the sale of goods is given to the Provincial Legislatures. When the respondents first came into Court their case was that a tax on the sale of goods is in all cases an excise duty and therefore the Madras Legislature had exceeded its power in enacting the General Sales Tax Act. In view of the decision of the Federal Court in (1939) 1 F C R 18,[1] where it was held that an Act of a Provincial Legislature levying a tax on retail sales of motor spirit and lubricants was not ultra vires the Provincial Legislature, it was impossible for the respondents to maintain that the Madras General Sales Tax Act was invalid in its entirety, but the question whether a tax on the first sale of goods manufactured or produced within the province constituted an excise duty remained open to them. Consequently, at the hearing, the respondents confined themselves to this question in their attack on the validity of the Act. The respondents also raised the question whether the assessing authority was entitled to impose the tax both on their purchases of groundnuts and their sales of groundnut oil and groundnut cake, relying here on a proviso to S. 3 of the Act to the effect that in respect of the same transaction the buyer and the seller shall not both be taxed, but only one of them, and that when the amount for which goods are brought by a dealer has been included in his turnover, the amount of the sale price shall be excluded. They averred that the goods which they bought and the goods which they sold were the same goods and therefore they could not be taxed both as buyers and sellers.

The District Munsif held that a tax on the first sale of goods manufactured in the province was an excise duty within the meaning of the Act and consequently granted a declaration to the effect that the Act and the rules framed thereunder in so far as they impose a tax on such sales are ultra vires the Provincial Legislature. The District Munsif did not grant an injunction, because he considered that there could be no reasonable doubt that the Provincial Government would honour a decree of a Court of law, and naturally this has been accepted to be the case. The District Munsif also accepted the respondents' plea that groundnut oil and groundnut cake were for the purposes of the Act the same goods as the groundnuts out of which they were made and, therefore, the respondents could not, in any event, be taxed both on their purchases of groundnuts and on their sales of the goods made therefrom. The result was that the claim for a refund of the Rs. 163-11-0 was accepted by the District Munsif.

The Provincial Government appealed to the District Court of Vizagapatam, but the Advocate General of Madras applied for an order transferring the appeal to this Court. The application was not opposed and, in view of the importance of the case, this Court granted the application. The appellant's contentions may be summarized as follows:
(1) An excise duty implies only a tax on the manufacture or production of goods before they leave the hands of the manufacturer or producer and as such a tax can be imposed before any sale takes place, there is no conflict of power. The Federal Legislature has free scope to impose an excise duty before a sale takes place, leaving the Provincial Legislature the power to impose a tax when a sale in fact takes place.
(2) The tax imposed by the Madras General Sales Tax Act is a tax on turnover and such a tax cannot be classified as an excise duty.
(3) The rules framed under the Act are intra vires and the respondents have not been subjected to double taxation, the two sides of their business being quite distinct.
(4) While a suit will lie for a declaration that the Act and the rules are ultra vires, if intra vires, the validity of an assessment can only be raised before the tribunals constituted by the Act and not in a Court of law.

While not disputing that the rules fall within the scope of the Act, assuming the Act to be intra vires, the respondents join issue on all these contentions. The most important question is the first of those just

1. ('39) 26 A I R 1939 F C 1: 180 I C 161: I L R (1939) Kar F C 6: (1939) 1 F C R 18, In re Central Provinces and Berar Sales of Motor Spirit & Lubricants Taxation Act 14 of 1938.

enumerated. If a tax on the first sale of goods manufactured or produced within the Province is an excise duty then the Act is ultra vires to this extent, and there is a corresponding defect in the rules framed under the Act, which means that the respondents cannot lawfully be taxed on their sales of groundnut oil and groundnut cake, and questions 3 and 4 will not arise. Question 2 is bound up with the first. In the course of the hearing, Mr. Venkatarama Sastriar intimated that his clients were only concerned with the levy of the tax on their sales. The entry in the Federal List relating to duties of excise is Entry No. 45, which reads as follows :

> Duties of excise on tobacco and other goods manufactured or produced in India except—
>
> (a) alcoholic liquors for human consumption;
>
> (b) opium, Indian hemp and other narcotic drugs and narcotics ; non-narcotic drugs ;
>
> (c) medicinal and toilet preparations containing alcohol, or any substance included in sub-para. (b) of this entry.

The power of imposing excise duties on the excepted goods is given to the Provincial Legislature by Entry No. 40 of the Provincial List. If such goods are manufactured or produced in the Province, the Provincial Legislature may levy "duties of excise" on them ; if manufactured or produced elsewhere in India, it may impose "countervailing duties" at the same or lower rates. The entry in the Provincial List regarding taxes on sales is Entry No. 48 and is in these words : "Taxes on the sale of goods and on advertisements." The question of what is meant by a duty of excise was fully discussed in the judgments of the Federal Court in (1939) 1 F C R 18.[1] Broadly speaking, an excise is a duty imposed on goods manufactured or produced in the country as opposed to a customs duty, which is levied on goods imported from other countries, but this broad distinction will not suffice here. In the United Kingdom such taxes as the entertainment tax and the dog tax are regarded as duties of excise, and so are licence fees. Therefore a tax on the sale of goods manufactured or produced within the United Kingdom would undoubtedly fall within the definition of excise, but it is to be remembered that in the United Kingdom there is no division of legislative powers. Parliament stands alone. According to Blackstone, Stephen's Commentaries (1928 edition, Vol. 4, p. 420) and economists excise duties may be imposed at any stage from manufacture to consumption, as was pointed out in (1939) 1 F C R 18,[1] although Gwyer C. J. maintained that the primary and fundamental meaning in English of an excise duty is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption and that the Government of India Act, 1935, did not intend to give the words "duties of excise" an extended meaning. The learned Chief Justice of India observed (p. 47) :

> In my opinion, the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connexion with, manufacture or production and extends no further.

He did not, however, proceed to discuss the problem whether a tax on the first sale, that is the sale by the manufacturer or producer, is a duty imposed in connexion with the manufacture or production, because the question did not arise in that case. Sulaiman J. was also of the opinion that the wider meaning given by commentators and economists and accepted in England may be inapplicable to the Indian Constitution and in the course of his judgment said (p. 77) :

> The essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If a duty is imposed on the goods manufactured or produced when they issue from the manufactory, then the duty becomes leviable independently of the purpose for which they levy it and irrespective of what happens to them later. On the other hand, a duty on the sale of goods cannot be levied merely because goods have been manufactured or produced. Nor can it be levied merely because the goods have been consumed or used or even destroyed. The right to levy the duty would not at all come into existence before the time of the sale. It cannot at all be levied unless the goods are actually sold, and may not be leviable if they are transferred in some other form. Thus, a duty on goods manufactured or produced is distinct and separate from and independent of a duty on their sale and, (except probably at the stage of the first sale) there seems to be no good reason why the two may not co-exist without overlapping.

In excepting the first sale, Sulaiman J. had in mind the decision of the High Court of Australia in (1927) 38 Com L R 408[2] to which we shall refer presently. In the opinion of Jayakar J., a tax on the sale of goods manufactured or produced in a country is an excise duty, but he considered that by the insertion of Entry No. 48 in the Provincial List Parliament meant to reserve to the Provincial Legislature the power of imposing a tax on sales for the purposes of con-

2. (1927) 38 Com L R 408, Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia.

sumption, and the only question in (1939) 1 F C R 18[1] was whether a tax levied by the Provincial Government on the sale to the consumer was lawful. Jayakar J. laid great stress on Entry No. 16 in Schedule 1 of the Devolution Rules made under S. 45A of the previous Government of India Act. The relevant portion of that entry reads as follows :

16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs and the levying of excise duties and licence fees on or in relation to such articles.

The learned Judge considered that there was no escape from the conclusion that the definition of "excise" in Entry No. 16 of the Devolution Rules and the expression "duties of excise" in Entry No. 40 of the Provincial List in the present Act bear a wide signification, and include all duties levied on the consumption of the excisable commodity in the province at any stage from production to sale. He expressed his conclusion in these words (p. 116) :

On a careful review of the whole question, I am therefore inclined to hold that Parliament intended:

(1) That, as regards goods centrally excisable, taxes on their sale within the province for purposes of consumption, when such taxes are in no way connected with their production, manufacture, etc., within the province, but are imposed on their sale in the province merely as existing articles of trade and commerce, should be exclusively within the competence of the Provincial Legislature.

(2) That, save as aforesaid, all duties of excise on those goods, whether levied and collected at the stage of manufacture, production or any subsequent stage upto consumption (exclusive of sale in the province as stated above), should remain exclusively within the competence of the centre. A corollary of this rule will be that the residuary powers, if any, of levying and collecting excise duties on those goods (save on their sales as aforesaid) will remain exclusively within the competence of the Central Legislature.

As we read the judgments delivered in (1939) 1 F C R 18,[1] the learned Chief Justice of India was of the opinion that a tax on the sale of a commodity cannot be an excise duty unless it is connected with its manufacture or production, but he expressed no opinion on, whether a tax on the sale by the manufacturer or producer should be classified as an excise duty. Sulaiman J. was substantially in agreement with the learned Chief Justice in his definition of excise duty, but he thought it probable that a tax on the first sale should be classified as an excise duty. Jayakar J. was definitely of the opinion that a tax on the first sale was an excise duty and taxes on subsequent sales, excluding the last sale, should be similarly classified. He made an exception in the case of the last sale, because Entry No. 48 in the Provincial List indicated that this was the intention of Parliament. It cannot be disputed—in fact it has been conceded by both sides—that the judgments of the Federal Court in (1939) 1 F C R 18[1] leave open the question whether a tax on the sale by the manufacturer or producer constitutes an excise duty, but, of course, even when obiter the observations of the Federal Court must be treated with great respect.

At this stage it will be convenient to discuss the judgments delivered by the High Court of Australia in (1927) 38 Com L R 408.[2] The constitution of the Australian Commonwealth has been built on different lines from those of the Indian constitution and in interpreting the Government of India Act, 1935, the Court can only have regard to the provisions contained therein; but this does not mean that the Court is precluded from examining the judgments in (1927) 38 Com L R 408[2] in order to see whether they throw light on the meaning to be attached to the words "excise duties" used in the Government of India Act, 1935, and we consider that these judgments do render great assistance in solving the first of the problems with which this Court is now confronted. The Act of the South Australian Parliament imposed a tax of three pence on every gallon of motor spirit sold within the state (excluding spirits sold for delivery in or transportation to any place outside the State) and the vendor was authorized to add the amount of the tax to the price agreed to be paid. Six of the seven Judges who constituted the Court were of the opinion that the Act was ultra vires, because it violated the power of the Commonwealth Parliament to impose duties of excise. With the one exception the learned Judges were all of the opinion that a tax on the first sale amounted to an excise duty. The basis of their decision was that a tax on the first sale was a tax on the production of the article. In citing this case and in an endeavour to find support for his argument that even a tax on the first sale is not an excise duty the learned Advocate General laid great stress on this passage in the judgment of Isaacs J. (p. 426):

Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the articles sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of the goods as existing articles of trade and commerce,

independently of the fact of their local production, a licence or tax on the sale appears to me to fall into a classification of Governmental power outside the true content of the words "excise duties" as used in the Constitution. Such taxing regulations are, in my opinion, not 'withdrawn' from the States, however they might stand in presence of relevant Commonwealth Legislation respecting foreign or inter-state trade. I agree with the reasoning in (1904) 1 Com L R 497.[3] Therefore, if the taxation by the State Act under S. 4 were simply on motor spirit as an existing substance in South Australia and not subject to any foreign or inter State operation of trade or commerce, it would not be open to the challenge here made. That, however, is not the nature of the legislation.

These remarks do not help the learned Advocate General. The distinction which Isaacs J. here draws is the distinction between the stage of production and the stage when the goods produced have become part of what has been described as the general stock of the province. In other words, if the tax is imposed while the goods are in the hands of the producer, it is a tax on the production and therefore an excise duty; but if the tax is imposed after the goods have left his hands it is not. This is made clear by the following passage in the judgment of Isaacs J. (p. 430) :

The first sale of motor spirit, after its production either by primary or later processes, is naturally and in the ordinary course of business a sale by the producer, and a sale by him is certainly included. A tax on that sale, so described, is essentially a burden and a tax on the production of the goods. Production of motor spirit is with a view to sale; and the tax, having direct reference to a sale so described as to be intimately related to production, is a matter which affects the producer as such, because it burdens the trade for which his production is the essential preparation. A tax laid expressly on the production alone of goods would affect every one who produced them, even for personal use or consumption. But it is all one in reality whether the tax is expressed to be on production followed by sale, or, as here, on the sale immadiately following production.

Higgins J. also said that a tax on the sale of an article is a tax on the article itself and in accepting the definition in Mill's Political Economy, Edn. 4, Vol. 2, page 434, that "taxes on the sale of consumable commodities are simply taxes on those commodities." Starke J. said the same thing. The learned Advocate-General has accepted the proposition stated by the learned Chief Justice of India in (1939) 1 F C R 18,[1] that a tax connected with the manufacture or production of goods within the province constitutes an excise duty, and in our opinion, the correctness of the proposition is not open to doubt. Therefore what the Court has to decide, in the first place, is whether a tax on the sale of goods by the manufacturer or producer is so connected with their manufacture or production as to amount to an excise duty. The High Court of Australia has said that a tax imposed on the first sale of goods is so connected with their production that it is an excise duty and no reason has been advanced in the course of the arguments in this case to induce us to think otherwise. The tax operates on the goods themselves and it is imposed before they leave the hands of the manufacturer or producer. In the normal course, he is certainly not going to part with his goods until a contract of sale has been entered into. This being the case, it seems to us that the tax is intimately connected with the manufacture or production of the goods. We hold that a Provincial Legislature in India has no power to tax a sale by the manufacturer or producer as, for the reasons given, this would mean the imposition of an excise duty and the assumption of power vested only in the Centre.

Where an entry in the Provincial List overlaps an entry in the Federal List, the Federal List must prevail. Where the interests can be reconciled, this must be done, because obviously Parliament could never have intended that there should be a conflict. Entry No. 45 in the Federal List and Entry No. 48 in the Provincial List can be reconciled by reading into Entry No. 48 of the Provincial List a power to tax all sales subsequent to the sale by the manufacturer or producer, that is, when the property in the goods has passed beyond the manufacturer or producer and the goods have become part of the general stock of the province. On this basis, the Provincial Legislature can levy a tax on the sale by the person who obtains the goods from the manufacturer or producer and so on when the goods pass from hand to hand. It has been said that there is nothing to prevent the manufacturer or producer opening a shop to sell his goods retail. This is so, but it is exceptional and as pointed out by Sulaiman J. on Privy Council authority, it is the pith and substance of the Act which is the decisive factor.

It is now necessary to decide whether the Madras General Sales Tax Act does impose a tax on first sales. The learned Advocate General has said that the tax is imposed on a dealer's turnover and that it is not in reality a tax on sales. In this connexion he has pointed to an argument advanced by the Advocate General of India

3. (1904) 1 Com L R 497, Paterswald v. Bartley.

in (1939) 1 F C R 18[1] to the effect that the only power given to the Provincial Legislature by Entry No. 48 is a power to impose a tax on turnover. The contention of the Government of India was that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act constituted an infringement of the power of the Central Legislature and the argument of the learned Advocate General of India was advanced in support of this contention. The Federal Court refused to accept the argument, but this does not mean that this decision implied that a tax on turnover does not mean a tax on sales. Under the Madras General Sales Tax Act, the tax is undoubtedly based on the dealer's turnover. "Turnover" is defined by S. 2 (i) as meaning the aggregate amount, for which goods are either bought by or sold by a dealer whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, is excluded from his turnover. By an amending Act, which received the assent of the Governor on 4th March 1940, the tax is Rs. 4 per month if a dealer's turnover does not exceed Rs. 20,000 and one quarter of one per cent. of the turnover if it exceeds Rupees 20,000. Any dealer whose turnover in any year is less than Rs. 10,000 is not liable to pay the tax for that year.

A tax on a dealer's turnover is, in effect, a tax on his purchases or sales as the case may be. Whether the Legislature makes him pay a tax on each transaction, or whether it makes him pay a lump sum when the sales for a particular period have been ascertained, the result is the same: a tax on his purchases or sales. The whole includes the part. And the very title given to the Act implies that it is a tax on sales. Moreover it is to be remembered that a Legislature cannot do indirectly that which it has no power to do directly. In fact, the learned Advocate General did not appear to be pressing his second point, although he did suggest that the Court should accept the contention of the learned Advocate General of India in (1939) 1 F C R 18[1] that Parliament merely intended to give to the Provinces the power to impose a tax on turnover and not a power to tax individual transactions, but in doing so he overlooked the fact that the decision in (1939) 1 F C R 18[1] makes such an argument untenable. Notwithtstanding that the tax imposed by the Madras General Sales Tax Act is based on turnover, we hold that it is, in fact, a tax on sales and that in so far as it imposes a tax on the first sales of goods manufactured or produced within the Province, it is ultra vires the Provincial Legislature. This means that we consider that in calculating a dealer's turnover for the purposes of the Act, the sale by him of goods which he has manufactured or produced must be excluded.

In view of these findings, it is not necessary for us to decide questions 3 and 4 stated by the learned Advocate General. As it has not been suggested that in ordering the refund of Rs. 163-11-0 the District Munsif committed any error, assuming his decision on the main issue to be correct, the decree passed by him will stand. Consequently, the appeal will be dismissed with costs and a certificate for two counsel granted. A memorandum of cross-objections has been filed by the respondents, but they have not pressed it and it will also be dismissed, in this case without costs. As this judgment involves a substantial question of law as to the interpretation of the Government of India Act, 1935, a certificate will issue in accordance with the provisions of S. 205 of that Act.

C.R.K./G.N. *Appeal dismissed.*

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(28) A. I. R. 1941 Madras 918

WADSWORTH J.

Natesa Naicker — Appellant

v.

Sambanda Chettiar — Respondent.

Appeal No. 436 of 1940 and Civil Revn. Petn. No. 491 of 1941, Decided on 21st July 1941, against order of District Court, Chingleput, D/- 8th July 1940.

(a) Civil P. C. (1908), O. 47, R. 1 — By oversight Judge going wrong by not knowing legal position established by well-known authority — This may be error apparent on face of record.

When there is a legal position clearly established by a well-known authority and by some unfortunate oversight the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case be a ground coming within the category of an error apparent on the face of the record : ('24) 11 AIR 1924 Mad 98, *Foll.* [P 920 C 1]

(b) Civil P. C. (1908), O. 47, R. 1—Court has no power to rely on decision subsequent to original order for purposes of review.

A Court has no power to rely upon a decision pronounced subsequent to the original order for purposes of review. [P 920 C 2]

(c) Civil P. C. (1908), O. 47, R. 1 — Basis of review order not correct—Still appellate Court

will not interfere if original order is demonstrably wrong.

Where the original order which has been reviewed is demonstrably wrong, the appellate Court will not interfere with that review order even though the basis or reasoning on which the original order has been reviewed is open to criticizm. [P 920 C 2; P 921 C 1]

R. Thirumalai Thathachariar and R. V. V. Thathachariar — for Appellant.

A. K. Muthuswamy Iyer — for Respondent.

Judgment.—These two matters arise out of an application for the filing of a complaint under S. 206, Penal Code, in respect of the cutting of trees alleged to be under an attachment at the instance of the District Munsif's Court, Poonamallee. The application was rejected by the District Munsif mainly on the ground that the attachment covered trees described as Pala Virukshangal which the learned District Munsif interpreted as fruit bearing trees, not including casuarina trees such as were cut. The applicant appealed to the District Judge of Chingleput who differed from the District Munsif as to the interpretation of the phrase, he translating it as "various trees" not as "fruit bearing trees" and considering that the attachment was intended to cover all the trees on the land and not merely fruit bearing trees. But the learned District Judge came to the conclusion that the materials on the record of the District Munsif's inquiry were not sufficient to justify the filing of a complaint by the appellate Court and he also came to the conclusion that he had no power under S. 476A, Criminal P. C., to remand the petition for the taking of additional evidence; nor had he the power to take additional evidence in appeal. The appeal was therefore dismissed with the observation that it was open to the decreeholder to move the High Court in revision.

After the disposal of this appeal, it was brought to the notice of the District Judge that there was ample authority for the view that the Court hearing the appeal against an order of a civil Court declining to file a complaint under the powers conferred by S. 476A, Criminal P. C., acted as a civil Court and could employ all the powers conferred by the Civil Procedure Code on a Court of appeal, and attention of the learned District Judge was also drawn to ILR (1940) Mad 762,[1] the Full Bench decision pronounced subsequent to the District Judge's original judgment and establishing the correctness of the view that the appellate Court in such a case was a civil Court and not a criminal Court. The learned District Judge therefore reviewed his previous order and remanded the matter to the trial Court for further evidence and a specific finding on the facts. It is against this order of review that the present appeal has been preferred. After the remand under the order of review there was a finding and a further hearing before the District Judge as a result of which the District Judge directed a complaint to be filed. Against the order for the filing of a complaint the civil revision petition has been preferred.

Dealing with the latter first, it seems to me that there are no grounds upon which this Court's revisional jurisdiction can be invoked in this case. The question of the precise scope of the attachment is one upon which two views were taken by the two civil Courts which had to deal with the matter and one upon which the decision of the criminal Courts will be final. But certainly the learned District Judge on the view which he took of the order of attachment had ample jurisdiction to direct the filing of the complaint and it is not possible for this Court sitting in revision to reverse the District Judge's order merely on a consideration of the comparative merits of the two interpretations which have been given of the order of attachment.

The appeal against the review order deserves more serious consideration. It was held in 46 Mad 955[2] that an error apparent on the face of the record under O. 47, R. 1, Civil P. C., might be an error of law and in that particular case the error of law which was the ground for review was the failure to take note of an established authority reported in the Indian Law Reports finally deciding a matter of succession. That is to say, the Bench recognized the power of the Court in an appropriate case to review its order because it had overlooked a leading authority on a clear matter of law. So far as I am aware, this decision is still good law. I have followed it myself in a case, AIR 1939 Mad 293[3] and though it has been criticised by a single Judge of this Court in a case, A I R 1927 Mad 998,[4] it has not, so far as I am aware, been dissented from by any

1. ('40) 27 A I R 1940 Mad 465 : 189 I C 630 : 41 Cr L J 769 : ILR (1940) Mad 762: (1940) 1 M L J 719 (F B), Kumaravel v. Shanmugha.

2. ('24) 11 AIR 1924 Mad 98 : 76 I C 342 : 46 Mad 955 : 45 M L J 309, Murari Rao v. Balvanth Dikshit.

3. ('39) 26 AIR 1939 Mad 293 : 189 I C 320 : (1939) 1 M L J 120, Venkatarayulu v. Venkata Rattamma.

4. ('27) 14 A I R 1927 Mad 998 : 106 I C 514, Opporti Padhi v. Paila Ujjulla.

subsequent Bench. Certainly the decision in 46 Mad 955[2] should not be taken any further than it goes. It is not authority for the view that whenever a Judge has overlooked a ruling he has a power to review his decision; nor is it authority for the view that whenever, after a judgment has been pronounced, a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. But when there is a legal position clearly established by a well-known authority and by some unfortunate oversight the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case, in the light of 46 Mad 955,[2] be a ground coming within the category of an error apparent on the face of the record. That seems to me to be the position, so far as this Court is concerned, in the light of 46 Mad 955.[2]

Now turning to the legal question which caused the difficulty of the learned District Judge in the present case, there was before the matter was settled by the Full Bench in I L R (1940) Mad 762[1] a considerable divergence of judicial opinion, not only in other Courts but in this Court, on the question whether proceedings taken by a civil Court under S. 476, Criminal P. C., and the following sections were properly to be regarded as civil proceedings governed for the purposes of appeal and revision by the Civil Procedure Code or as criminal proceedings in respect of which the Criminal Procedure Code would decide the powers of the Court of appeal or revision.

It is not necessary to discuss the cases in which the two rival views were adopted. They are set forth in the decision of the Full Bench to which I have just referred. It is sufficient to say that there was very considerable doubt on this matter. The decision actually quoted before the District Judge was a decision of 1916 in a case in which two Judges of a Bench differed and the matter came before three Judges who decided by a majority that the proceeding in revision against the sanction order under S. 476 of the old Criminal P. C., was a civil proceeding. But other Judges have taken other views since that case was reported and I doubt whether it can be said that at the time of the District Judge's review order there was a clearly established rule laying it down finally and with authority that a Court in sitting in appeal against a decision of a civil Court under S. 476, Criminal P. C., was governed by the Civil Procedure Code and not by the Criminal Procedure Code. There is in fact a Full Bench decision of 1933, reported in 57 Mad 177[5] which assumes that the procedure is covered by the Criminal Procedure Code. But the point to notice is that at the time when the learned District Judge reviewed his order, whichever Code applied to the proceedings, the authority of this Court was clear that he had the power of remand which he thought that he had not.

The Full Bench decision in 57 Mad 177[5] decides that a Court acting under S. 476B, Criminal P. C., has the power by the application of S. 423 of the Code to remand the matter for fresh disposal. It seems to follow that at the time when the District Judge dismissed the appeal, thinking that he had no power of remand, that order was quite definitely and obviously wrong on the established authorities whichever view might be taken as to the Code applicable to the proceedings. No doubt the learned District Judge in reviewing his order does not rely upon the Full Bench decision in 57 Mad 177[5] but founds himself on the decision that the proceedings are civil, and fortified that view by the subsequent Full Bench ruling. If the matter rested solely on the existence of the power of the appellate Court under the Civil Procedure Code to remand, I should have had some hesitation in upholding the order in review which to some extent depends upon a subsequent ruling of this Court. But as the order which the District Judge reviewed was clearly and demonstrably wrong on the established authorities of this Court, whichever Procedure Code was applicable, I do not think that I should be justified in reversing the review order and restoring the wrong decision merely because the reasoning of the review order is open to criticism. The District Judge ought to have remanded the case on the view he took of the attachment order and had he been fully appraised of the authorities he would certainly have done so. He reviewed the order on the basis of a decision which was perhaps at that time not as authoritative as he thought it to be, and he fortified himself by quoting a decision pronounced subsequent to his original order, which in my opinion he had no power to rely upon for the purpose of review. But as the original order was demonstrably wrong, even though the decision upon which he relied

5. ('34) 21 A I R 1934 Mad 52 : 147 I C 351 : 35 Cr L J 392 : 57 Mad 177 : 65 M L J 873 (F B), Janardhan Rao v. Lakshminarasamma.

in review was not at the time of the original order unchallenged. I decline to interfere with that review order in appeal. The appeal and the revision petition are therefore dismissed with costs in the civil revision petition.

C.R.K./K.S. *Appeal and revision dismissed.*

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(28) A. I. R. 1941 Madras 921

MOCKETT J.

Kallepalli Subbayya — Petitioner

v.

Kurra Venkatadri and others — Respondents.

Civil Revn. Petn. No. 101 of 1939, Decided on 4th February 1941, to revise decree of Dist. Munsif, Bapatla, in O. S. No. 134 of 1936.

Civil P. C. (1908), Sch. 2, paras. 8 and 15 — Award made after order superseding arbitration and later order cancelling reference cancelled — Suit not proceeded with — Award is not void ab initio — It has to be set aside by application under para. 15.

Where an award has been made after the issue of the order of the Court superseding the arbitration but the Court did not proceed with the suit because it cancelled its order cancelling the reference, the award is not void ab initio but has to be set aside under Sch. 2, para. 15. And the words "or being otherwise invalid" even if construed on the ejusdem generis principle must apply to a case like this. Hence, where no application to set aside the award has been made an order of the Court to pass a decree in terms of the award cannot be set aside: 18 All 422 (F B), *Ref.* [P 921 C 2; P 922 C 1]

K. Krishnamurthy — for Petitioner.

K. Kotayya — for Respondents.

Order. — The petitioner was plaintiff 1 in a suit. The following is the history of the case. On the 8th of October 1937 a reference was made through the Court to arbitration, the time for the award being fixed for the 15th of November 1937. There was much delay and time was finally extended to 25th January 1938. On that day an order was made adjourning the suit to 11th February. On 5th March the Court passed an order cancelling the reference to arbitration. That is an appealable order under S. 104 (a), Civil P. C., but no appeal has been filed against it. On 12th March 1938 the arbitrators submitted an award notwithstanding the order of 5th March and on 25th March the lower Court in a brief order cancelled its order of 5th March, i.e., the order cancelling the reference. No civil revision petition was filed against that order and no further action taken by the petitioner except that on 3rd June 1938 objections were filed by the petitioner. On 30th July 1938 the District Munsif passed an order, "Decree in terms of the award," ruling that the objections of the petitioner were out of time. This civil revision petition is now directed towards the order of 30th July and not against any other order. The position therefore is that notwithstanding the order made under para. 8 of Schedule 2 an award was made and that later the order under para. 8 was cancelled. Whichever way the facts are regarded, there is no doubt that this was a case where the award was made after the issue of an order by the Court superseding the arbitration. Now para. 15 states that no award shall be set aside except on the grounds specified in that rule and one of them is as follows :

> The award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit. . . . [Para. 15 (c)].

It is true that the award has been made after the issue of the order of the Court superseding the arbitration. But the Court did not proceed with the suit because it cancelled its order cancelling the reference. What the precise reason for the introduction of the words "and proceeding with the suit" is, I confess, I have difficulty in appreciating but in those circumstances the remedy of the person aggrieved is to apply to the Court to set aside the award. There is no provision in the Code for circumstances such as those before me, unless it can be said that they are comprised in the words "or otherwise being invalid" which occur at the end of sub-r. (c) to para. 15. The authorities have been of little assistance. I have been referred to a judgment of a Full Bench of the High Court of Allahabad, 18 ALL 422,[1] which dealt with the Code before it was amended and the words " or being otherwise invalid" are not included in the original framing of the section. Section 521 states that no award shall be set aside except on one of the following grounds :

> (c) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit.

Paragraph 15 in Schedule 2 is much more comprehensive. The learned Judges of the Allahabad High Court say that :

> If the power of the arbitrator is revoked as for example by the Court passing an order superseding the arbitration under Ch. 37 of the Code or the period fixed for making the award has expired before the award is made, the arbitrators have no longer seisin of the reference; they are functus officio and they cease to have any more power to

1. ('96) 18 All 422 : 1896 A W N 137 (F B), Ibrahim Ali v. Mohari Ali.

make an award than the man in the street and in such a case any award which they made or purported to make would be void ab initio.

I do not however find that there was any discussion before the learned Judges of the procedure found in S. 521 which implies that such an award should go through the formality of being set aside. One is tempted to say that an award made by persons who have been superseded must be bad, but in view of the explicit words of Schedule 2, I think that I am bound to be against the petitioner in this case on procedural grounds. I think he had many remedies ; he could have filed a civil revision petition against the order of 25th March 1938. I find it difficult to believe that on an affidavit alleging that such an order had been made, it would not have been possible to have directed the lower Court to send a copy of that order to this Court for revision. I have had a most interesting argument from the counsel on both sides but I have come to the conclusion that even when an award is made by arbitrators whose powers have been revoked, it is not void ab initio but has to be set aside under para. 15 of Schedule 2. I am satisfied that the words "or being otherwise invalid," even if construed on the ejusdem generis principle must apply to a case like this, which only differs from the case envisaged in para. 15 in that the suit is no more to be proceeded with. That being so, no application to set aside the award having been made, I have no alternative except to dismiss this civil revision petition with costs.

C.R.K./K.S. *Petition dismissed.*

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* (28) A. I. R. 1941 Madras 922
SPECIAL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras— Petitioner

v.

P. Ramaswamy Chettiar, Money-lender, Peelamedu, Coimbatore— Respondent.

O. P. No. 96 of 1941, Decided on 15th September 1941.

*** Income-tax Act (1922), S. 2 (6A) — Release of assets by company is necessary — Allotment of bonus shares and share certificates representing capitalization of profits given to share-holder held not dividend.**

In order that a distribution may amount to dividend it is necessary that it should entail the release by the company to its share-holders of all or any part of the assets of a company. [P 923 C 1]

A company distributed bonus shares to the share-holders by a resolution passed and gave them share certificates representing the capitalization of the profits :

Held* that as the money representing the profits remained with the company, there was no release of assets by the company and as such the distribution of bonus shares did not amount to dividend within the meaning of S. 2 (6A): (1921) 2 A C 171, *Foll.*; ('36) 23 A I R 1936 P C 238 and ('24) 11 A I R 1924 Mad 802 (S B), *Rel. on. [P 923 C 2]

***Held further* that the position would be same even if the resolution was not validly passed.** [P 923 C 2; P 924 C 1]

K. V. Sesha Ayyangar — for Petitioner.

M. Subbaraya Aiyar — for Respondent.

FACTS. — The question referred is the following : "Whether the distribution of Rs. 10,000 to the assessee by Lakshmi Mills Co. Ltd., in accordance with the resolution at the annual general meeting held on 11th July 1939 is dividend income within the meaning of the Act or only capital receipt in the assessee's hands ?"

Leach C. J.—The question referred must be answered against the assessee and in the manner indicated by the Commissioner in his statement of the case. There is overwhelming authority for the opinion expressed by the Department. The assessee is a share-holder in the Lakshmi Mills Co. Ltd., which carries on a spinning business at Coimbatore. For the year of assessment, (1940-41), the assessee returned an income of Rs. 11,213-14-0 which included a sum of Rs. 10,000, said to be a dividend received from the Lakshmi Mills Co. Ltd. The Income-tax Officer discovered that the Rupees 10,000 had not been paid to the assessee in cash, but represented the nominal value of certain bonus shares which had been allotted to the assessee in accordance with a resolution passed at a general meeting of the company held on 11th July 1939. During the year ending 31st March 1939 the company had made a profit of Rs. 4,51,946-8-1. In the previous year a profit of Rs. 5320-8-11 had been earned but had not been distributed.

The directors proposed that these profits together with a sum of Rs. 1,42,732-15-0 taken from the general reserves of the company, making in all Rs. 6,00,000 should be capitalized in the form of bonus shares and distributed to the share-holders in proportion to their holdings. This resolution was passed and in due course the assessee received bonus shares of the value of Rs. 10,000, which represented the "dividend." The company had, of course, paid income-tax on its profits and was taxed at a higher rate than the assessee. Consequently, he sought

to recover from the income-tax authorities the difference between the amount the company had paid on the Rs. 10,000 and what he would have paid if the tax had been levied according to the rate appropriate to his income. Section 2 (6A), Income-tax Act, says that the word "dividend" includes inter alia distribution by a company of accumulated profits, whether capitalized or not, if the distribution entails the release by the company to its share-holders of all or any part of the assets of the company. By reason of this section, the income-tax authorities refused to recognise the claim for a refund. They said that the delivery to the assessee of the bonus shares did not represent the payment of a dividend within the meaning of the Act. This is the question which forms the subject-matter of the reference. Now it is manifest that, unless the distribution of bonus shares amounts to a "release" of assets by the company to the share-holders, the assessee cannot claim the Rs. 10,000 to be a dividend within the meaning of the Act. The House of Lords in (1921) 2 A C 171[1] held that a distribution of bonus shares does not represent the payment of a dividend, and the reasoning there was applied by the Privy Council in 63 I A 457.[2] In the former case Lord Haldane said :

> For the reasons I have given I think that it is, as a matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its share-holders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which share-holders electing to take up unissued shares would otherwise have to contribute. If this is done, the money so applied is capital and never becomes profits in the hands of the share-holder at all. What the latter gets is no doubt a valuable thing. But it is a thing in the nature of an extra share certificate in the company. His new shares do not give him an immediate right to a larger amount of the existing assets. These remain where they were. The new shares simply confer a title to a larger proportion of the surplus assets, if and when a general distribution takes place as in a winding up.

In the same case Viscount Finlay said :

> The second contention of the Crown is that the allotment of the preference shares was equivalent to the payment of the bonus. To appreciate this point it is necessary to consider closely what it was that the share-holder got. Did he get anything in the nature of payment of income? It is obvious that he did not. He gave up any claim to the income. What might have been paid as income went to increase the capital of the company. The share-holder got his proportionate share in the business of the company as increased by the additional capital .... Instead of his getting any dividend, or anything in the nature of a dividend, the fund which might have been divided was impounded to increase the capital of the business. How is it possible to treat any advantage accruing from this as a payment of income? The case differs *toto coelo* from a case in which a dividend is paid not in money but in money's worth by the delivery, say, of goods or of securities.

Coutts-Trotter C. J., and Ramesm J., applied the decision in (1921) 2 A C 171[1] in deciding 47 Mad 837,[3] where it was sought to make the assessee liable to super-tax on the value of bonus shares. It was held that the Indian Income-tax Act contained no such power. After quoting from the judgment of Viscount Finlay in (1921) 2 A C 171,[1] Coutts-Trotter C. J., observed :

> You cannot say that there is a notional payment of a dividend to a share-holder when the position is that, if he sued for it, his action must be dismissed, that is to say, when the whole conception that he is entitled to the dividend is one that the law refuses to countenance.

The share-holders of the Lakshmi Mills Company have received no portion of the profits which were made in the years ending 31st March 1938 and 31st March 1939. The money representing the profits remains with the company. All that the share-holders have got are share certificates representing the capitalisation of these profits and an additional sum taken from the reserve. Therefore there has been no release of assets of the company to the share-holders. It has been said by Mr. Subbaraya Ayyar that the capitalisation of these moneys has not been lawfully carried out. He admits that the company has by reason of its memorandum and articles of association power to capitalise profits, but he says that the notice of the meeting contained no intimation that this would be part of the business before the meeting. In saying this the learned advocate overlooks the fact that with this notice the share-holders received a copy of the annual report in which the directors make the proposal to capitalise the sums making up the Rs. 6,00,000. The Court is only concerned with the question referred, but assuming that the resolution had not been validly passed, even assuming that the meeting had done something which by reason of the memorandum and articles of association it

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1. (1921) 2 A C 171 : 90 L J K B 1028 : 125 L T 497 : 65 S J 642 : 37 T L R 762, Inland Revenue Commissioners v. Blott; Inland Revenue Commissioners v. Greenwood.
2. ('36) 23 A I R 1936 P C 238 : 163 I C 425 : 63 I A 457 : I L R (1937) 1 Cal 180 (P C), Commissioner of Income-tax, Bengal v. Mercantile Bank of India, Ltd.
3. ('24) 11 AIR 1924 Mad 802 : 82 I C 17 : 47 Mad 837 : 47 M L J 242 (S B), Commissioner of Income-tax v. Binny & Co.

had no power to do, the assessee's position here would be in no way improved. The bonus shares received by him would still not represent dividend income, and he has received nothing but the bonus shares. We answer the question referred in the negative, and the assessee will pay the Commissioner's costs, Rs. 250.

C.R.K./K.S. *Reference answered.*

(28) A. I. R. 1941 Madras 924

SPECIAL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras
Petitioner

v.

K. M. S. Lakshmanier — Respondent.

O. P. No. 55 of 1941, Decided on 15th September 1941; Reference by Commissioner of Income-tax.

Income-tax Act (1922 as amended in 1937), S. 16 (3) (a) (ii)—Partnership of father and minor members of divided Hindu family — Father assessed as an individual on total of his and minors' share of income—Procedure held proper.

There is nothing in S. 16 (3) (a) (ii) which justifies the Court in drawing a distinction between a case where a minor's property is with a firm and the case where the minor is allocated a share without any contribution to the assets. The section can only be construed in accordance with the words used in it. Therefore where a partnership is formed between a father and his minor sons who have become divided, the minors are admitted to the benefits of the partnership and S. 16 (3) (a) (ii) applies. Hence an assessment of the father as an individual on the total of his and the minors' share of the income is proper. [P 924 C 2; P 925 C 1]

K. V. Sesha Ayyangar — for Petitioner.

T. M. Krishnaswami Ayyar for M. Subbaraya Ayyar — for Respondent.

Leach C. J. — The assessee is a partner in two firms trading under the styles of K. M. S. Lakshmanier & Sons and Lakshmanier Sons & Co. respectively. In the former firm he possesses a 1/5th share, the remaining 4/5ths being owned by his sons, three of whom are minors. In the firm of Lakshmanier Sons & Co., he possesses a 1/20th share, the remaining 19/20ths being owned by his sons and his daughters, who are also minors. The family became divided several years ago, since when the assessee has been assessed as an individual on his total income, including his share of the profits in these two firms. In respect of the year of account 1939-40 the income-tax officer held that to the assessee's income should be added the partnership profits which were allocated in that year to his children. In adopting this course the income-tax officer relied on the provisions of S. 16 (3) (a) (ii), this section having been inserted in the Act by the Amending Act of 1937 which came into force on 1st April 1937. The assessee contended that this course was contrary to the section and appealed to the Assistant Commissioner. The Assistant Commissioner having concurred in the order of the income-tax officer, the Commissioner of Income-tax in response to a request by the assessee has referred to this Court under S. 66 (2) of the Act the following question :

Whether on the facts of this case the Income-tax authorities are right in adding the minors' share of income to the petitioner's income under S. 16 (3) (a) and whether the section has been properly applied to this case.

We agree with the Commissioner of Income-tax that the statutory provision relied upon by the income-tax officer is conclusive against the assessee. Section 16 (3) (a) (ii) states that in computing the total income of an individual for the purpose of assessment there shall be included so much of the income of a minor child of his as arises directly or indirectly from the admission of the minor to the benefits of partnership in a firm of which the individual is a partner. It is difficult to imagine words which would express the intention more clearly than the words used in this section. The assessee is a partner in two firms. He has minor sons who have been admitted to the benefits of of those partnerships. Being minors they are not actual partners but the Partnership Act allows them to be admitted to partnership benefits. Profits have been earned and on these profits the assessee is liable to be taxed, not only in respect of what he has received, but what has been paid in respect of the shares of the minors. Before the Commissioner the assessee contended that as the minors had antecedent rights and as no new right was created or conferred by the father when the family business became a partnership business it could not be said that the minors had been admitted to the benefits of partnership. On this basis it was said that S. 16 (3) (a) (ii) does not apply. The Commissioner has given the right answer in his statement of the case. The partition of the family put an end to the joint status and the family properties ceased to exist as family assets. The assets devolved on the partnerships and under S. 30, Partnership Act, the minors were admitted to the benefits of the partnerships and it is such benefits which fall within the statutory provision referred to.

On behalf of the assessee it has also been contended that as the minors were not admitted gratis into the firm, but owe their membership to the fact that they contributed to the assets their shares in the joint family property, S. 16 (3) (a) (ii) can have no application. The suggestion is that unless the minors are admitted to the benefits of the partnership without any contribution to the assets S. 16 (3) (a) (ii) has no application. This is really putting the first contention in another way. There is nothing in the section which justifies the Court in drawing a distinction between a case where a minor's property is with a firm and the case where the minor is allocated a share without any contribution to the assets. The section can only be construed in accordance with the words used in it and there is no foundation for this argument in view of what the section says. We agree with the Commissioner that S. 16 (3) (a) (ii) has been rightly applied in this case and we answer the reference accordingly. The respondent will pay the Commissioner's costs, Rs. 250.

C.R.K./K.S. *Reference answered.*

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* (28) A. I. R. 1941 Madras 925

FULL BENCH

LEACH C. J., GENTLE AND SOMAYYA JJ.

Rengaswami Ayyangar — Appellant

v.

Sivaprakasam Pillai and others — Respondents.

Second Appeal No. 993 of 1937, Decided on 19th September 1941, against decree of the Sub-Judge, Mayavaram, in A. S. No. 36 of 1937.

* **Limitation Act (1908), S. 21 (3) (b)—Nature of Hindu son's liability to pay father's debt and of member of joint Hindu family in respect of family debt explained—Debt incurred by managing member of joint Hindu family — Payment after partition by one member cannot extend limitation against other members : I L R (1939) Mad 140=('39) 26 A I R 1939 Mad 69=180 IC 49, *OVERRULED.***

The Hindu son's liability under the pious obligation rule in no sense arises out of contract but arises solely from the fact that he is the son of his father and his personal law regards it as being right and proper that he should pay his father's debts. His liability is personal to himself. This does not mean that he is personally responsible in the ordinary acceptance of the expression of personal liability but that the obligation devolves upon him by reason of his relationship. The position is not different when he has brothers. Each is similarly but separately liable. The position of a member of a joint family with regard to a debt binding on the family is very much the same. His liability arises from the fact that he is a member of the family, and the fact that it is limited to his individual share in the family properties emphasizes the personal nature of the liability : ('17) 4 A I R 1917 Mad 989, *Approved.* [P 927 C 1]

Consequently a payment made after partition by a member of a Hindu family of interest due on a promissory note which was executed by the managing member when the family was joint cannot start a fresh period of limitation against the other members of the family. The law of joint liability, as understood in England, is of no help in such a case : ('38) 25 A I R 1938 Mad 774 and ('37) 24 A I R 1937 Mad 586, *Approved*; I L R (1939) Mad 140=('39) 26 A I R 1939 Mad 69=180 I C 49, *Expl. and OVERRULED*; ('30) 17 A I R 1930 Mad 738 and ('35) 22 A I R 1935 Mad 101, *Expl.* [P 925 C 2; P 927 C 1; P 928 C 1, 2]

N. R. Sesha Ayyar—for Appellant.

S. Sankara Ayyar—for Respondents.

Leach C. J. — The question which falls for decision in this appeal is whether a payment made after partition by a member of a Hindu family of interest due on a promissory note which was executed by the managing member when the family was joint starts a fresh period of limitation against the other members of the family, the payment having been duly acknowledged by the person who made it. There are conflicting decisions of this Court and it is for this reason that this appeal has been placed before a Full Bench for decision. The facts present no complication. On 12th March 1925 the appellant's father, one Thiruvenkatachariar, and his youngest son Srinivasachariar, executed a promissory note for Rs. 2384 in favour of one Gnanambal Achi. Thiruvenkatachariar had three sons, and at the time of the execution of the promissory note the family was joint. It is common ground that the debt was incurred for a family necessity. On 25th March 1925 the father died. Payments towards interest were made subsequently by Srinivasachariar on behalf of himself and his brothers. On 13th June 1930 the brothers separated. It was then agreed between them that Srinivasachariar should be responsible for the repayment of the debt due on this promissory note. In deciding what properties should be taken by Srinivasachariar as his share due allowance was made for his obligation to discharge the debt. On 10th June 1933, Srinivasachariar paid a sum of Rs. 55 on account of interest due on the promissory note and made an endorsement on it recording the fact that he had made the payment. On 24th July 1935 respondent 1, who has died during the pendency of the appeal and is now represented by respondent 2, instituted in the Court of the District Munsif of Shiyali the present suit to recover the balance due on the promissory note, it

having been bequeathed to him by his mother in her will. All the sons of Thiruvenkatachariar were made defendants. The District Munsif held that the payment made by Srinivasachariar operated to extend the period of limitation against his brothers as well as against himself. Accordingly he granted a personal decree against Srinivasachariar as an executant of the promissory note and a decree against his brothers limited to their shares in the family properties. The appellant appealed to the Subordinate Judge of Mayavaram, who concurred in the judgment of the District Munsif and consequently dismissed the appeal. The present appeal is from the decree passed by the Subordinate Judge. The plaint has not been printed but it has been accepted for the purpose of the appeal that the plaintiff sued on the debt as well as on the instrument.

A payment of interest made by the person liable to pay the debt, or by his agent duly authorized in this behalf extends the period of limitation, provided that an acknowledgment of the payment appears in the handwriting of or in a writing signed by the person making it. This is one of the provisions of S. 20, Limitation Act. Subsection (2) of S. 21, however, says that nothing in S. 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by a payment made by one of them or his agent, and cl. (b) of subs. (3) of S. 21 makes it clear that where a liability is incurred by, or on behalf of, a Hindu undivided family, only the manager of the family or his duly authorized agent can make a payment which will have the effect of extending the time against all the members of the family. This clause was inserted by the Indian Limitation (Amendment) Act, 1927. As long ago as 1882 this Court held that the manager of a Hindu family had the same authority to acknowledge as he had to create debts, but without special authority he could not revive a claim against the family already time barred: *see* 5 Mad 169.[1] Some other High Courts did not share the opinion that the manager could acknowledge liability and the amendment was made in order to put an end to the controversy.

Now, it is manifest that in making the payment of Rs. 55 on 10th June 1933 Srinivasachariar was not acting as the agent of his brothers. They had divided and, as already indicated, in allocating the shares of the three members in the assets and the liabilities of the family it was stipulated that Srinivasachariar alone should be responsible for the payment of the debt in suit. The arrangement between brothers could not, of course, affect the rights of the holder of the promissory note, but it makes it impossible to contend that Srinivasachariar was acting as the agent of his brothers when he paid the Rs. 55. Srinivasachariar was never the manager of the family, although until the partition took place it would be legitimate to regard interest payments made by him as having been made under the authority of his eldest brother on whom devolved the managership of the family on the death of the father. The provision of law embodied in S. 21 (3) (b), Limitation Act, is an important factor in this case. While the family remains united only the manager or his duly authorized agent can extend the period of limitation against the family. After partition there is no manager and therefore no one who can extend the period of limitation in respect of a family debt so as to affect the erstwhile members. Before proceeding to examine the reported decisions of this Court which have bearing on the question to be decided, it will be useful to inquire into the nature of the liability of a Hindu son to pay his father's debts and of a member of a joint family in respect of a family debt. In 40 Mad 581[2] Ayling and Srinivasa Ayyangar JJ. observed :

> The liability of a Hindu son to pay the debts of his father not being illegal or immoral (Avyavaharika) has been developed by judicial decisions from his pious obligation to save the father from sin, as laid down by the Hindu Law Texts. This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English law; in fact it is difficult to bring it under any particular legal category of the English law. In 22 Mad 49,[3] which for the first time settled that the son could also be joined with the father in a suit to recover the father's debt, Sir V. Bhashyam Ayyangar, in his interesting argument, repeatedly admitted that the son was not jointly liable with the father. In his judgment in the Full Bench case, 27 Mad 243,[4] Bhashyam Ayyangar J. treats it as settled law that the son could not be sued alone, during his father's lifetime, for recovery of a debt due by the father, though the father can be sued alone without the son. It is also settled that after the father's death a suit can be instituted on the original cause of action though judgment had been recovered against

1. ('82) 5 Mad 169 (FB), Chinnayya v. Gurunathan.

2. ('17) 4 A I R 1917 Mad 989: 35 I C 918: 40 Mad 581: 31 M L J 386, Narayana Chettiar v. Veerappa Chettiar.

3. ('99) 22 Mad 49: 8 M L J 312 (F B), Ramaswami Nadan v. Ulaganatha Goundan.

4. ('04) 27 Mad 243 : 14 M L J 84 (F B), Periasami Mudaliar v. Seetharama Chettiar.

the father. These positions show clearly that a Hindu son is not jointly bound with his father.

With these observations we are in full agreement. The son's liability under the pious obligation rule in no sense arises out of contract. His liability arises solely from the fact that he is the son of his father and his personal law regards it as being right and proper that he should pay his father's debts. His liability is personal to himself. This does not mean that he is personally responsible in the ordinary acceptance of the expression of personal liability but that the obligation devolves upon him by reason of his relationship. The position is not different when he has brothers. Each is similarly but separately liable. The position of a member of a joint family with regard to a debt binding on the family is very much the same. His liability arises from the fact that he is a member of the family, and the fact that it is limited to his individual share in the family properties emphasizes the personal nature of the liability. Therefore in deciding whether after partition one brother can extend the liability of his brothers in respect of a debt incurred by the family before partition, the law of joint liability as understood in England is of no help. Regard can only be had to Hindu conception of liability arising out of relationship.

Turning now to the reported decisions, the judgment on which the appellant most strongly relies is that delivered by Stodart J. in I L R (1938) Mad 968[5] in which Madhavan Nair J. concurred. There a joint Hindu family consisted of three brothers the eldest of whom as the manager of the family executed in 1919 a promissory note in favour of the plaintiff. In the following year the brothers separated. After the partition the eldest brother made four payments of interest the last of which was on 5th March 1930. All the payments were endorsed on the promissory note. The suit was filed in 1931. The Court held that even if the loan was contracted for the benefit of the family, the eldest brother could not after partition by making payments towards the loan and placing them on record as required by S. 20, Limitation Act, keep the debt alive against his brothers. The learned Judges were of the opinion that the brothers were not co-debtors in the sense that one member by making a part payment could keep the debt alive against the others. It was pointed out that if one brother could extend the period of limitation against the others, there would have been no necessity for the Legislature to enact section 21 (3) (b).

For the respondent equal stress is laid on the decision of Burn and Lakshmana Rao JJ. in I L R (1939) Mad 140.[6] In that case the facts were these: A Hindu father executed a promissory note in 1918 which he kept alive by payments of interest. The last payment was made by him on 6th August 1921 and the fact of payment was endorsed on the promissory note. The father died in 1922, being survived by three sons. In February 1924 one of the sons, defendant 1 in the suit, was converted to Islam which meant the separation of the family. On 5th August 1924 one of his brothers, defendant 2, paid Rs. 25 towards the debt and endorsed the fact of payment on the promissory note. On 4th August 1930 the suit was filed. The Court held that the payment of 5th August 1924 kept the note alive as against all the brothers. The basis of the decision was that all the sons were liable under the pious obligation rule. The Court distinguished the decision in I L R (1938) Mad 968,[5] on the ground that in that case the pious obligation rule had no bearing, but the learned Judges overlooked the fact that the rule only creates a personal liability based on sonship. Whether a co-heir can bind his co-heirs may be another matter, but in the present case the Court is not concerned with the position of co-heirs. It is only concerned with the position of divided brothers in respect of a debt which was created for family purposes before partition.

The appellant also relies on 45 M L W 767[7] and the respondent on A I R 1930 Mad 738.[8] In the former case Beasley C. J. sitting alone held that where the manager of a joint Hindu family executes a promissory note for money required for a family necessity, a payment by the son who becomes the manager on his death does not save limitation against another son when the payment is made after partition. The learned Chief Justice pointed out that after a partition there is no undivided family and therefore no managing member of it, and unless there is authority to acknowledge the debt or make a part payment the other

5. ('38) 25 AIR 1938 Mad 774 : 178 I C 243 : ILR (1938) Mad 968 : (1938) 2 M L J 33, Pangudaya Pillai v. Uthandia Pillai.

6. ('39) 26 A I R 1939 Mad 69 : 180 I C 49 : I L R (1939) Mad 140 : (1939) 1 M L J 68, Somasundara v. Narasimhachariar.

7. ('37) 24 A I R 1937 Mad 586 : 173 I C 319 : 45 M L W 767, Rama Vadhyar v. Manian Vadhyar.

8. ('30) 17 A I R 1930 Mad 738 : 127 I C 641, Lokandha Naiko v. Lokhono Naiko.

members of the family will not be bound by the acknowledgment or part-payment of one member alone. In A I R 1930 Mad 738[8] Curgenven J. also sitting alone held that payment of interest made by some of the descendants of a deceased mortgagor binds the other descendants even though they became divided from the family before the payment was made. The learned Judge considered that Sec. 21 (2) could not save them because it did not relate to "co-heirs" and other persons who are liable by reason of their personal law and not from direct contract with the promisee. This view of S. 21 (2) is obviously right, but it does not follow from this that after partition one member of a Hindu family can bind another member by what he does alone. The learned advocate for the respondent also referred to the decision of Varadachariar and Burn JJ. in 58 Mad 418,[9] but that case has very little bearing here. The facts there were these. A joint family consisted of two brothers both of whom were parties to a deed of mortgage of immovable property belonging to the family. A part payment of interest due on the mortgage was made by the brother who was the managing member of the family. The payment was acknowledged by an endorsement on the deed, but this was only signed by the managing member. The mortgagee brought a suit to enforce payment of the loan. The question was whether the part payment of interest by the managing member would save limitation against the other brother. It was held that on the evidence it could be inferred that in making the payment the managing member was acting as the agent of his brother. The learned Judges did not consider it necessary in such circumstances to adjudicate on the contention which was raised that in the case of joint mortgagors payment by one cannot save limitation as against the co-mortgagors or their interests in the mortgaged property.

We consider that I L R (1938) Mad 968[5] was rightly decided, and should be followed here; in the present case the sons were not parties to the instrument and before the partition their liability in respect of the debt which it represented could only be extended by the managing member. A fortiori after partition, when there was no managing member, a part payment of principal or interest by one could not affect the others. From the beginning the liability of the sons was an individual liability, whether considered in connexion with the pious obligation rule or in connexion with membership of the family. It is not suggested, that the plaintiff could call in aid the pious obligation rule in order to make the appellant liable and partition prevented even the erstwhile managing member extending the period of limitation against his brothers. In these circumstances the payment made by Srinivasachariar on 10th June 1933 could only bind his brothers if he was acting as their authorized agent, which clearly he was not. Therefore his action left them unaffected. For these reasons we allow the appeal with costs throughout.

C.R.K./G.N. *Appeal allowed.*

9. ('35) 22 A I R 1935 Mad 101 : 154 I C 1053 : 58 Mad 418 : 68 M L J 470, Lakshmi Naidu v. Gunnamma.

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* (28) A. I. R. 1941 Madras 928
SPECIAL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras— Petitioner

v.

Sm. Ar. Vr. Annamalai Chettiar, Devakotta — Respondent.

O. P. No. 52 of 1941, Decided on 15th September 1941; reference by Commissioner of Income-tax.

*** Income-tax Act (1922), S. 4 (2) — Remittances of profits from assessee's foreign business to British India included in profits made by assessee during year of account — Fact of losses in foreign business incurred subsequently in year cannot alter character of remittances.**

Where the remittances of profits from the assessee's foreign business into British India have been included by the income-tax authorities in the profits made by the assessee during the year of account, the fact that the losses in the foreign business were incurred subsequently in the year would not change the character of the remittances when the profits actually earned in the foreign business had been more than sufficient in amount to cover the remittances. [P 929 C 1]

K. V. Sesha Ayyangar — for Petitioner.

M. Subbaraya Ayyar — for Respondent.

Leach C. J. — The assessee is a Nattukottai Chettiar who deals in stocks and shares at Devakottah and carries on a money-lending business in Penang. Between 26th April 1937 and 20th November 1937, the assessee remitted to British India the sum of Rs. 13,900, which represented profits which he had made in his money-lending business at Penang. These remittances have been included by the income-tax authorities in the profits made by the assessee during the year of account 1937-38. The assessee

says that in the last quarter of the year of account he suffered heavy losses in Penang and that these losses were greater than the profits which he had made in the earlier year. On this basis he contends that the income-tax authorities cannot in law treat the remittances as being remittances of profits. The income-tax officer refused to accept this contention, but on appeal the assessee persuaded the Assistant Commissioner to accept it. The Commissioner of income-tax agreed with the income-tax officer and consequently restored his order of assessment. At the request of the assessee the Income-tax Commissioner has referred, under S. 66 (2) the following question to this Court for decision :

Whether in the circumstances of this case the Commissioner was justified in coming to the conclusion that the remittances between 26th April 1937 and 20th November 1937 came out of the profits of the next preceding year which were available when the remittances were actually made, although subsequently in the same accounting period, i. e., between January and April 1938, the petitioner incurred losses which were sufficient to wipe out those profits.

We consider that the Commissioner is right in the view which he takes. The remittances in fact came out of profits. This is not disputed. The fact that losses were incurred subsequently in the year would not change the character of the remittances. We are not dealing with a case where there has been a remittance in anticipation of profits. We are dealing with a case in which profits had actually been earned and more than sufficient in amount to cover the remittances. Therefore, we cannot accept the assessee's contention that his subsequent losses must be deemed to have charged the character of his remittances. The reference will be answered in favour of the Commissioner and he is entitled to his costs, Rs. 250.

C.R.K./G.N. *Answer accordingly.*

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* (28) A. I. R. 1941 Madras 929
FULL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

Velagala Sriramareddi and others — *Petitioners*

v.

Karri Sriramareddi, being minor by certificated guardian, G. Bhima Rao — *Respondent.*

Civil Misc. Petns. Nos. 4772, 4773, 4774 and 4775 of 1941, Decided on 16th September 1941, for issue of order of scaling down debt under decree passed in High Court in A. S. Nos. 349 and 297 of 1938, D/- 21st August 1941.

1941 M/117 & 118

(a) Civil P. C. (1908), S. 33 and O. 20, R. 7— Judgment pronounced—Drafting of decree cannot be stayed *(Per Burn and King JJ., in Order of Reference).*

Where a judgment has been pronounced the Court has no power to order stay of the drafting of the decree. Judgment having been pronounced the decree must follow : ('32) 19 AIR 1932 Pat 228, *Rel. on.* [P 932 C 1]

***(b) Madras Agriculturists' Relief Act (4 of 1938), Ss. 19, 6, 7 and 8 — Judgment delivered by High Court on appeal—Practice of remitting subsequently filed application for scaling down debt to lower Court for enquiry and report and drawing decree in accordance with that report is contrary to law:** 51 M L W 606=('40) 27 A I R 1940 Mad 478, *OVERRULED.*

Where subsequent to delivery of judgment by the High Court on appeal, an application for scaling down the debt is filed, the practice of remitting such application to the lower Court for enquiry and report and drawing the decree in accordance with such report is contrary to law in view of the provisions of Civil P. C. (S. 33 and O. 20). Once a judgment has been delivered, the consequent decree must be drawn up in accordance with the terms of the judgment and no subordinate Court has power to pass an order which will affect the decree. The Judges obviously have no power to make any order which affects the judgment which they have delivered unless passed on an application for review : 51 M L W 606=('40) 27 AIR 1940 Mad 478, *OVERRULED.* [P 931 C 2; P 932 C 1, 2]

(c) Madras Agriculturists' Relief Act (4 of 1938), Ss. 7, 8 and 19—Pending appeal in High Court, application for scaling down debt filed— Proper course is to remit such application to lower Court for enquiry and report and leave open decree until report is received and then pass final decree *(Obiter).*

Where an application for scaling down debt has been made to the High Court before judgment has been delivered the proper course will be to reserve the final order until the application for scaling down has been decided. All questions arising in the appeal other than the question of scaling down can be decided and the decree left open until a report has been received from the trial Court the application for scaling down being remitted to that Court for inquiry and report. If this procedure is followed the final decree of the High Court will state exactly what the judgment-debtor has to pay, bearing in mind all that he is entitled to under the Agriculturists' Relief Act. [P 932 C 2]

V. Govindarajachari and P. Satyanarayana Raju — for Petitioners.

V. Viyyanna — for Respondent.

ORDER OF REFERENCE

Burn and King JJ.—After hearing arguments on these miscellaneous petitions we have found it necessary to refer to a Full Bench the question whether the case in 51 M L W 606[1] has been correctly decided. There is no doubt about the facts. The plaintiff (a minor in O. S. No. 61 of 1936 on the file of the Subordinate Judge of Ellore) sued to recover money due on a mortgage. The learned Subordinate Judge gave him a decree

1. ('40) 27 AIR 1940 Mad 478 : 51 M L W 606, Somasundaram Chettiar v. Peria Karuppan Chettiar.

for part of the amount claimed. In A. S. No. 297 of 1938 the plaintiff appealed from this decree in so far as it disallowed part of his claim. In A. S. No. 349 of 1938 defendants 1 to 12 in the suit, who are members of the family of defendants 1 to 4, (the mortgagors), appealed against the decree, claiming that the suit should have been entirely dismissed. On 21st August 1941 we allowed A. S. No. 297 with costs and dismissed A. S. No. 349 with costs. C. M. P. No. 4772 is an application by the appellants in A. S. No. 349 of 1938 in which they pray that this Court

may be pleased to give appropriate directions for scaling down of the debt under the decree which would now be passed in accordance with the judgment of this Honourable Court in the above appeal and A. S. No. 297 of 1938, under the provisions of the Madras Act 4 of 1938 and pass such other order or orders as this Honourable Court may deem fit in the circumstances of the case.

C. M. P. No. 4773 is a similar application by the same parties, the first 12 respondents, in A. S. No. 297. C. M. Ps. Nos. 4774 and 4775 are applications to stay the drafting of the decrees in A. S. Nos. 349 and 297 of 1938 pending disposal of the other two applications for scaling down the decree debt. It may be noted, though it is not important for the purpose of these applications, that on 19th August 1941 the same parties (appellants in A. S. No. 349) filed an application to scale down the decree in O. S. No. 61 of 1936 on the file of the Sub-Court, Ellore, under the provisions of Ss. 8 and 19 of Madras Act, 4 of 1938. This petition we dismissed on 21st August 1941, the day on which we pronounced judgment in the appeals, on the ground that this Court has no jurisdiction to scale down the Sub-Court's decree.

When these applications came on for hearing on 29th August, learned counsel for the petitioners contended that they are agriculturists entitled to the benefits of Madras Act 4 of 1938, and that the decree to be passed by the High Court has to be scaled down in accordance with the provisions of Ss. 7 and 8 of that Act. Learned counsel for the respondent (minor plaintiff) contended that these applications filed after the judgment had been pronounced, and after the passing of Act 4 of 1938, are not maintainable since S. 19, Madras Act 4 of 1938, applies only to decrees passed before the commencement of the Act. The respondent also did not admit that the applicants are agriculturists entitled to the benefits of Act 4 of 1938. The objections of the respondent appear to us to have considerable weight and we put to Mr. Govindarajachari on behalf of the applicants another point, namely that the decrees to be issued in the appeals must follow the judgments. Mr. Govindarajachari then quoted to us the case in 51 M L W 606.[1] So far as the facts appear from the report that case was in essence similar to this. The only difference is that in that case the plaintiff's suit was dismissed by the trial Court, and consequently there was no decree of any kind against the defendants. The plaintiff's appeal was allowed and then for the first time a decree had to be passed against the defendants. At that point (apparently after the judgment in the appeal had been pronounced) an application was made on behalf of respondent 4 under Ss. 7 and 8, Madras Agriculturists' Relief Act, to scale down the debt. The learned Judges held that the application was one which ought to be admitted and which must be enquired into. The order which they made was as follows:

In accordance with the usual practice, the application will be remitted to the Court below for disposal according to law after due enquiry, and the decree in the appeal will be subject to the final order thereon.

This decision was based upon the consideration of the fact that it was only after the judgment was pronounced in the appeal that any necessity could arise for making an application to scale down the debt. The learned Judges said it was not reasonable to expect a party to put in an application which might never be necessary; and it could not, they thought, be said that the omission to make an application before the judgment was pronounced debarred the petitioner from making the application as early as possible after the judgment was pronounced, and before the decree was actually drawn up. They thought that it would be going against the spirit of the Act to dismiss applications for relief which the Legislature meant to give to debtors on such a purely technical ground as the fact that there was no particular provision made in the Act for making applications for scaling down under Ss. 7 and 8 of the Act.

It does not appear from the judgment that the learned Judges considered the provisions of S. 33 and O. 20, Civil P. C. Section 33 says: "The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow." Order 20, Rule 6 provides that the decree shall agree with the judgment. Rule 7 of Order 20 provides that the decree shall bear date the day on which the judgment was pronounced,

and R. 3 of O. 20 provides that the judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review. These rules of O. 20 do not apply to this High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, but they do apply to this High Court in the exercise of its appellate jurisdiction. With all respect to the learned Judges who decided the case in 51 M L W 606[1] it appears to us that in view of these provisions of the Code of Civil Procedure it is not permissible, after the High Court has pronounced judgment, to refer to a subordinate Court for disposal an application for the scaling down of the debt which is the subject of the High Court's judgment. It has never been suggested that the rules of O. 20 which we have quoted are other than mandatory. We can see no escape from the conclusion that once the judgment of the High Court has been pronounced, the decree must be in accordance with the judgment and if the judgment declares that a certain amount is due from the judgment-debtors, no subordinate Court can be allowed to hold an enquiry and to say as a result of that enquiry that something less than the amount found due by the High Court in its judgment, shall be embodied in the decree as the amount due from the defendants. It is also, we think, with respect, contrary to all principle to allow that the decree of this Court shall be modified in accordance with the decision of a subordinate Court. It is of course clear that the only decrees which can be scaled down under the provisions of Madras Act 4 of 1938 are decrees passed prior to the commencement of the Act (*vide* S. 19). It has been expressly stated also in the decision in (1940) 2 M L J 202.[2] In that judgment it has been pointed out that anyone who wishes to claim the benefits of Madras Act, 4 of 1938 in a suit which is pending, must put forth his claims before the decision is pronounced, and the learned Judges have expressed the view (with which we respectfully associate ourselves) that

having regard to the ex-proprietary nature of the provisions. Courts should watch with a jealous eye attempts to have the scope of the Act extended, under colour of interpretation beyond what its terms expressly warrant.

The plea on behalf of the applicants is that while the decree of the lower Court was in force (that being a decree for a sum much less than was claimed by the plaintiff) they had no necessity to apply for the scaling down of the debt. That may very well be true, but it cannot affect R. 3 of O. 20 which says that the only way to get a judgment modified is by an application for review. Our attention has been drawn to the decision in ILR (1939) Mad 218.[3] The principal question there decided was that it was not the intention of the Legislature to limit the relief under Madras Act, 4 of 1938 to cases where a person was personally liable, and that a purchaser of the equity of redemption, if he himself was an agriculturist, could claim the benefits of the Act. It is not however clear from the report whether any question was reserved in the judgment with regard to the liability of the judgment-debtors, and the report does show that the terms of the decree to be finally passed were settled by the learned Judges of this Court, and were not left to the determination of a subordinate Court. That case therefore gives no support to the 'practice' which is said to exist of sending down such application as this to subordinate Courts for disposal and of modifying this Court's decrees in accordance with the findings of such subordinate Courts. Such a practice appears to us, with all respect, to be contrary to all principle and, if it exists, we are of opinion that it should be stopped. We may also refer to the case in (1940) 2 M L J 473[4] where Wadsworth J. held that an application made to a lower Court to scale down the appellate Court's decree was not maintainable. It appears in that case that the appellate Court in its judgment had made a reservation in the following words:

This judgment will not preclude the defendants from applying to the lower Court for scaling down the debt under the provisions of Madras Act 4 of 1938 if they are entitled to have such relief.

Wadsworth J. expressed the view that in that case the proper procedure was for the petitioner to apply to the appellate Court to have the decree brought in accordance with the judgment by embodying a direction to the trial Court to deal with the application for relief under Act, 4 of 1938 and amend the decree according to its decision. We have already stated our objections to

2. ('40) 27 A I R 1940 Mad 910 : 194 I C 753 : I L R (1940) Mad 1023 : (1940) 2 M L J 202, Kotayya v. Venkatapunnayya.

3. ('39) 26 AIR 1939 Mad 186 : 182 I C 879 : ILR (1939) Mad 218 : (1938) 2 M L J 1068, Perianna Goundan v. Chellappa Goundan.

4. ('40) 27 AIR 1940 Mad 959: 194 I C 757: (1940) 2 M L J 473, Kannabhiran Pillai v. Govindasami Pillai.

the view that a subordinate Court can be permitted to amend a decree of this Court. With reference to the applications to stay the drafting of the decrees in the appeals we are of opinion that we have no power to order such stay. Judgment having been pronounced the decree must follow and as was observed by the learned Judges in 11 Pat 532[5] after the judgment has been pronounced and it has been signed and sealed, no power is left in the Court to alter it or add to it or subtract anything from it; and the judgment having been pronounced a decree must be prepared in accordance with it. Since we are clearly of opinion that the decision in 51 M L W 606[1] requires consideration, we refer to a Full Bench the question whether it has been correctly decided.

OPINION

The question which has been referred is whether 51 M L W 606[1] was rightly decided by this Court. The judgment was pronounced by Pandrang Row and Krishnaswami Ayyangar JJ. sitting as a Division Bench. After the judgment had been pronounced an application was made on behalf of respondent 4 by his mother, who was his guardian for an order under Ss. 6, 7 and 8, Madras Agriculturists' Relief Act, scaling down the debt. The Act had not been pleaded at any stage before the appeal was heard and decided. The reason was that when the suit was dismissed by the trial Court, the Act had not come into force, and the claim was allowed only when it came before this Court on appeal. On the footing that it would be contrary to the spirit of the Agriculturists' Relief Act not to give the judgment-debtor the benefit of the provisions of the Act the learned Judges passed this order :

> We are therefore of opinion that the application is one which ought to be admitted and which has to be enquired into. In accordance with the usual practice the application will be remitted to the Court below for disposal according to law after due inquiry, and the decree in the appeal will be subject to the final order thereon.

In making this reference Burn and King JJ. have expressed strong dissent with regard to the propriety of this course. They have pointed out that once a judgment has been delivered the consequent decree must be drawn up in accordance with the terms of the judgment and no subordinate Court has power to pass an order which will affect the decree. We consider that there is great force in the criticisms which the learned Judges have made with regard to the course adopted in 51 M L W 606.[1] The learned Judges obviously had no power to make any order which affected the judgment which they had delivered unless passed on an application for review and there was no application for review. They added something to their judgment which is prohibited by the Code of Civil Procedure, and we have no hesitation in holding that the course adopted in that case is contrary to law.

If the mother of respondent 4 in 51 M L W 606[1] had raised the question before judgment was pronounced and signed, the position might perhaps have been different. It has been the practice of some learned Judges of this Court, where an application for scaling down has been made before judgment has been delivered, to direct that an inquiry into the application should be conducted by the trial Court and the amount awarded in the judgment should be deemed to be subject to the finding on the application. It is not necessary to decide whether this practice is lawful or not, but to avoid any question arising in future, we consider that the proper course will be to reserve the final order until the application for scaling down has been decided. All questions arising in the appeal other than the question of scaling down can be decided and the decree left open until a report has been received from the trial Court, the application for scaling down being remitted to that Court for inquiry and report. If this procedure is followed the final decree of this Court will state exactly what the judgment-debtor has to pay, bearing in mind all that he is entitled to under the Agriculturists' Relief Act. But if the application is not made before the judgment is delivered, it will be too late for a judgment-debtor to raise the question. The judgment in such circumstances will be the final judgment and the decree must be drawn up in accordance therewith. The costs of this reference will be costs in the matters which have occasioned it.

C.R.K./K.S. *Reference answered.*

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5. ('32) 19 AIR 1932 Pat 228: 137 I C 855 : 11 Pat 532: 13 P L T 304, Kedarnath Goenka v. Chandra Mauleswara Prashad.

(28) A. I. R. 1941 Madras 933

FULL BENCH

LEACH C. J., GENTLE AND SOMAYYA JJ.

Bhayankaram Venkata Narasimhacharyulu — Appellant

v.

Secretary of State and others — Respondents.

Letters Patent Appeal No. 25 of 1940, Decided on 17th September 1941, against judgment and decree of Venkataramana Rao J., in S. A. No. 196 of 1937, D/- 15th March 1940.

Madras Revenue Recovery Act (2 of 1864), Ss. 59 and 38—Deputy Collector confirming under S. 38 sale under Act—Application to Collector under S. 3, Madras Regulation, 7 of 1828 to set aside sale on ground of fraud made within time—Limitation for suit under S. 59 to set aside sale runs from date of Collector's final order and not from date of Deputy Collector's order confirming sale : 30 Mad 367, *OVERRULED.*

Where a sale under the Act is confirmed by the Deputy Collector under S. 38 and an application to set aside that sale on the ground of fraud is made to the Collector under S. 3 of Madras Regulation 7 of 1828 within time, the period of six months allowed for a suit to set aside the sale under S. 59 must be calculated from the date when the Collector on revision under S. 3 of Madras Regulation 7 of 1828 passes his final order and not from the date when the sale is confirmed under S. 38 by the Deputy Collector : 30 Mad 367, *OVERRULED*; 23 Cal 775 (PC) and ('20) 7 AIR 1920 Mad 1 (FB), *Rel. on.* [P 934 C 2]

V. Rangachari and K. V. Rangachari — for Appellant.

Government Pleader, P. Somasundaram and P. Suryanarayana — for Respondents.

Leach C. J.— The substantial question in this appeal is whether 30 Mad 367[1] was rightly decided by this Court. The appellant contends that the decision conflicts with the judgment of the Privy Council in 23 Cal 775[2] and therefore cannot be allowed to stand. The appellant instituted a suit in the Court of the District Munsif of Gudivada for a decree setting aside a sale of immovable property which had taken place under the provisions of the Madras Revenue Recovery Act. The allegation was that defendant 4 had by fraud secured the order for the sale of the property. The sale took place on 18th July 1932 and was confirmed by the Deputy Collector on 28th September 1932. The appellant discovered the fraud on 15th November 1932 and three days later applied to the Collector for an order setting aside the sale. By an order dated 30th June 1933 the Collector refused to interfere and consequently on 18th July 1933 the appellant filed the present suit.

Section 59 of the Act allows an aggrieved party to apply to the civil Court for redress, subject to the proviso that the suit is instituted within six months "from the time at which the cause of action arose." Section 3 (3) of Madras Regulation, 7 of 1828, gives full power to the Collector to confirm, modify or annul an order passed by a subordinate or assistant and to pass any further order in the case as he may see fit. Parts of the Regulation have been repealed, but this provision is still in force, and it is common ground that it conferred upon the Collector power to confirm or annul the order of sale which was passed by the Deputy Collector on 18th July 1932 in respect of the land in suit. The order of the Deputy Collector confirming the sale was passed in pursuance of the authority given to him by S. 38, Revenue Recovery Act, which directs confirmation on the expiration of thirty days from the date of the sale, if no application for an order setting aside the sale has been made. If such an application has been filed the question of confirmation of the sale remains in abeyance until the application has been decided. The fact that a subordinate Collector has confirmed the sale does not, however, prevent an aggrieved party from taking advantage of S. 3 (3) of the Regulation of 1828 and in case of fraud he has thirty days from the discovery of the fraud in which to apply to the Collector for redress. Section 18, Limitation Act, specifically provides that where a person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of his right or of the title on which it is founded, the time limited for instituting a suit or making an application shall be computed from the time when the fraud first became known to him.

The District Munsif held that the sale in question was not fraudulent and that the suit was barred by the law of limitation. On appeal the Subordinate Judge of Masulipatam held that fraud had been proved, but he agreed with the District Munsif that the suit was time barred. The appellant then appealed to this Court. The appeal was heard by Venkataramana Rao J. who feeling himself bound by the decision in 30 Mad 367[1] dismissed it, but granted a certificate under the provisions of Cl. 15 of the Letters Patent. In the course of his judg-

1. ('07) 30 Mad 367 : 2 M L T 328, Chinnammal Achi v. Saminatha Malavarayan.
2. ('96) 23 Cal 775 : 23 I A 45 : 7 Sar 1 (PC), Baijnath Sahai v. Ramgut Singh.

ment the learned Judge clearly indicated that, in his opinion, 30 Mad 367[1] conflicts with 23 Cal 775[2] but as 30 Mad 367[1] has been decided some years after the decision in 23 Cal 775,[2] he felt that he could not ignore it. In 30 Mad 367[1] certain lands were sold on 10th July 1901 under the provisions of the Madras Revenue Recovery Act for arrears of revenue. The sale was confirmed by the Head Assistant Collector on 28th September 1901. The plaintiffs petitioned the Collector under Regulation 7 of 1828 without success, their petition being rejected by an order dated 10th May 1902. On 9th July 1902 they filed the suit out of which the appeal arose. The appeal was heard by Benson and Miller JJ. who held that the period of six months allowed for a suit to set aside a sale under S. 59, Madras Revenue Recovery Act, must be calculated from the date when the sale is confirmed and not from the date when the Collector on revision under Regulation 7 of 1828 passes his final order. The learned Judge observed :

In 26 Mad 495[3] it was decided in effect that the sale is incomplete until confirmed, but that case gives no support to the contention that a sale is incomplete until the Collector decides whether or not to revise the order of the officer confirming the sale.

They did not, however, make any reference to the judgment of the Privy Council in 23 Cal 775.[2] Presumably it was not brought to their notice. The appeal in 23 Cal 775[2] was from a judgment of the Calcutta High Court and had reference to the provisions of the Public Demands Recovery Act (Bengal Act 7 of 1880). In 1882 the Collector sold for arrears of road cess and public works cess lands belonging to the plaintiffs. On 25th January 1884 the Commissioner confirmed the sale, but on 12th August 1884 the sale was set aside by the Board of Revenue at the instance of the plaintiffs. In 1886 the Board of Revenue had occasion to review its order of 12th August 1884 and by an order dated 21st August 1886 confirmed the sale. In July 1887 the plaintiffs instituted their suit and the question was whether it had been filed in time. The Judicial Committee held that it was in time as the cause of action did not arise until the Board of Revenue passed its order of 21st August 1886 confirming the sale. Lord Davey in delivering the judgment of the Board said :

Their Lordships are of opinion that there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date. . . In fact, their Lordships are of opinion that there was not during the period which had elapsed between the date of the sale and 21st August 1886 any sale to set aside which a suit could have been brought by the present appellant and respondents. Therefore their Lordships are of opinion that the confirmation dates only from August 1886, and that the law of limitation is not a defence to this action.

Their Lordships here indicate in words which leave no room for doubt that until the final order has been passed no suit lies, which means that time only begins to run from the date of the passing of the final order. The decision in 30 Mad 367[1] undoubtedly conflicts with the judgment of the Judicial Committee in the case just referred to and therefore cannot be allowed to stand. It is also in conflict with the decision of this Court in 43 Mad 185[4] which was decided by a Full Bench of five Judges. There a court-sale was confirmed without opposition on 26th April 1913, but, on 3rd January 1914, an application for an order setting aside the sale was filed, fraud being alleged. The sale was set aside on 25th June 1915 as to part of the properties sold. On 17th February 1917 the auction purchaser applied for delivery of the remaining properties. The Full Bench held that the application was not barred under Article 180, Limitation Act, as time should be computed from the date of the order disallowing the petition asking for the setting aside of the sale and not from the date of the first order of confirmation. Article 180 fixes the period of limitation for an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession at three years from the date when the sale becomes absolute, and it was held that the sale did not become absolute until the application for an order setting it aside had been dismissed. We consider that the present case is governed by the decision of the Privy Council in 23 Cal 775.[2] The appellant filed his application to the Collector under S. 3 of Regn. 7 of 1828 in time and until that application had been decided the sale was not finally confirmed. The result is that the appeal will be allowed and the appellant's suit decreed with costs throughout.

C.R.K./G.N. *Appeal allowed.*

3. ('03) 26 Mad 495 : 13 M L J 225, Sabapathi Chetti v. Rengappa Naicken.

4. ('20) 7 A I R 1920 Mad 1 : 54 I C 66 : 43 Mad 185 : 38 M L J 1 (F B), Muthu Korakkai Chetti v. Madar Ammal.

* (28) A. I. R. 1941 Madras 935

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND CHANDRASEKHARA AYYAR JJ.

Vasi Reddi Venkayya — *Appellant*

v.

Gopu Sreeramulu and others — *Respondents.*

Second Appeal No. 803 of 1938, Decided on 1st September 1941, against decree of Sub-Judge, Bezwada, in A. S. No. 108 of 1935.

* (a) Hindu law—Adoption—Widow—Authority in general terms given by nearest sapinda —Adoption by widow is valid: 26 Mad 681; 1914 M W N 502=('15) 2 A I R 1915 Mad 316=25 I C 3 and 20 M L W 503=('25) 12 A I R 1925 Mad 67 = 83 I C 59, *OVERRULED.*

An adoption by a Hindu widow of a son to her deceased husband is valid when the authority to adopt has been given by the nearest sapinda and expressed in general terms when the authority has been exercised within a reasonable period and the circumstances have not changed materially. It is not necessary that the sapinda should consent to the adoption of a particular person in order to make the adoption valid : ('14) 1 A I R 1914 Mad 77, *Approved*; 26 Mad 681; 1914 M W N 502=('15) 2 A I R 1915 Mad 316 = 25 I C 3 and 20 M L W 503=('25) 12 A I R 1925 Mad 67 = 83 I C 59, *OVERRULED*; ('18) 5 A I R 1918 P C 97, *Expl.*; ('20) 7 A I R 1920 P C 4, *Ref.* [P 936 C 1, 2; P 937 C 1]

(b) Hindu law—Adoption—Widow —Sapinda giving consent conditional on widow adopting named person —Ignoring of condition — Effect *(Obiter).*

If the sapindas only give their consent conditional on the widow adopting a named person the ignoring of such a condition would mean acting beyond the scope of the authority. [P 936 C 2]

V. Govindarajachari and T. G. Krishnamurthi — for Appellant.

K. Kameswara Rao — for Respondents.

Leach C. J.—The only question involved in this appeal is whether an adoption by a Hindu widow of a son to her deceased husband is valid when the authority to adopt has been given by the nearest sapinda and expressed in general terms. In other words, must the sapinda consent to the adoption of a particular person in order to make the adoption valid ? Plaintiff 1 in the suit out of which this appeal arises was adopted on 7th May 1920 by Venkamma, the widow of one Sivaramayya. No authority had been given by Sivaramayya to his widow, but she informed the nearest sapinda of her intention to adopt and sought his consent. The sapinda gave his consent in writing, the operative portion of the document being in these words :

> You shall, therefore, whenever you like, bring and adopt duly a boy whom you like according to shastras. This is the deed of authority to adopt, executed and delivered by me wholeheartedly.

Plaintiff 1 sued as the adopted son and asked for a declaration that certain alienations were not binding on him. Plaintiff 2, who is the appellant, claimed a half share in the properties in suit by reason of a deed of assignment executed in his favour by plaintiff 1. The defendants challenged the validity of plaintiff 1's adoption on the ground that the sapinda's consent was invalid because it was couched in general terms and this plea was accepted by the trial Judge, the District Munsif of Bezwada, and by the Subordinate Judge of Bezwada on appeal. The result was that the suit was dismissed. The appellant then appealed to this Court and the appeal has been placed before a Full Bench because certain judgments of this Court which have bearing are in conflict. In 1 M L W 511,[1] Wallis and Sadasiva Iyer JJ., held that an authority to adopt given by sapindas was not invalid because it was expressed generally and empowered the widow "to adopt any boy at any time she liked." The words in quotation marks are from the judgment. The exact words of the authority given in that case are not quoted in the report, but we have examined the deed authorizing the adoption and find that paragraph 2 reads as follows :

> As your son Jogi Ramachandrudu died unmarried, and as you have asked me that permission should be granted for adopting for the increase and perpetuity of the family permission is granted through this approving your request. Therefore this is the deed of permission executed heartily that by adopting the boy you like whenever you like, the increase and perpetuity of the family should be accomplished.

The Court had no hesitation in holding that a document so expressed conferred a valid authority on the widow. In disputing the correctness of this decision the contesting respondents rely on observations made in the judgments in 26 Mad 681,[2] 1914 M W N 502[3] and 20 M L W 503.[4] The first of these cases was decided by Subramania Iyer and Davies JJ. There the sapindas had signed a document assenting to the adoption by the widow of any boy at any time, but she did not make an adoption until nine years

1. ('14) 1 A I R 1914 Mad 77 : 24 I C 257 : 1 M L W 511, Kanesam v. Batchamma.
2. ('03) 26 Mad 681, Suryanarayana v. Venkataramana.
3. ('15) 2 A I R 1915 Mad 316: 25 I C 3: 1914 M W N 502, Veera Basavaraju v. Balasurya Prasada Rao.
4. ('25) 12 A I R 1925 Mad 67: 83 I C 59: 20 M L W 503, Brahmayya v. Rattayya.

later and during the interval the circumstances had materially changed. It was not necessary for the purpose of deciding that case for the Court to express an opinion on whether a general power given to a widow to adopt was valid or whether the fact that the circumstances had materially changed in the course of the nine years made any difference, because the Court found that the widow had received authority from her deceased husband. The judgment in 26 Mad 681[2] was considered by Wallis and Sadasiva Ayer JJ. in 1 M L W 511.[1] They did not think that Subramania Iyer and Davies JJ. intended to say that a general authority cannot be availed of by the widow when she adopts almost immediately after the authority has been given. The learned Judges who decided 26 Mad 681[2] may not have intended to say that a general authority to adopt is void in all cases but their remarks were considered to amount to this by White C. J. and Oldfield J. in 1914 M W N 502.[3] In that case White C. J. and Oldfield J. said :

> But on the evidence available and the terms of Ex. R-1, we must hold that it at the highest authorized the adoption of any boy at any time and therefore was useless, *vide* 26 Mad 681,[2] and that, as the learned District Judge opines, it expresses only a general willingness to consider the making of an adoption favourably, the necessary final consent, to a specific adoption being reserved, until details are available.

It was not necessary for the decision in 1914 M W N 502[3] for the learned Judges to make these observations and therefore they must also be regarded as obiter, but at the same time they are in direct conflict with the decision in 1 M L W 511,[1] 20 M L W 503[4] was decided by Ramesam J. who held that the sapinda must indicate the person to be adopted and the authority to adopt must be used within a short period. We are of the opinion that the law was correctly stated in 1 M L W 511[1] and that the judgments in 26 Mad 681,[2] 1914 M W N 502[3] and 20 M L W 503,[4] should be disregarded, when the authority has been exercised within a reasonable period and the circumstances have not changed materially. We do not wish to be understood to imply that if the authority is not exercised quickly it ceases to be valid. That question does not arise here and the effect of the lapse of years and the change of circumstances must be decided when the question does arise. In the present case the adoption took place within five months of the receipt of the sapinda's letter and it is not suggested that the circumstances had changed. It cannot be disputed, nor has any attempt been made to dispute it, that a husband can give to his wife a general authority to adopt. When she has received authority from her husband the widow is at liberty to adopt whomever she likes as a son to her deceased husband. The sapindas take the place of the husband when he has died without giving authority to his widow. Why should they not also leave the choice entirely to the widow? There is nothing in the ancient texts to indicate that they cannot and we can see no justification whatsoever for the opinion that the sapindas must name the boy to be adopted. Of course if the sapindas only give their consent conditional on the widow adopting a named person that will be different matter. To ignore such a condition would mean acting beyond the scope of the authority.

It has been said in the course of the arguments that a passage in the judgment of the Privy Council in 41 Mad 998[5] supports the opinion expressed in 26 Mad 681.[2] In the case before the Privy Council the widow had made an adoption with the consent of remote sapindas without having asked for the consent of the nearest sapindas and it was held that the adoption in the circumstances was invalid. There were five grades of sapindas and one member of the fourth grade had given his assent in a letter addressed to the widow. In describing this letter Mr. Ameer Ali, who delivered the judgment of the Board observed :

> This letter contains a general approval of her intention to make an adoption, but does not evince a consent to any specific adoption.

It is this passage which it is said indicates approval of the opinion expressed in 26 Mad 681.[2] When the whole of the paragraph from which this statement has been extracted is read it is obvious that their Lordships were merely describing the letter and were not intending to lay down any principle. If there should be any doubt whether this is so it can be set at rest by reference to the judgment of the Judicial Committee in 43 Mad 650,[6] where Viscount Cave said (p. 659 of the report):

> Apart from the absence of the necessary assent, other objections to the adoption were put forward on behalf of the respondents. It was said (1) that an authority given by sapindas to adopt "any boy

5. ('18) 5 A I R 1918 P C 97 : 48 I C 706 : 41 Mad 998 : 45 I A 265 (P C), Veerabasavaraju v. Balasurya Prasada Rao.
6. ('20) 7 A I R 1920 P C 4 : 56 I C 391 : 43 Mad 650 : 47 I A 99 (P C), Krishnayya v. Lakshmipathi.

at any time" is invalid (*see* 26 Mad 681[2]); (2) that an authority given by sapindas in 1901 could not validly be executed in 1908 when several of the signatories were dead and the opinion of others might have altered; and (3) that an authority to adopt asked and given for religious motives and in order to keep up the line of succession to Seshadri was not properly exercised by the adoption of Krishnayya on the terms that he should give up to the adopting widow or to her relatives the greater part of her late husband's estates. These questions, although raised in the Courts below, were not the subject of decision there ; and their Lordships accordingly refrain from expressing any opinion upon them.

Nothing could be clearer than this and it is not suggested that the question has arisen before the Judicial Committee since. We hold that the authority given to the widow in this case was valid authority and that plaintiff 1 was lawfully adopted by Venkamma to her late husband. It is accepted by all parties that on this finding the appeal must succeed to the extent of a half share in the properties described in entries Nos. 8, 9, 10 and 11 in the schedule to the plaint and that the suit must be remanded to the trial Court to decide the questions, if any, which are consequential on this decision. If any such questions arise the trial Court will pass a final decree when it has decided them. The appellant is entitled to his costs in this Court and before the Subordinate Judge. The costs in the trial Court will be decided by the District Munsif when he passes the final decree.

C.R.K./G.N. *Order accordingly.*

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* (28) A. I. R. 1941 Madras 937

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND CHANDRASEKHARA AYYAR JJ.

Kandulapati Kanakaratnam — *Appellant*

v.

Kandulapati Narasimha Rao, minor, by mother and next friend K. Nagaratnam and another — *Respondents.*

Appeal No. 426 of 1938, Decided on 28th August 1941, against decree of Sub-Judge, Ellore, D/- 9th August 1938.

* Hindu law — Adoption — Widow — Valid authority to adopt received — Motive for adoption is irrelevant : 37 M L W 729=('33) 20 A I R 1933 Mad 540=146 I C 346 and 57 Mad 411=('34) 21 A I R 1934 Mad 191 = 151 I C 200, *OVERRULED.*

In the Madras Presidency a widow cannot adopt unless she has received direct authority from her husband, either before his death or at his death by will, or the consent of the nearest sapindas, unless such consent is improperly withheld in which case she can go to the next nearest sapindas. Since the adoption by a widow confers spiritual benefit on her deceased husband, and a widow in the Madras Presidency can only adopt when she has received authority to do so, her motive in making the adoption is entirely irrelevant. However spiteful her action may be towards others, the benefit conferred upon her deceased husband by her action is in no way affected, and the fact that she cannot act without authority makes the position all the more clear. Consequently when a widow has received valid authority to adopt, her motive in doing so can be ignored : 37 M L W 729=('33) 20 A I R 1933 Mad 540 = 146 I C 346 *and* 57 Mad 411 = ('34) 21 A I R 1934 Mad 191=151 I C 200, *OVERRULED*; ('29) 16 A I R 1929 Mad 577 (FB), *Expl.*; ('35) 22 A I R 1935 P C 190, *Rel. on*; 22 Bom 558 (FB), *Approved*; ('33) 20 A I R 1933 P C 155; 12 M I A 397 (P C) and ('36) 23 A I R 1936 Mad 460, *Ref.* [P 939 C 2]

P. V. Rajamannar and K. Subba Rao — for Appellant.

Sir Alladi Krishnaswami Iyer and B. V. Subramaniam—for Respondents.

Leach C. J.—The question which arises for decision in this appeal is whether the adoption by a Hindu widow of a son to her deceased husband is invalid when the widow is actuated, not by a sense of religious duty, but by an improper motive. On 8th June 1931 one Kandulapati Gopalam died leaving two widows, respondent 2 and the appellant. Respondent 2 was the senior widow. On 20th October 1931, respondent 2 purported to adopt respondent 1 and it is not suggested that any of the necessary formalities were ignored. On 17th December 1935, respondent 1 filed in the Court of the District Judge of West Godavari the suit out of which this appeal arises to recover possession of Gopalam's estate. The suit was subsequently transferred to the Court of the Subordinate Judge of Ellore. Respondent 1 alleged that Gopalam had by will given authority to respondent 2 to adopt a son. He also alleged that irrespective of the will the adoption was valid as the nearest sapinda had given his consent. The appellant denied that the will had been executed by the testator and disputed the validity of the consent of the nearest sapinda. The will was not produced, but the Subordinate Judge held that respondent 1 had been validly adopted because respondent 2 had in fact received the consent of the nearest sapinda, and this is not now disputed. It may be taken for the purposes of the appeal that in adopting respondent 1, respondent 2 was not actuated by any religious motive and that her object was to prevent the estate falling into the hands of the appellant.

Two arguments have been advanced on behalf of the appellant. In the first place it is said that a Hindu widow cannot make a

valid adoption when she has been prompted by a corrupt motive. In the second place, it is said that here the consent of the nearest sapinda cannot be regarded as being a lawful consent because he gave it under the impression that Gopalam had by will directed respondent 2 to adopt a son to him. The second contention was not seriously pressed and calls for little comment. The nearest sapinda was Kandulapati Bullivenkayya, the elder brother of Gopalam. He gave evidence and stated that his consent was given independently of any authority received from Gopalam. His statement was believed by the Subordinate Judge and we see no justification for disbelieving it. The appellant mainly relies on a passage in the judgment of the Privy Council in 12 M I A 397,[1] which is usually referred to as the *Ramnad case*. It was there held that according to the law prevalent in the Madras Presidency a Hindu widow who has not received authority from her husband may nevertheless adopt a son to him if she has received the consent of his kinsmen. Subsequent decisions make it clear that by kinsmen is meant the nearest sapindas. The passage relied upon by the appellant reads as follows:

> It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and bona fide performance of a religious duty and neither capriciously nor from a corrupt motive.

We will assume that where a senior widow adopts a son in order to prevent her husband's estate falling into the hands of a junior widow her motive is "corrupt" in the sense that it is improper. On behalf of respondent 1 it is contended that the widow's motive in making the adoption is not really a factor and that weight should not be attached to the words "and neither capriciously nor from a corrupt motive" which appear in the judgment in the *Ramnad case*, 12 MIA 397.[1] For reasons, which we shall state, we consider that there is great force in this contention. The judgment in the *Ramnad case*, 12 M I A 397,[1] was delivered in 1868. In 1876 the Privy Council had occasion to consider their observations in that case in 1 Mad 174[2] and in delivering the judgment of the Board James Colvile observed :

> Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.

Here the weight is attached to the consent of the nearest sapindas. Their consent is the important factor and this has been emphasized in numerous decisions given by the Judicial Committee since. In quoting from the judgment in the *Ramnad case*, 12 M I A 397,[1] Sir James Colvile pointed out that the evidence which was required was evidence of the assent of the kinsmen and not evidence of the widow's motives. In 1935 the Privy Council expressly left open the question whether the widow's motive could be disregarded when the consent of the nearest sapinda had been obtained, but in doing so their Lordships did express doubt whether her motive is relevant. This occurred when the Board delivered judgment in 69 M L J 388.[3] In that case their Lordships observed :

> The last objection urged by the respondent is based on the motives of defendant 1. She is said not to have made the adoption for the benefit of her husband or upon religious grounds, but merely in order to get hold of a substantial part of the property. Their Lordships doubt if, where the consent of the sapindas has been obtained, the motive of the adopting widow is relevant. They do not, however, consider it necessary to decide this question in the present case, as assuming it to be so, they think that there is no ground for imputing a corrupt motive to the lady.

At this stage it will be convenient to refer to three decisions of this Court on which the appellant also relies. In 37 M L W 729,[4] Madhavan Nair and Jackson JJ. applied the dictum in the *Ramnad case*, 12 M I A 397,[1] and held that if the consent of the sapinda was given with the object of benefiting himself or the facts showed that the widow was making the adoption to defeat the interest of a sapinda and not to promote the spiritual welfare of her husband, the adoption was invalid. In 52 Mad 620,[5] a

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1. ('67-69) 12 M I A 397 : 10 W R 17 : 1 Beng L R 1 : 2 Suther 135 : 2 Sar 361 (P C), Collector of Madura v. Moottoo Ramalinga Sethupathi.
2. ('76-78) 1 Mad 174 : 4 I A 1 : 3 Sar 669 (P C), Vellanki Venkatakrishna v. Venkatarama.
3. ('35) 22 A I R 1935 P C 190 : 157 I C 881 : 69 M L J 388 (P C), Krishnayya Rao v. Venkata Kumara Mahipathi Surya Rao.
4. ('33) 20 A I R 1933 Mad 540: 146 I C 346: 37 M L W 729, Kandasami Goundar v. Chinnammal.
5. ('29) 16 A I R 1929 Mad 577: 119 I C 389: 52 Mad 620: 56 M L J 760 (F B), Annapurnamma v. Appaya Sastri.

Full Bench (Coutts-Trotter C.J., Madhavan Nair and Jackson JJ.) said that the consent of the son who is the nearest sapinda would be sufficient

if the circumstances showed that the adoption was made by the widow in the proper and bona fide performance of a religious duty, and the real motive which actuated her was the conferment of spiritual benefit on her husband.

It was not necessary to say this for the purpose of deciding the question which was raised in the case, and Mr. Rajamannar, on behalf of the appellant, has very properly conceded that these observations must be regarded merely as obiter. The question of the widow's motive was also discussed in 57 Mad 411,[6] where Madhavan Nair and Jackson JJ. again felt themselves bound by the observations of the Judicial Committee in the *Ramnad case*, 12 M I A 397,[1] although Jackson J., indicated in his judgment that if he were not bound by what had gone before he might have decided otherwise. These three decisions were, of course, all given before the judgment of the Privy Council in 69 M L J 388.[3] That judgment was, however, considered by this Court (Cornish and Varadachariar JJ.) in 70 M L J 619.[7] The learned Judges apparently regarded the judgment of the Judicial Committee in 69 M L J 388[3] as actually deciding that the only person whose motive requires to be canvassed is the sapinda and not the widow, but the passage which we have just quoted from the judgment of the Board shows that this is going too far. The question was fully debated by the Bombay High Court in 22 Bom 558,[8] which was decided by a Full Bench of five Judges. The Court held, one Judge dissenting, that in the Bombay Presidency any discussion of the widow's motive in making an adoption was irrelevant, because a widow in the Bombay Presidency had the power to adopt without any consent and the adoption resulted in religious benefit to her deceased husband.

As the result of the judgment of the Privy Council in 69 M L J 388[3] the Court can now decide the question untrammelled by the observations in the *Ramnad case*, 12 M I A 397,[1] on which the appellant so much relies. In 12 Pat 642,[9] the Privy Council emphasised the importance of the spiritual significance of the act of adoption. In the Madras Presidency a widow cannot adopt unless she has received direct authority from her husband, either before his death or at his death by will, or the consent of the nearest sapindas, unless such consent is improperly withheld in which case she can go to the next nearest sapindas. Bearing in mind that the adoption confers spiritual benefit on the deceased husband that in the Madras Presidency a widow can only adopt when she has received authority to do so it seems to us that her motive is entirely irrelevant. However spiteful her action may be towards others, the benefit conferred upon her deceased husband by her action is in no way affected, and the fact that she cannot act without authority makes the position all the more clear. The English law does not inquire into the motive for the exercise of a power when the power exists and we can see no justification for applying a different rule here. Consequently we hold that when a widow has received valid authority to adopt her motive in doing so can be ignored. It follows that we consider that the decisions in 37 M L W 729[4] and 57 Mad 411[6] on this question should be overruled and that the observations of the Full Bench in 52 Mad 620[5] to which we have referred should not be given effect to. In the present case the widow received authority from the nearest sapinda and consequently her adoption of respondent 1 should be regarded as valid notwithstanding that her object was to defeat the appellant. We dismiss the appeal with costs in favour of respondent 1.

C.R.K./G.N. *Appeal dismissed.*

6. ('34) 21 A I R 1934 Mad 191: 151 I C 200: 57 Mad 411: 66 M L J 577, Murahari Brahma Sastri v. Sumitramma.
7. ('36) 23 A I R 1936 Mad 460: 163 I C 90: 70 M L J 619, Hari Ramayya v. Venkatachalapathi.
8. ('98) 22 Bom 558 (F B), Ramchandra v. Mulji.
9. ('33) 20 A I R 1933 P C 155: 143 I C 441: 12 Pat 642: 60 I A 242 (P C), Amarendra Mansingh v. Sanatan Singh.

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(28) A. I. R. 1941 Madras 939

LAKSHMANA RAO J.

Nandarapu Mahalakshmi Naidu — *Petitioner*

v.

Kalangi Satyam and others — *Respondents.*

Criminal Revn. Case No. 312 of 1940 and Criminal Revn. Petn. No. 301 of 1940, Decided on 1st November 1940, to revise order of Joint Magistrate, Narasapatam, D/- 31st January 1940.

Criminal P. C. (1898), S. 147 — Order under should not be passed against person who is not party to proceeding.

The dam in question was constructed by the mokhasadharini who was not a party to the proceeding, and her agent who was impleaded in the proceeding died before the completion of the inquiry :

Held that the order directing the removal of the dam could not be passed against the mokhasadharini. [P 940 C 1]

B. Jagannadha Das — for Petitioner.

B. V. Ramanarasu for V. Govindarajachari — for Respondents.

Public Prosecutor — for the Crown.

FACTS — The case is one under S. 147, Criminal P. C., filed by the Jeryoti Tenant. The finding of the Joint Magistrate is that the construction of the dam was a high-handed act adversely affecting the rights of the petitioner to water. The contention of the counter-petitioner was that the dam was put by the mokhasadarini of the village through her agent, C. P. W. 3. The mokhasadarini was not a party and the Estate Revenue Inspector who was a party to the proceeding as C. P. W. 10 died during the trial of the case. The Joint Magistrate found that there was no party on record against whom a mandatory order directing the removal of the dam could be passed and relying on 5 M L W 118[1] and A I R 1935 Lah 115,[2] held that the petitioner's only remedy was by a suit in a civil Court after impleading all the necessary parties. Against this order the revision petition was filed on the ground that the Joint Magistrate erred in thinking that he could not pass an order against the mokhasadarini because she was not a party to the proceeding by name.

Order. — The dam in question was constructed by the mokhasadharini who was not a party to the proceeding, and her agent, counter-petitioner 10, died before the completion of the inquiry. An order to remove the dam cannot therefore be issued, though it is found to be an obstruction to the clear right of user of the petitioner of the water of the Gorregadda at the point of the dam to at least one-fourth share of the waters at that point and the revision petition is accordingly dismissed.

C.R.K./K.S. *Petition dismissed.*

1. ('17) 4 A I R 1917 Mad 742 : 36 I C 876 : 18 Cr L J 44 : 5 M L W 118, Nagoji Row v. Subbarayulu Naidu.
2. ('35) 22 A I R 1935 Lah 115, Mt. Maya Devi v. Diwan Chand.

(28) A. I. R. 1941 Madras 940 (1)

PATANJALI SASTRI J.

T. V. Ranga Rao Naidu and others

v.

Seth Balaksonlal Janaki Prasad represented by Power of Attorney holder Pannalal Fomra and others

Civil Revn. Petn. No. 776 of 1939, Decided on 14th February 1941.

Civil P. C. (1908), S. 152 — Applicability — S. 152 applies to mistakes in document evidencing transaction itself and copied in plaint and decree in suit to enforce transaction.

Section 152 is not restricted to mistakes or errors which occur for the first time in the plaint or the subsequent proceedings in Court, but applies also to cases where the mistake occurred earlier in the document evidencing the transaction itself and was copied in the plaint and the decree in the suit brought to enforce the transaction : ('31) 18 A I R 1931 Mad 260, *Rel. on* ; ('34) 21 A I R 1934 All 100, *Dissent.* [P 940 C 2]

P. V. Rajamannar and K. Subba Rao — for Petitioners.

P. V. Subramaniam — for Respondents.

Order. — There is no ground in my opinion for restricting S. 152, Civil P. C., to mistakes or errors which occur for the first time in the plaint or the subsequent proceedings in Court. This Court has applied S. 152 also to cases where the mistake occurred earlier in the document evidencing the transaction itself and was copied in the plaint and the decree in the suit brought to enforce the transaction : *see* 61 M L J 805.[1] The Allahabad High Court has taken the view that the section is inapplicable to such cases, *see* A I R 1934 ALL 100,[2] but with all respect I am of opinion that the view taken by this Court is the sounder one and I have no hesitation in following it in preference to that of the Allahabad High Court. On the merits, the Court below has clearly found that the extent mentioned in the mortgage deed which was subsequently copied in the plaint and the preliminary and final decrees was a mistake and this finding cannot be questioned in revision. The civil revision petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

1. ('31) 18 A I R 1931 Mad 260 : 131 I C 6 : 61 M L J 805, Satyanarayana Rao v. Purnayya.
2. ('34) 21 A I R 1934 All 100 : 147 I C 633, Shujaatmand Khan v. Govind Behari.

(28) A. I. R. 1941 Madras 940 (2)

LAKSHMANA RAO J.

Machinari Lakshmi Amma — Petitioner

v.

Thundikandiyil Parkum Natukandiyil Koyithatta Krishnakurup — Respondent.

Criminal Revn. Case No. 203 and Petn. No. 195 of 1940, Decided on 26th September 1940, to revise order of Sub-Divisional Magistrate, Calicut, D/- 20th December 1939.

Criminal P. C. (1898), S. 488 — Marriage subsisting at time of passing of Madras Marumakathayam Act — Income of wife's tavazhi properties little — Wife and infant child held entitled to maintenance.

Where the marriage between the parties has not been dissolved before the Madras Marumakathayam Act of 1932 came into force, the marriage has to be deemed to be a legal marriage and if the income of

the tavazhi properties of the wife is very little, the infant son is also entitled to maintenance.

[P 941 C 1]

T. R. Ramchandran — for Petitioner.

P. Govinda Menon — for Respondent.

Public Prosecutor — for the Crown.

Order. — The marriage was not disputed and the evidence does not warrant the conclusion that it was dissolved before the Madras Marumakathayam Act of 1932 came into force. The marriage has therefore to be deemed to be a legal marriage and on the finding of the Sub-Divisional Magistrate that the income of the tavazhi properties of the petitioner is very little the infant son is also entitled to maintenance. The order of the Sub-Divisional Magistrate is therefore set aside and the petition is remanded to him for fixing the appropriate rate of maintenance for the petitioner and her infant son and passing the order under S. 488, Criminal P. C.

C.R.K./K.S. *Order set aside.*

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(28) A. I. R. 1941 Madras 941

HORWILL J.

Inspecting Assistant Commissioner of Income-tax — Petitioner

v.

Chotabhai Javerbhai and others — Respondents.

Criminal Revn. Case No. 806 and Criminal Revn. Petn. No. 760 of 1940, Decided on 1st August 1941, to revise order of Chief Presidency Magistrate, Egmore, D/- 2nd September 1940.

(a) Income-tax Act (1922), S. 52—Word 'person' in S. 52 — Meaning — It includes person duly authorized — General power of attorney in very wide terms executed by assessee firm in favour of its agent not specifically referring to file income-tax returns—Returns filed by agent in previous years accepted by firm without question — In year in question on being asked by income-tax authorities as to reason why he and not partners had filed return, agent showing his power of attorney — Acting on this representation income-tax authorities filing complaint under S. 52 — Agent held had authority both in law and fact to file return.

The word 'person' in S. 52 does not necessarily mean the assessee. It must be given its ordinary dictionary meaning. It includes a person duly authorized. [P 943 C 1]

The power of attorney executed by the assessee firm in the very widest terms in favour of its agent did not specifically refer to the filing of income-tax returns. During the previous years the returns submitted by the agent were accepted by the firm without question. In the year in question on being asked by the income-tax officer as to why he and not the partners in the firm had filed the return the agent replied that he was the accredited agent of the firm and showed his power of attorney in support thereof. The income-tax officer acted upon this representation as he or his predecessors had done in previous years :

Held that there was no doubt—whether the very wide and general terms of the power of attorney expressly authorized the agent or not — that the agent regarded himself as the agent of the firm for the purpose of filing income-tax returns and that the partners intended him to file them and expressly or implied authorized him to file the return in question and therefore the agent had authority both in law and fact to make the return he did.

[P 943 C 1]

(b) Income-tax Act (1922), S. 52 — Assessee firm's agent filing fraudulent income-tax return showing only Rs. 5000 as profits — Income-tax officer on investigation finding profits to be nearly Rs. 40,000—Complaint against assessee and agent under S. 52, Income-tax Act, and Ss. 193 and 196, Penal Code — In criminal case where burden to prove knowledge and intention was on prosecution assessee firm could not be said to have known beyond all reasonable doubt that agent was making fraudulent returns.

The assessee firm's agent filed an income-tax return showing Rs. 5000 as profits. On investigation the income-tax officer found that the firm had made profits of nearly Rs. 40,000 and therefore filed a complaint against the partners of the firm and the agent under S. 52, Income-tax Act, and Ss. 193 and 196, Penal Code :

Held that although the partners knew that the agent was showing that the firm had made a profit of nearly Rs. 5000 and must have been somewhat surprised it was not doing better, yet in a criminal case where the burden of proving knowledge and intention was upon the prosecution, it could not be said that the partners knew beyond all reasonable doubt that the agent was making fraudulent returns and therefore the charges against the partners should be dropped. [P 943 C 2]

V. L. Ethiraj for A. S. Sivakaminathan — for Petitioner.

T. R. Venkatarama Sastri, V. V. Srinivasa Ayyangar, K. S. Jayarama Iyer, P. S. Sarangapani, N.D. Varadachari and R. Viswanathan — for Respondents.

Crown Prosecutor—for the Crown.

Order. — The five accused in the lower Court are partners of a firm of the name Chotabhai Javerbhai, doing business in yarn and silver; and accused 6 is the son of accused 1 and the power of attorney agent of the firm in Madras. Accused 6 submitted an income-tax return showing profits of about Rs. 5000. P. W. 4, the then Income-tax Officer, upon looking through the accounts of the accused firm, discovered that the figure '1' had been introduced in front of the figures 3180 on the debit side, thus indicating an expenditure of Rs. 10,000 more than if that '1' had not been inserted. This aroused P. W. 4's suspicions, and so he examined the accounts more closely. He then discovered that many fraudulent entries had been made in the accounts and that the profits were at least Rs. 41,672. After a full examination of the accounts, he assessed

the firm's profits at more than Rs. 65,000; but as an appeal is pending with regard to Rs. 24,000 the case proceeded on the footing that the profits of the firm for the year in question were Rs. 41,672. It was accused 6 who had made calculations and submitted the return; but a complaint was filed by the Inspecting Assistant Commissioner against all the accused, alleging that they had fraudulently introduced these false entries into their accounts with a view to defraud the income-tax authorities and had thereby made themselves liable for punishment under S. 52, Income-tax Act, and under Ss. 193 and 196, Penal Code. The learned Chief Presidency Magistrate, by whom this case was tried, came to the conclusion that neither in law nor in fact was accused 6 authorized to file an income-tax return and that therefore no prosecution could be launched with regard to a return which had no legal significance. In considering the charges under Ss. 193 and 196, Penal Code, he came to the conclusion that although it was true that false entries had been made in these accounts, there was nothing to show that accused 6—and still less the other five accused — had any knowledge of these false entries and that the necessary *mens rea* for a criminal conviction was lacking. He therefore discharged all the accused. A revision petition has been filed by the Crown against this order of discharge.

It is not here disputed that accused 6 was the agent of accused 1 to 5 in the conduct of the Madras business. A general power of attorney by the five partners in his favour has been marked as Ex. U. It is however argued by all the six accused that accused 6 had no authority to file an income-tax return. The power of attorney is worded in the very widest terms, although no specific reference is made to the filing of income-tax returns. Accused 6 is empowered under clause (5),

> to sign and verify plaints..... and all other documents and papers and to institute or defend any proceeding in any Court of law, etc.

In cl. (11) he is authorized to appear and represent the firm "before any revenue officer, railways, port trust, corporations and all departments of the Government or local authority." Under cl. (14) he is authorized

> generally to do all acts and things necessary or expedient in the interests of the said firm as fully and effectually as we could have done if personally present;

and the partners

> agree to ratify and confirm all that our said attorney or attorneys shall do or cause to be done in the execution of these presents.

Accused 6 for many years acted as the agent of the firm; and in pursuance of this power of attorney dated 7th February 1935 he did in fact send in income-tax returns. The other partners of the firm knew that he was sending in income-tax returns and they of course knew in due course what profits he had shown in his accounts and in his returns to the Income-tax Officer; and they seem to have always approved of his conduct and his representations before the income-tax authorities. In the year in question, when he presented his return, P. W. 4 asked him why he had submitted his report and not the partners themselves; and accused 6's reply was that he was the accredited agent of the firm in Madras. In support of his statement he showed the Income-tax Officer Ex. U. P.W. 4 acted upon this representation as he or his predecessors had done in previous years. There can therefore be no doubt — whether the very wide and general terms of Ex. U extracted above expressly authorized accused 6 or not —that accused 6 regarded himself as the agent of the firm for the purpose of filing income-tax returns and that accused 1 to 5 intended him to file them and expressly or impliedly authorized him to file the return in question.

A more serious argument against the validity of the prosecution is that in law he was not the agent of the firm, in that the Income-tax Act does not permit of an agent's presenting an income-tax return. It is pointed out that S. 22 (2), for example, requires the income tax officer to serve a notice upon any person whose total income in his opinion is such an amount as is liable to render such person liable to income-tax. That person is then required to make a report. The subsequent sections continue to refer to that person. That person may be a firm, it is argued; but it must be some individual or body of individuals, himself or themselves liable to assessment. I have not however been given any cogent reason why, if an assessee can present a return, his agent cannot do it for him. The principle *qui facit per alium facit per se* is of very wide and general application. An exception would arise if a person entered into a contract to have something done by one on whose personal skill he relied. There seems however to be nothing in the Income-tax Act, which suggests that it is essential that this act of sending in an income-tax return should be done only by an assessee. It can be done not only equally well by the person in

charge of the business, but very much better. Paragraph 90 of the instructions issued by the Central Board of Revenue says :

> Returns and verifications required under the Act must be signed either by the assessee himself or by some representative duly authorized for the purpose in proper legal form so that his acts will bind his principal.

Section 52, which is one of the provisions of law under which the accused have been charged, says :

> If a person makes a statement in a verification mentioned in S. 19A or S. 20A or S. 22 which is false and which he either knows or believes to be false—(he) shall be deemed to have committed the offence described in S. 177, I. P. C.

Mr. Venkatarama Sastri contends that the word "person" referred to here means the assessee, as it does in S. 22 (2) and elsewhere, and that one should not give to the word "person" in this section its ordinary meaning. I do not see why the word "person" should not have its dictionary meaning in S. 52; but even if it means only what the same word means in S. 22 (2), I am satisfied for the reasons given above that the word "person" includes a person duly authorized. Far from agreeing, therefore, with the learned Magistrate that "accused 6 had no authority in law or in fact to make the return which he did," I hold that accused 6 had authority both in law and in fact to make the return he did.

The learned Magistrate has discussed but little the actual evidence against the accused which would go to support a charge under S. 52; because he had arrived at the conclusion that whatever may have been the guilty knowledge and intention of accused 6, he could not be liable under S. 52 of the Act. It has been argued by Mr. Venkatarama Sastri for accused 6 that the evidence on record is insufficient to justify this Court in ordering any further proceedings. I wish to say as little about the matter as possible, because it is desirable that the Magistrate and not this Court should adjudicate upon the weight of the evidence and give a finding whether or no the evidence is sufficient to bring home the charge to the accused. I need only say that it is difficult in the absence of some sort of explanation by accused 6 to understand how on one day a clerk or subordinate could put Rs. 10,000 in his pocket without the manager of the business being any the wiser, on another day not long afterwards putting Rs. 8400 in his pocket, and the day after that again another Rs. 1600. It is also difficult to understand how an intelligent man of business should not be aware that his business was making a substantial profit (Rs. 40,000 and more a year) and believe that his firm was doing so badly as to make only Rs. 5000 a year. I do not wish to express any opinion whether this in itself would be sufficient evidence to justify a conviction. Still less do I wish to say that this is so conclusive against the accused that nothing he can say would rebut that evidence. But I think that these facts and the other evidence in the case require further consideration by the Magistrate.

With regard to the charge against the accused under Ss. 193 and 196, Penal Code, Mr. Venkatarama Sastri has put up a very strong argument which, if correct, would show that the complaint had not been made by the proper person within the meaning of S. 175, Criminal P. C. This objection to the complaint was not raised in the Magistrate's Court, and the learned Public Prosecutor points out that because that was not done, he is not in a position on the evidence on record to satisfy me that the complaint was made by a proper person. He however contends that if it is questioned in the trial Court, he is prepared to adduce evidence to satisfy the Court that the complaint made was a proper one upon which a Court can proceed. As the case is going back to the Magistrate, the question of the propriety of the complaint with regard to the charges under Ss. 193 and 196, Penal Code, will be left open for the consideration of the Magistrate.

Although accused 1 to 5 knew that accused 6 was showing that the firm had made a profit of nearly Rs. 5000 and must have been somewhat surprised, it was not doing better; yet, in a criminal case, where the burden of proving knowledge and intention is upon the prosecution, I do not think it can be said that accused 1 to 5 knew beyond all reasonable doubt that accused 6 was making fraudulent returns. So that I do not think it is in the interests of justice that I should require the Presidency Magistrate to make any further inquiry into the charges against them. In the result, the order of discharge by the Presidency Magistrate with regard to accused 6 only is set aside and some Magistrate other than the Magistrate against whose judgment this petition has been preferred is ordered to make further inquiry into the case against him. The petition against accused 1 to 5 is dismissed.

C.R.K./G.N. *Order accordingly.*

(28) A. I. R. 1941 Madras 944

BURN AND HAPPELL JJ.

Fatima Bibi v. *Shaik Peda Pentu Saheb.*

Appeal No. 348 of 1939, Decided on 23rd July 1941, against order of District Court, Guntur, D/- 7th March 1939.

(a) Guardians and Wards Act (1890), S. 19 (b) — For appointing guardian father must be shown unfit.

Under S. 19 (b) no guardian of the person of a minor can be appointed unless his father is shown to be unfit to be his guardian. [P 944 C 1, 2]

(b) Mahomedan law—Guardian—Girl below age of puberty — Failing mother, custody belongs to mother's mother in preference to father — But father of girl is her legal guardian.

Under the Mahomedan law, failing the mother, the custody of a girl who has not yet attained puberty belongs by right to the mother's mother in preference to the father. But the father of the girl is her legal guardian: ('18) 5 A I R 1918 P C 11, *Rel. on.* [P 944 C 2]

(c) Guardians and Wards Act (1890), S. 25— Applicability.

Section 25 cannot apply unless it is shown that the ward has left or been removed from the custody of his or her guardian. [P 944 C 2]

V. Suryanarayana — for Appellant.

V. Rangachari — for Respondent.

Burn J. — This is an appeal from the order of the learned District Judge of Guntur in O. P. No. 110 of 1938. The appellant was the petitioner before the District Court. She said that she was the maternal grandmother of three minor Mahomedan girls. She said that the youngest child was in her custody and that the two elder ones were in the custody of their father, the respondent in the petition and the respondent in this appeal. The application was for the appointment of a proper and fit person as guardian of the property of the minors and for delivery of the two elder children to the custody of the petitioner. It was also prayed that the rate of maintenance for the minors may be fixed. The learned District Judge dismissed the petition holding that under S. 19 (b), Guardians and Wards Act, he had no power to appoint a guardian of the persons of any of these minor children because their father had not been shown to be unfit to be their guardian. The amount of property left by the minors' mother, the learned District Judge says, appears to be small and therefore he was of opinion that there was no necessity to appoint a guardian of the property. The maternal grandmother has filed this appeal.

Mr. V. Suryanarayana for the appellant has agreed that the maternal grandmother cannot in this case pray that she may be appointed as guardian of these children under the provisions of the Guardians and Wards Act. He recognises that S. 19 is a bar since the father has not been shown to be unfit. He contends however that treated as an application under S. 25, Guardians and Wards Act, the prayer of the grandmother for the custody of the two elder children ought to have been granted and should now be granted by this Court. This contention however must fail when the wording of S. 25, Guardians and Wards Act, is considered. It appears from the treatises on Mahomedan law that, failing the mother, the custody of a Mahomedan girl who has not yet attained puberty belongs by right to the mother's mother in preference to the father : *vide* Mulla on Mohamedan Law, Edn. 11, Ss. 256, 257 and 259. But it is equally settled law that the father of a Mahomedan girl is her legal guardian. Sir Dinshaw Mullah himself on p. 255 of Edn. 11 of his treatise quotes the decision of the Privy Council in 45 I A 73[1] :

> It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child upto a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian.

Now S. 25 makes provision for the restoration to the guardian's custody of a ward who has left or been removed from the guardian's custody. Section 25 therefore can have no application unless it is shown that the ward has left or been removed from the custody of his or her guardian. In the present case there is no allegation that the two elder minors have ever been in the custody of the appellant, their maternal grandmother. The allegation in the petition is that they are in the custody of their father the respondent and it is not suggested that they have been in any other custody during the whole of their short lives. There is therefore no question in this case of the Court arriving at the conclusion that "it will be for the welfare of the ward to return to the custody of his guardian." The petition was therefore rightly dismissed by the learned District Judge and this appeal must fail. Whether the appellant can by a suit in a civil Court enforce her right under the Mahomedan law to the custody of the two elder children is a question upon which no opinion need now be given. The appeal fails and is dismissed with costs.

C.R.R./G.N. *Appeal dismissed.*

1. (18) 5 A I R 1918 P C 11: 47 I C 513: 45 Cal 878: 45 I A 73 (P C), Imambandi v. Haji Mutsaddi.

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